REHEARING PRACTICE IN THE COURTS OF APPEAL:

THEY HEARD YOU THE FIRST TIME, AND OTHER RULES OF THUMB.

Articles and Commentary by:

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State Bar of Texas
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CIVIL APPELLATE PRACTICE COURSE
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Austin

CHAPTER 1

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PROFESSIONAL EMPLOYMENT

First Court of Appeals, Houston, Texas (Staff Attorney for Justice Elsa Alcala, February 2006 to present)

Prepare and present proposed opinions on large, complex civil and criminal cases to panel of justices. Perform advanced legal research and analysis. Responsible for the issuance of opinions in approximately 160 appeals. Research, prepare, and submit proposed rulings on motions. Assist in docket management and supervision of junior attorneys and law student interns.

Sheehy, Lovelace and Mayfield, P.C., Waco, Texas (Associate, January 2002 to February 2006)

Trial and appellate practice in diverse litigation areas, including commercial, construction, insurance defense, products liability, condemnation, estate, and family law. Assisted at all stages of litigation, including preparation of pleadings, drafting and reviewing discovery requests and responses, deposing and presenting witnesses, preparing motions for summary judgment. Trial experience includes attendance and participation at hearings, voir dire, and trial, preparing trial briefs, examining witnesses, preparing jury charges, drafting motions for new trial, and preparing appellate briefing.

Representative appellate work in private practice includes:

- *Fagan v. Crittenden*, No. 10-04-00042-CV, 2005 WL 428469 (Tex. App.—Waco 2005, pet. denied). Prepared principal and reply brief for appellant and motion for rehearing in court of appeals. Prepared petition for review and brief on the merits in Texas Supreme Court.

- *Allen v. Hines Ranches of Texas, Inc.*, No. 03-03-00167-CV, 2003 WL 22908134 (Tex. App.—Austin 2003 no pet.). Prepared motion for summary judgment and brief for appellee.

- *Restitution Revival v. Waco I.S.D.*, No. 10-02-00248-CV, 2003 WL 22359189 (Tex. App.—Waco 2003, pet. denied). Prepared brief for appellee.

United States Navy (Lieutenant, Surface Warfare Officer, May 1993 to June 1998)

USS CUSHING
Assistant Operations Officer, July 1996 to June 1998
Supervised four officers and 80 enlisted men. Deployed to Persian Gulf.

USS REUBEN JAMES
First Lieutenant, January to July 1996 – Supervised 21 sailors in maintaining and operating ship's boats and deck equipment.
Damage Control Assistant, November 1994 to January 1996 – Supervised ten sailors in maintaining firefighting, flooding, and other damage control equipment. Planned and implemented damage control training for a crew of 200 sailors. Deployed twice to Persian Gulf.

Surface Warfare Officer School, Newport, Rhode Island, June 1993 to April 1994

EDUCATION

Baylor University School of Law, Waco, Texas
Juris Doctorate, 2001
- Top Graduate November 2001
- Top 22nd percentile
- Best Brief and Octofinalist: Strasburger and Price Moot Court Competition, Spring 2000
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United States Naval Academy, Annapolis, Maryland, Bachelor of Science, History, 1993

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3rd Court of Appeals, Austin, the Honorable Bob Pemberton

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11th Court of Appeals, Eastland, the Honorable Rick Strange

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Law Clerk / Staff Attorney
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Education

Texas Tech University School of Law (J.D., 2004), *Cum Laude*

Law Review
2003-2004 Lead Articles Editor

Board of Barristers
Member, 2003-2004

2004 Dupree Award
Awarded to the member of the graduating class who, in the opinion of his colleagues, best exemplifies the ability, integrity, & sense of professional responsibility desired in one soon to join the legal profession

2003 Law Review Outstanding Staff Member Award
Awarded to the second year member who, in the opinion of the Board of Editors, has exhibited extraordinary dedication to the Law Review

2003-2004 Dean's Executive Award
Awarded annually to the six members of the Law Review Executive Board

Texas A&M University (B.B.A., 1999), *Summa Cum Laude*

Memberships / Awards

Texas Young Lawyers Association, State Moot Court Committee
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	Briefing Attorney assigned to the Honorable Charles Barrow, Supreme Court of Texas, 1980-1981
Areas of Practice:	Appeals, mass tort litigation, products liability, personal injury, commercial litigation, legal malpractice, collections, Miller Act and construction contract claims and claims involving fraud and the Deceptive Trade Practices Act.
Admissions:	State Bar of Texas (former Member, District Unauthorized Practice of Law Committee) Supreme Court of the United States Fifth Circuit Court of Appeals United States District Courts (all Districts in Texas)
Memberships:	American Law Institute (2005-present) Appellate Law Section, State Bar of Texas (Council, 2008-present; Co-Chair, Website Comm., 2005-present). Appellate Law Section, Tarrant County Bar Association (Chair, 2007-8) Texas Association of Defense Counsel (Amicus Committee) Tarrant County Bar Association, 1993-present (Director, 2005-2008) Mahon Inn of Court (President 2009-2010, Master since 2005; Treasurer, 2007-2008; Counselor, 2008-2009) Bell-Lampasas-Mills Counties Bar Association, 1984-1992 (former Director) Bell-Lampasas-Mills Counties Young Lawyers Association (former President, Vice-President, Secretary-Treasurer and Director) Life Fellow, Texas Bar Foundation
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PROFESSIONAL:

November 1993:	Admitted to the State Bar of Texas
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1982-1990:	Juvenile Probation and Parole Officer, Twelfth Judicial District, Otero & Lincoln Counties, New Mexico

EDUCATION:

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Texas Tech University School of Law
Doctor of Jurisprudence—May 1993
- Summa Cum Laude
- Order of the Coif
- Phi Kappa Phi
- Who's Who Among Law Students
- Note Editor, Texas Tech Law Review

Graduate and Undergraduate:

New Mexico State University
- Master of Criminal Justice—August 1990
  - Thesis: "Criminal Dispositions of New Mexico Juveniles Transferred to Adult Court."

Bachelor of Criminal Justice—January 1981
Associate of Criminal Justice—July 1980

PUBLICATIONS:

Trying Juveniles as Adults: A Note on New Mexico's Recent Experience. The Justice System Journal, Vol. 15, No. 3, 1992, 814-23 (with G. Larry Mays, Ph.D.).

Criminal Dispositions of New Mexico Juveniles Transferred to Adult Court. Crime & Delinquency, Vol. 37, No. 3, July 1991, 393-407 (with G. Larry Mays, Ph.D.).

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BIOGRAPHICAL INFORMATION

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EDUCATION

B.A. in Anthropology, Texas A & M University
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PROFESSIONAL ACTIVITIES

Law Clerk to former Texas Supreme Court Chief Justice Thomas R. Phillips 2002-2003
Co-Editor-in-Chief of *The Appellate Advocate* 2009-2012; Associate Editor 2006-2009
State Bar of Texas Local Bar Services Committee 2008-2011
Hidalgo County Bar Association; President-Elect 2010-2011; Treasurer, 2009-2010; Board of Directors 2007-2009; Chairperson, Women's Bar Section 2007-2008; Chairperson, Appellate Bar Section 2007-2008
Hidalgo County Young Lawyers' Association: Secretary, 2008-2009; Board of Directors 2006-2008

PROFESSIONAL AWARDS

Recognized as a Rising Star in appellate practice in the 2006, 2007, and 2008 Texas Super Lawyers "Rising Stars" Edition of Texas Monthly
Stars of the Bar Award, State Bar of Texas: co-authored of a series of eight articles titled, *Anatomy of an Appeal: TRAPS (Texas Rules of Appellate Procedure) for the Trial Lawyer*, recognized as best substantive series in a bar association newsletter
Hidalgo County Bar Association Board of Directors Outstanding Board Member Award 2008, 2010

PUBLICATIONS

Brandy M. Wingate & Tina S. Koch, *Would You Swear to That? Problems With Verifying a Petition for Writ of Mandamus*, The Appellate Advocate, State Bar of Texas Appellate Section Report, Vol. 19 No. 4, p. 26 (Summer 2007)

Brandy M. Wingate & Robert B. Gilbreath, *Review of Arbitration Awards After Hall Street Associates v. Mattel: The Supreme Court Says "No" to Contractual Expansion . . . and to "Manifest Disregard of the Law"?*, The Appellate Advocate, State Bar of Texas Appellate Section Report, Vol. 20 No. 4, p. 277 (Summer 2008)

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EDUCATION

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Juris Doctor, Summa cum laude

BAYLOR UNIVERSITY, Dallas, Texas **1982**
Bachelor of Science, Nursing

WILLIAM WOODS COLLEGE, Fulton, Missouri **1981**
Bachelor of Arts, Biology

PROFESSIONAL EXPERIENCE

FIFTH DISTRICT COURT OF APPEALS, Dallas, Texas **1994-present**

- Chief Staff Attorney (March 2010-present)
- Deputy Chief Staff Attorney (November 2009-March 2010)
- Staff Attorney for Justice Carolyn Wright (September 1996-November 2009)
- Research Attorney for Justices Tom James and Joseph Devany (March 1995- September 1996)
- Briefing Attorney for Chief Justice Charles McGarry (October 1994-March 1995)

Texas Wesleyan University School of Law, Fort Worth, Texas **2006-present**

- Adjunct Professor, Legal Writing and Appellate Advocacy

REGISTERED NURSE **1982-1994**

- Baylor University Medical Center, Dallas, Texas
- Madigan Army Medical Center, Tacoma, Washington
- 130th Station Hospital, Heidelberg, Germany
- Parkland Memorial Hospital, Dallas, Texas
- Direct patient care in a variety of intensive care settings, including neonatal, bone marrow transplant, cardiac care, and burns

MEMBERSHIPS

- Dallas County Bar Association
- Annette Stewart Inn of Court
- Legal Writing Institute

TABLE OF CONTENTS

REHEARINGS IN THE COURTS OF APPEALS.

1. INTRODUCTION—BY STEVEN K. HAYES

Over the years, and especially over the last ten years, the Appellate Bench and Bar have devoted a good deal of CLE attention to more effective legal writing when it takes the form of briefs, petitions for review and responses, and replies to the same. And the Bench and Bar have also given some attention to analyzing the raw numbers associated with the granting and denying of petitions, the speed with which cases move through the various state appellate courts, and the likelihood of grants and denials of petitions for review and reversals of trial court decisions. But we really have not spent much time dealing with motions for rehearing, despite the fact that parties file such motions in response to a significant number of opinions issued by the courts of appeals, and despite the fact that the parties and the courts spend significant resources dealing with such motions. This paper focuses on motions for rehearing, their rates of success, how the courts view and respond to them, and ways to make them more effective.

A. Common Dynamics—the Courts Grant Very Few Motions.

We discovered what we believe are common themes and dynamics in the rehearing practice among the various courts of appeals:

1. Only a minute fraction of motions for rehearing succeed. Only two courts granted more than 15% of the motions for rehearing (Texarkana at 17.6% and Tyler at 15.4%), only two others granted more than 10% (the First Court with 13.9% and the Fort Worth Court with 11.1%), and two of the courts granted no motions for rehearing (El Paso and Beaumont). Five of the remaining courts granted fewer than 5% of the motions for rehearing, and 3 courts granted 6-10% of their motions. The rehearing grant rate in some courts only slightly exceeds the chances of having a mandamus granted—and in some courts, the rehearing grant rate is not that high.
2. On top of that, only a very small percentage of those rehearings which the courts grant result in a complete reversal of the court's earlier judgment.
3. About as often as the courts grant motions for rehearing, the courts will deny the same, but accompany that denial with a withdrawal of their earlier opinion, and the issuance of a substituted opinion. ***This substituted opinion does not change the judgment of the court.*** The substituted opinion will address an error in the statement of facts, or a new case raised by a party, or rework the reasoning of the opinion, but it will not change the judgment of the court.

B. Reasons the Courts Grant Very Few Motions.

Based on the numbers from the various courts, the papers submitted by Justices and Staff Attorneys for some of the courts, and informal comments by justices and former justices, the following dynamics explain the lack of success for most motions for rehearings:

1. The courts have already put a lot of work and independent research into drafting an opinion.[1]
2. The courts face an avalanche of cases,[2] and time is the enemy[3]—if a justice ever gets behind on the cases assigned to them, it is a herculean task to catch up. This dynamic dictates that justices do not have the luxury to revisit and rethink every opinion, once issued.

C. Some Scenarios Which Do Not Provide Fertile Ground for Rehearing, and Some Which *Occasionally* Do.

The foregoing dynamics, when coupled with the low rehearing grant rate and a study of successful motions, lead us to make the following recommendations in deciding whether to pursue filing a motion for rehearing:

1. Do not assume that any of the following indicate that your motion for rehearing is more likely to succeed. In fact, the following are more often associated with unsuccessful motions for rehearing:

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[1] Informal conversation with Justice Terry McCall of the Eleventh Court of Appeals in Eastland.

[2] Comments of Scott Brister, former Justice of the Supreme Court of Texas, at PRACTICE BEFORE THE SUPREME COURT 2009, *Suggestions About Oral Argument.*

[3] *See* comments of Stacey Stanley, Staff Attorney, Sixth Court of Appeals, Texarkana.

- submission on oral argument;
- the mere presence of a dissent—***especially*** on one of the courts which consists of only three Justices (six of the fourteen courts of appeals). On one of the three-Justice courts, a dissent probably means the parties' positions have been pretty thoroughly hashed out; or
- the court having taken a long time to issue its opinion.

2. The following can provide fertile areas to convince the courts to grant rehearing—if you can clearly show why the grant is necessary:

   - DWOJ's—if you can explain how the court does, in fact, have jurisdiction.
   - DWOP's—especially when dealing with an "administrative" dismissal, if you can adequately explain any lack of prosecution (*i.e.*, failure to comply with the court's instructions or the rules, failure to pay filing fees or file a docketing statement, etc.).
   - Pointing out that the ground on which the court decided the case was waived by the other side.
   - A clear need for the court to fix a "housekeeping" error, such as a miscalculation of interest, a clear disconnect between the judgment and the court's reasoning, the failure to dispose of funds in the trial court's registry, or a misstatement of the record ***which makes a big enough difference to affect the judgment***.
   - A situation in which there was a dissent, and one of the two justices who decided against you has left the bench (especially on one of the six courts comprised of only three justices).

The foregoing areas underscore some of the dynamics mentioned above which seem to drive the rehearing docket in many courts. For example, practitioners should understand that the courts will use DWOJ's and DWOP's, in appropriate situations, to manage the avalanche of cases they face—but it is good to know that, if the practitioner can explain or fix the reason for the DWOJ or DWOP, the court will grant rehearing and decide the case on the merits.

D. Suggestions for A Successful Motion for Rehearing.

Once you have carefully concluded that you have a situation that will prove fertile for a successful motion for rehearing, consider the following suggestions, which arise from this study and comments of those on the bench, to increase the odds of your motion's success:

1. Motions for rehearing should be short and to the point, with only one or two issues (remember that "time is the enemy" and the avalanche of cases faced by the courts). Overall, to quote one Chief Staff Attorney, make your motion "short, sweet, and do not repeat."[4]
2. Draft the motion as though you were reasoning with a trusted friend.[5] Focus your motion on assisting "the Court's understanding of the record or [the law] in a way that will change the outcome of the case."[6]
3. With regard to the foregoing suggestion, always assume the court, and especially the opinion author and panel, will carefully consider your motion for rehearing. In informal comments, Justices Rebecca Simmons of the San Antonio Court and Sue Walker of the Fort Worth Court echoed a theme often heard in discussions with appellate court justices—they ***always*** pay close attention to motions for rehearing because they want to get the opinion ***right.*** If the court's opinion has an error, misstatement or disconnect, the court wants a motion for rehearing to point that out.
4. Look for ways to give the court an escape hatch to admit error, such as conceding the court's opinion is "understandable based on the confusing precedent" or "perfectly logical as far as it goes."
5. To the extent you need to vent about how the

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[4] *See* comments of Cliffie Wesson, Chief Staff Attorney for the Fifth Court of Appeals in Dallas, *infra*.

[5] *See* Justice Terry Jennings, *Making the Appellate Court Rethink: Motions For Rehearing and Rehearing En Banc*, UNIVERSITY OF TEXAS SCHOOL OF LAW CONFERENCE ON STATE AND FEDERAL APPEALS 2007, pp. 8-11.

[6] *See* comments of Kim Anders, Staff Attorney for the 8th Court of Appeals in El Paso, *infra*.

court has done you and your client wrong, do so—and then toss what you have written in the trash can and start with a fresh mind and a clean slate.[7]

6. Make your motion compelling, with a bearing as serious as your brief. You must make the error clear, perhaps by pointing to specific language in the court's opinion and clearly articulating the erroneous nature of that language—and just because they disagreed with you does not mean you can convince them they erred.
7. With only the rarest exception, merely repeating arguments you made in your brief will not succeed.
8. Keep in mind that sometimes success can come in incremental forms. When filing a motion for rehearing with a court consisting of more than three justices, always strongly consider including a request for *en banc* rehearing. While pointing out that it rarely, rarely happens, Justice Rebecca Simmons mentioned that the *en banc* motion provides the only means for a justice not on the issuing panel to write a dissent. And that dissent can provide a ground for the Supreme Court to grant an ensuing petition for review. *See* TEX. R. APP. P. 56.1(a)(1).

While the motion for rehearing in the following case did not succeed, this dissent from the court's denial of the motion for rehearing may help us all focus on the kinds of things that can help a motion succeed—by telling us why most motions fail, and why the motion in this case at least convinced one justice of its merit:

> Most motions for rehearing do nothing more than rehash the same arguments made in the original brief on appeal. This motion for rehearing is different. This motion for rehearing does three things that cause me to know that we need to address the issues raised therein. First, it points out the fact that we did not address all of the Fagans's arguments on the single issue addressed in the opinion. Second, it points out that, unlike most appeals, a simple affirmance of the trial court's judgment on one theory does not eliminate the need, in this particular appeal, to address each of the other theories raised on appeal that may support the judgment. Third, and finally, the motion for rehearing calls attention to the fact that this appeal should, but does not, resolve the entire dispute between the parties.

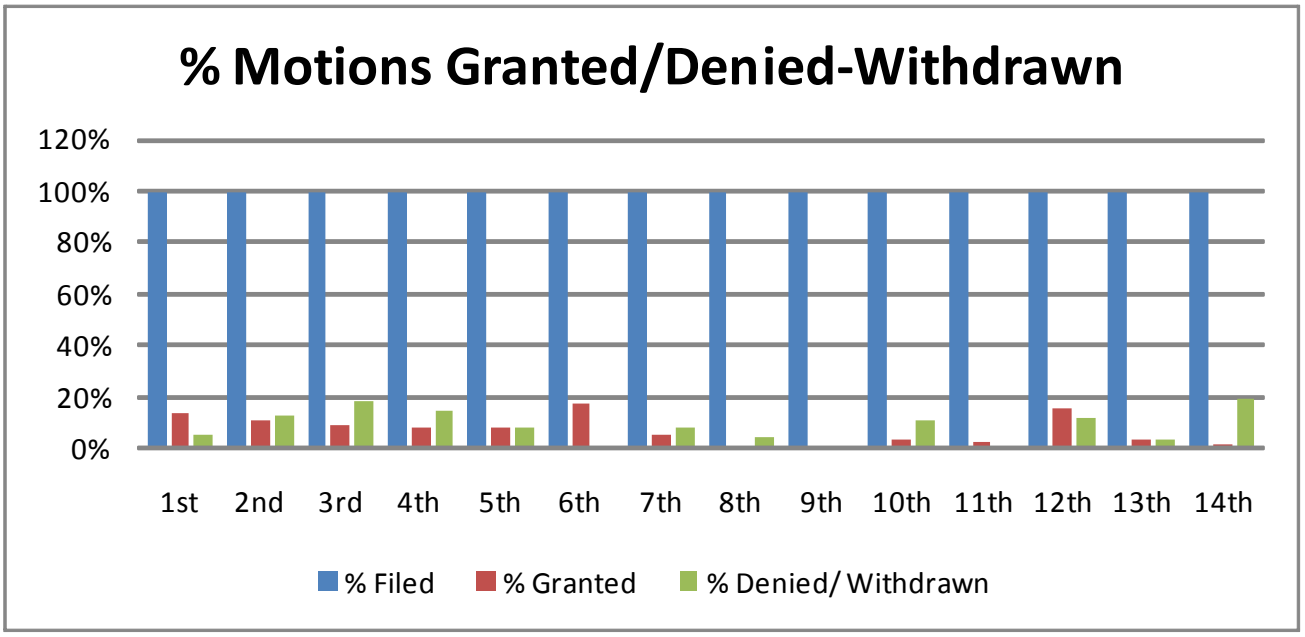
Fagan v. Crittenden, 166 S.W.3d 748 (Tex. App.–Waco 2005, pet. denied) (Gray, C.J., dissent).

We will now look at some specific comments and examples which underlie the foregoing observations and suggestions, before turning to an analysis of the rehearing dockets in specific courts of appeals.

2. THE OVERWHELMING LIKELIHOOD THE COURT WILL NOT GRANT YOUR MOTION.

While a substituted opinion, without any change in the judgment, may in some limited circumstances give you all you need, most of the time your client will not benefit from a motion for rehearing unless the court grants the motion. So we have to start this study with a stark reality: the overwhelming majority of the time, the courts of appeals do not grant motions for rehearing in civil cases. You may find the numbers for each court of appeals in Appendix One to this paper. The following graph starkly depicts the reality. In the graph, the tall column for each court reflects 100% of the motions for rehearing filed, the column adjacent to that column shows the percentage of motions granted, and the final column for each court shows the percentage of motions which each court denied, but for which it issued a substituted opinion which did not change the result of the case:

[7] Informal conversation during early with Justice Anne McClure of the Eighth Court of Appeals in El Paso.



So, the grant rate is abysmally small. Put another way:

% of Motions for Rehearing	Number of Courts Granting This % of Motions
>18%	-0-
15-18%	2
10-15%	2
6-10%	3
.1-5.9%	5
0%	2

More than 2/3 of the courts granted less than 10% of the motions filed with them, half the courts granted less than 5.9% of the motions filed with them, and 2 of the courts granted no motions for rehearing at all. No court granted more than 18% of the motions for rehearing, two courts granted slightly more than 15% of the motions for rehearing, and two more courts granted more than 10% of the motions filed with them. With the exception of the Second and Thirteenth Courts, the numbers which support the preceding graph come from the fiscal year ending August 31, 2009. The Second Court numbers came from a full fiscal year (4/1/2008 through 3/31/2009) and the numbers for the Thirteenth Court came from two consecutive fiscal years ending August 31, 2009.

3. WHAT OTHERS HAVE SAID ABOUT FACTORS THAT MIGHT INFLUENCE REHEARING PRACTICE.

A. The "avalanche" of cases which the Courts must keep up with.

One former Supreme Court Justice, who had previously served on two courts of appeals and the trial bench, suggested that all Justices on the Supreme Court might benefit from serving on a court of appeals, if for no reason other than it would heighten their appreciation of the avalanche of cases faced by justices on the courts of appeals. That volume of cases, he suggested, created a situation in which a justice who fell behind on his or her portion of the docket would find it difficult, if not impossible, to ever catch up.[8] While this Justice did not comment on rehearing practice, at least one corollary of his comment seems clear—having to deal with motions for rehearing certainly will detract from the justices' efforts to keep up with the avalanche of new cases.

B. Courts have already poured their heart and soul into the opinion.

One court of appeals Justice pointed out a sentiment that the authors of this paper think is shared by most if not all court of appeals justices: by the time the motion for rehearing was filed, the authoring justice has "already put his heart and soul into drafting

[8] Comments of Scott Brister, former Justice of the Supreme Court of Texas, at PRACTICE BEFORE THE SUPREME COURT 2009, *Suggestions About Oral Argument.*

the opinion."[9] In other words, no matter what we think, the court of appeals did not issue its opinion without a lot of discussion, research, and thought. The court issued the opinion because they thought it was ***right***. They put their names on it, they publish it for the entire world to see, and they realize that law professors fifty years from now may make snide comments about it. If you embrace the fact that they believe they got it right, and combine that fact with the avalanche of cases they face, you begin to understand at least part of the dynamic behind why courts of appeals grant so few motions for rehearing.

C. Everyone understands the need to vent, but vent and toss—and don't toss the venting at the Court.

In one conversation, another Justice mentioned an aspect of rehearing practice that everyone understands—the need to vent when you feel the Court has not given your argument appropriate weight.[10] That Justice suggested that you adopt a "vent and toss" tactic—fire up the word processor, vent to your heart's content, fill the paper with your bile and outrage—and then toss that work product, or just share it with members of your firm. Having vented, you can then dispassionately draft your motion for rehearing with a clear head (if you still feel the need to draft a rehearing at all).[11] This Justice gave the following specific example of an exercise in venting which shouldn't have been tossed at the court:

> Collectively, the two attorneys representing Appellant have been practicing law for 62 years. Never have we seen such a flagrant disregard for an accurate statement of the facts, an analysis of the applicable law, and a patient review of precedent and public policy.[12]

Needless to say, the Court did not grant the motion.[13]

D. Words of Advice.

So the courts of appeals are busy, they appreciate respect and brevity, they don't want you to just repeat yourself, and they don't react favorably to venting. But the foregoing comments, and the authors' experiences, import a more overarching dynamic that you must embrace to succeed on rehearing, or accurately decide whether a motion for rehearing is worthwhile: once a court of appeals has invested its time, resources, and "heart and soul" in deciding your case and writing the opinion, and done the best job it can in doing so, it simply does not have the time or resources, as a rule, to revisit its decision except for the most clear and compelling reasons. Just telling the court it did not understand you is not such a reason. And, absent some indications of a court's internal discontent with a decision, neither is just repeating arguments you made before.

Some other good advice concerning motions for rehearing comes from Justice Terry Jennings in his paper concerning the same.[14] Justice Jennings emphasizes the need to respectfully and objectively bring the court's attention to the claimed errors of fact or law in its opinion, including its failure to address an issue raised and necessary to the decision. Justice Jennings emphasized the need to not merely repeat arguments previously made, but to give the court "compelling reasons to reconsider its holdings and opinion."[15] And he suggested using the motion for rehearing as though you were trying to reason with a trusted colleague with whom you had a good faith disagreement.[16]

So here are the recurring themes about rehearing practice we hear from Justice and Staff Attorneys who serve and who have served on the various courts of appeals:

- They have poured their hearts and souls into the opinions.
- They face an avalanche of cases, and cannot afford to fall behind.
- Time is the courts' enemy.
- They grant fewer than 15-20% of the motions for rehearing in civil cases.

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[9] Informal conversation with Justice Terry McCall of the Eleventh Court of Appeals in Eastland.

[10] Informal communications with Justice Anne McClure of the Eighth Court of Appeals in El Paso.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* Justice Terry Jennings, *Making the Appellate Court Rethink: Motions For Rehearing and Rehearing En Banc*, UNIVERSITY OF TEXAS SCHOOL OF LAW CONFERENCE ON STATE AND FEDERAL APPEALS 2007, pp. 8-11.

[15] *Id.* at p. 12.

[16] *Id.* at p. 10.

As to structuring your motion for rehearing:

- Make the motion short and to the point.
- Have no more than one or two points.
- Don't vent at the court.
- Draft them as you would reason with a trusted colleague over a good faith disagreement.
- Give the court compelling reasons as to why it clearly erred.

With those thoughts in mind, let's look at rehearing practice in the various courts of appeals.

4. THE VARIOUS COURTS.

A. The First Court of Appeals (Houston—Eric Farrar, Staff Attorney).

DISCLAIMER: The following reflects the analysis of Eric Farrar alone, and does not necessarily reflect the analysis or opinions of the First District Court of Appeals or any of its justices

i. The Method.

We started with the fiscal year as the period of time we examined. For this paper, we examined the fiscal year ending August 31, 2009 (FY09). We looked at the number of cases filed, the number of rehearings filed, and the number of rehearings filed within that fiscal year. We also examined the courts internal case management system to gather information concerning the type of case, the length of time the motion for rehearing was pending, and similar basic data. Finally, we examined each of the successful motions, comparing them to the court's original opinion and the opinion after rehearing.

ii. The Numbers.

For FY09, 580 civil cases were filed in the First Court. In addition, 19 cases were transferred in and 5 transferred out. During the same period, 122 motions for rehearing were filed, and rehearings were granted in 17 cases.[17] A look at the prior fiscal years revealed similar numbers. In FY08, 545 cases were filed, 99 motions for rehearing were filed, and 16 rehearings granted.[18] In FY07, 589 cases were filed, 127 motions for rehearing were filed, and 26 rehearings granted.[19]

ii. The number crunching going into the breach.

a. The chance your rehearing will succeed.

The First Court granted rehearings in 17 case, or 13.9% of the cases in which a motion for rehearing was filed. (However, 6 of these grants were in cases that were dismissed—lack of jurisdiction, non-payment of fees, etc.—early in the case, often before briefing had been completed. Discounting these 6, the percentage drops to 9%.) In addition, the court denied rehearing but withdrew its opinion and issued a new opinion in another 6 cases, bringing the total to 23, or 18.9%.

b. The types of cases on which the Court grants or denies rehearing—familiarity breeds contempt?

The top five categories of Rehearing Cases were the following:

Rehearing Case Type	**Number of Cases in which Rehearings were filed**
Contract	23
Mandamus	9
Personal Injury (incl. Wrongful death)	9
Real Property (Condemnation, Oil and Gas, Easements, etc.)	9
Probate	6
Tort (Negligence, Fraud, etc.)	6

The cases in which the Court granted a motion for rehearing fell in the following categories:

Case Type	**# in which Rehearings filed**	**# in which Rehearings granted**
Contract	23	3
Personal injury	9	2
Probate	6	1

[17] *See* OCA Annual Report for 2009, available at http://www.courts.state.tx.us/pubs/AR2009/toc.htm.

[18] *See* http://www.courts.state.tx.us/pubs/AR2008/toc.htm..

[19] *See* http://www.courts.state.tx.us/pubs/AR2007/toc.htm..

Tort	6	2
Arbitration	4	1

c. The most successful rehearing motions are in the cases the Court spent the most time originally issuing its opinions—NOT!

In the cases resulting in a grant or a new opinion (excluding the 6 cases dismissed prior to submission), the Court, on average, took 72.9 days from submission to issue an opinion. In the denied cases, the average was 71.1 days.

d. Whether the Court had previously granted oral argument seemed to mean less to the Court in granting rehearing than it meant to us in filing rehearing motions.

Of the 23 cases, the Court heard argument in 10 or 43.5%. In contrast, the Court heard argument in 29.8% of the denied cases.

e. The presence of a dissenting opinion did not seem to enhance the likelihood of granting the motion for rehearing.

There was a dissenting opinion in one case of the 23 that the court granted rehearing or issued a new opinion (4.3%). In the cases that the court denied rehearing, a dissenting opinion was written in 8.5% of the cases.

f. The request for an en banc rehearing did not seem to enhance the likelihood of a grant.

In 2 of the 23 cases in which the court granted rehearing or issued a new opinion a motion for en banc reconsideration was filed with the motion for rehearing, or 8.7% of the time. There was a motion for en banc reconsideration in 12.8% of the cases in which the court denied rehearing.

g. The most successful rehearing motions were in the cases in which the Court issued the longest majority opinions

Of the 23 rehearing cases that resulted in a rehearing or a new opinion, the average length of the court's opinion was 14.6 pages. Discounting the 6 dismissals which resulted in short opinions (usually 2 pages), the average length was 18.9. The opinions in the denial cases averaged 16.6 pages.

iii. The number crunching after launching the salvo.

a. Sometimes, the longer you wait, the worse it gets—or maybe not.

On average, in the 23 cases in which the court granted rehearing or issued a new opinion, the court took 78.6 days to determine the motion for rehearing. It took the court 47.3 days to deny motions for rehearing.

b. Court ordered responses sometimes foretell a promising ending.

The Court asked for responses to motions for rehearing in 7 of the 23 cases that were granted or had a new opinion issue, or 30.4%. In contrast, a response was requested in only 6.4% of the cases in which rehearing was denied.

iv. The analysis of the motions: keep it short and to the point, use it to fix mathematical calculations, housekeeping errors or DWOJs where the jurisdictional problems have been fixed or can be shown to not exist, and look for the almost nonexistent situations where the Court might do an about face on the merits.

a. Keep it Short.

The successful motions averaged about 6.5 pages in length. However, one successful motion in a complex case was 21 pages in length.

b. Keep it to the Point.

The successful motions average about 2 points (2.18). In two of the cases in which the motion for rehearing was successful, the movant raised multiple points (6 and 5). However, these cases were rather complex. The original opinions were 46 pages and 29 pages long.

c. DWOJs and DWOPs sometimes result in rehearings.

As noted above, 6 of the cases in which rehearing was granted were dismissed very early on in the appellate process. Of these 6, the motion for rehearing included some information to explain the jurisdictional defect or the failure to pay appropriate fees. For example, in several cases resulting in dismissal for failure pay fees or comply with orders from the Court, notices from the Court were sent to an incorrect address, such as when counsel had changed offices, or the movant provided proof of payment of the fees. In 2 other cases dismissed for want of jurisdiction after submission, the Court abated for the trial court to make fact-findings necessary to determine appellate jurisdiction (e.g., when a question existed concerning the timeliness of appellant's notice of appeal).

d. Other cases resulting in grants of rehearings.

Other than the foregoing dismissal cases, the other cases in which the Court granted rehearings generally involved limited relief, for example:

- the Court granted rehearing to address

appellant's assertion that the Court violated Texas Rule of appellate Procedure 47.1 by failing to address each of appellant's issues raised on appeal, but Court's disposition remained the same;

- the Court granted rehearing to clarify its disposition of a multi-party, multi-part probate judgment when both appellants and appellees asserted the disposition by the court did not appear to match the discussion in the opinion; and
- the Court granted rehearing to clarify its discussion of the evidence in a legal sufficiency issue and to address a case from a different court that the movant contended was controlling.

B. The Second Court of Appeals (Fort Worth—Steve Hayes, Law Offices of Steven K. Hayes).

Since I've never worked on the Second Court of Appeals in any capacity, all the following observations come from the outside looking in, and you need to review them in that context. I base the following insights on nothing more than observation and instinct. The Court had no input in any of the following comments, and there is no endorsement of the Court or any of its individual members for any of the following, either express or implied.

i. The Method.

We started with the universe of civil cases (not involving original proceedings) in which the Second Court of Appeals issued opinions on the merits between April 1, 2008 and March 31, 2009. From that universe, we the identified the cases in which parties filed motions for rehearing ("Rehearing Cases"). Using the "Case Events" section of the page on the Second Court's website (www.2ndcoa.courts.state.tx.us) for each of those Rehearing Cases, we gleaned as much information as would could concerning those cases, and used that information to construct a spreadsheet. We populated that spreadsheet with information about each of the Rehearing Cases ranging from case styles and numbers, to panel members, to dates of submission and opinion, to type of case and length of opinions, and wrapping up with when parties filed and the Court decided motions for rehearing and whether the Court asked for or received responses to the same. We then obtained and analyzed the successful motions for rehearing, comparing the opinions the Court originally issued with the opinions which resulted from the rehearing process.

ii. The number crunching.

There are times the Court finds things in the motion for rehearing which causes it to rewrite or add to its opinion, but which do not convince it to change anything about the judgment. On those occasions, the Court will deny the motion, but withdraw its original opinion and issue a new opinion (designated as Denied/Withdrawn in the following table). On occasion, the motion for rehearing will convince the Court to grant the same, and change its judgment (designated as "Granted" in the following table). As shown in the following table, neither event is very likely:

	Number	**Percent**
Rehearing Cases	55	100 %
Denied/ Withdrawn	7	13 %
Granted	6	11 %

Everybody hates the numbers, but it's like one of my high school coaches said about the game film we watched every Monday—the numbers, like the celluloid (that's what film was back then, in the dark ages), do not lie. In fact, they might help us finally accept things justices have told us about what they do and the struggles they face, but which we either did not grasp or accept. For example, the Courts tell us that, for our motions to succeed, they cannot just recite the same facts and arguments relied on in the briefs. But as the number of denied/withdrawn cases in the foregoing table shows us, even if our motions do cite additional facts or law, they are not likely to succeed in getting a different judgment.

a. If your new arguments do not convince the Court to change its judgment, the Court will deny your motion, but withdraw its opinion and substitute another in its place.

Like many, if not all, of the other courts of appeals, the Second Court will sometimes deal with a motion for rehearing by denying the motion, while withdrawing its prior opinion and substituting another in its place. In the Rehearing Cases, the Court denied/withdrew/substituted slightly more than they granted motions for rehearing. They denied/withdrew/substituted when dealing with minor points, technical points, or points of legal purity, and sometimes added lengthy discussions of the same, but did not change the result.

In seven of the Rehearing Cases, the Court pursued the deny/withdraw/substitute path. For

example:

- In one case, the Court explained its denial of a mandamus by adding the explanation that jurisdiction to grant post-conviction habeas corpus relief from a final felony conviction "rests exclusively with the Court of Criminal Appeals." *In re Shilling*, No. 02-373-CV, 2008 Tex. App. LEXIS 9245, at *1 (Tex. App.– Fort Worth December 12, 2008, orig. proceeding) (mem. op.);
- In one parental rights case, the Court more fully explained that, while a nonparty may properly become a party for purposes of appealing an adverse final judgment by intervening in the action, in the case at bar the Attorney General attempts to appeal an ancillary order, not a final judgment; hence, the AG's only remedy is by mandamus. *In the Interest of A.A.*, No. 02-06-00467-CV, 2008 Tex. App. LEXIS 6237, at *11-12 (Tex. App.–Fort Worth Aug. 14, 2008, orig. proceeding) (mem. op.);
- In another parental rights case (decided by a plurality, and in which Justices wrote extensive concurring and dissenting opinions), the Court elaborated on the definitions of fraud, duress, and undue influence which would justify setting aside an affidavit relinquishing parental rights, and then added a discussion on which the trial court did not abuse its discretion in denying a request to set aside such an affidavit even if the appellant had preserved error on that point. *In the Interest of D.E.H.*, 301 S.W.3d 825, 828-32 (Tex. App.–Fort Worth 2009, pet. denied).
- In one case, the Court rejected the movant's argument that certain newly cited statutory and case authority showed that the phrase "equal to not less than" supported movant's argument that the phrase can denote a fixed amount, as opposed to a floor. *Range Res. Corp. v. Bradshaw*, 266 S.W.3d 490, 496 (Tex. App.–Fort Worth 2008, pet. denied);
- In one case, the Court dealt with a statute which allowed voters in a county to petition the commissioners' court for a "proposed minimum salary" for sheriff's department employees. The Court's opinion on rehearing added extensive discussion and analysis as to why it did not agree with the movant's position that the statute allowed the voters to create yearly automatic salary increases under the guise of minimum salaries within each rank, pay grade, or classification. *Wichita County v. Bonnin*, 268 S.W.3d 811, 821 (Tex. App.–Fort Worth 2008, pet. denied).
- In a Tort Claims Act case, the majority changed its mind from its original opinion, in which it found its "sister court's reasoning [in another case involving post suit notice] persuasive," so that in its opinion on rehearing it came to "disagree with the conclusion reached by the Dallas court in *Coutee* that the doctrine of *in pari materia* applies to our interpretation of *[Tex. Local Gov't. Code] section 89.0041*." *Howlett v. Tarrant County*, 301 S.W.3d 840, 845 (Tex. App.–Fort Worth 2009, pet. filed, response requested). The Court then decided in its opinion on rehearing (unlike its original opinion) that a Tort Claims Act claimant had to comply with both the pre-suit and post-suit notice provisions of the Act—but held the plaintiff in this case substantially did so, and issued the same judgment it had before, reversing the trial court's order of dismissal, and remanding the case to the trial court. *Howlett*, 301 S.W.3d at 847. One Justice wrote a concurring opinion, commenting that she joined in the majority's judgment, but disagreed "with the majority's analysis of *Dallas County v. Coutee, 233 S.W.3d 542, 543 (Tex. App.–Dallas 2007, pet. denied)*, and analysis of the scope of applicability of *[Tex. Local Gov't. Code] section 89.0041*," which she also felt were dicta. *Howlett*, 301 S.W.3d at 847-8 (Walker, J., concurring);
- In *Playoff Corp. v. Blackwell*, 300 S.W.3d 451, 457 (Tex. App.–Fort Worth 2009, pet. denied), the Court further expounded on rehearing on the facts of the case, which neither a jury nor a court could have ignored, showing that the parties's contract failed for indefiniteness, because the method of valuing the company should the plaintiff leave the company remained to be determined.

a. The 11% chance your rehearing will succeed.

Might as well tell your client about the long odds up front. Parties filed motions for rehearing in 55 cases, which (as mentioned above, we call Rehearing Cases). Of those, the Court granted relief in 6 cases. So your motion for rehearing in the Second Court has a 11.1% chance of resulting in some success. Put in context, one historical study showed the Second Court granted petitions for mandamus about 12% of the

time,[20] and a rough search on Lexis® for the most recent full calendar year reflected a grant rate by the Second Court on petitions for writ of mandamus at roughly 7.9% (6 grants out of 83 cases). So your chances of getting any relief at all on rehearing, no matter how slight that relief might be, approximate your chances of convincing the Second Court that a trial court abused its discretion.

b. The types of cases on which the Court grants or denies rehearing—familiarity breeds contempt?

Using subjective categories that focused only on the type of case, as opposed to the type of issue the Court decided, the Rehearing Cases involved 28 different types of cases. The top five categories of Rehearing Cases were the following:

Rehearing Case Type	**Number of Cases in which Rehearings were filed**
Employment	6
Suits Affecting the Parent Child Relationship	6
Family Law	5
Probate	4
Contract	4
Health Care	3

Exactly the kinds of cases in which we would the parties would get emotionally involved, would not give an inch, and would not likely give up. These would involve either intense personal relationships, serious injuries or disputes where the parties felt they had written agreements. And in how many of these cases did the Second Court grant relief on motions for rehearing?

None.

The Court did deny motions, but withdraw its prior opinion and issue a new opinion, in two suits affecting the parent child relationship and in one employment case. But in none of those three cases did the Court change its judgment.

Which may provide our second lesson here. But this lesson is not about the Court so much as it is about us—or at least it's a lesson about both Bench and Bar. Let's focus on the Bar first. Just because we or our clients are emotionally involved in the outcome and/or are outraged by the Court's opinion does not mean our rehearing will meet with success. In fact, when we look at the cases in which motions for rehearings met with at least some degree of success, we might see a different dynamic at work. The cases in which the Court granted some relief in response to a motion for rehearing fell in the following categories:

Case Type	**# of Cases in which Rehearings filed**	**# of Cases in which Rehearings granted**
DL Suspension	1	1
Insurance	2	1
Neg. Entrustment	1	1
Prisoner	1	1
Prompt Pmt. To Contractors	1	1
Workers Comp	1	1

No doubt the parties in these cases cared about the outcome. But these kinds of cases do not seem to have the emotional overlay that we would expect to see in the cases which were more commonly the subject of motions for rehearing. And perhaps that led the movants in the cases in which the Court granted rehearings to more soberly, dispassionately evaluate their likelihood of success.

As to the lesson about the Bench perhaps revealed by the foregoing analysis: most of the foregoing case types are categories the Court does not write on a lot, relatively speaking. It is possible that the lack of routine associated with these rarer cases might pique the Court's interest in revisiting a prior ruling.[21] I don't know about you, but I am more likely to think I made a mistake, or am at least more likely to second guess myself, on something I don't write much about. Just thoughts.

[20] *See* Steven K. Hayes, *Mandamus Before the Second Court of Appeals: An Analysis of Mandamus Rulings , 2003-2005*, presented at various seminars (www.stevehayeslaw.com/papermandamus041228.pdf)

[21] During the study period, the Court issued opinions on the merits on 5 Prisoner cases, 4 Workers' Compensation cases, and 3 Insurance cases. On DL Suspensions, Negligent Entrustment, and Prompt Payment cases, it issued 2 or fewer opinions on the merits.

c. The most successful rehearing motions are in the cases the Court spent the most time originally issuing its opinions—NOT!

This point might seem counterintuitive at first blush. But once you consider the dynamics of the Court's work load, this facet of rehearing practice makes perfect sense.

When you look at the numbers, the Court generally spent about half as long issuing opinions in the civil cases in which it subsequently granted some relief on rehearing (95 days, on average) as it did in those cases in which it denied rehearing (on average, 195 days).

Time to Issue Original Opinion	**Relief granted on Rehearing**	**Rehearing Denied**
Avg. Days	95 days	195 days
Case submitted oral arg	99 days	223 days
Case Submitted on briefs	89 days	155 days

How can that be? Wouldn't the Court be more likely to grant rehearings on cases it has seemingly struggled with the most (as measured by the time it took to issue its opinions)? Not necessarily. At least one former Supreme Court Justice has mentioned the burden faced by court of appeals justices—he referred to the never ending "avalanche" of cases faced by the courts of appeals, and the fact that if one ever got behind in producing assigned opinions, he or she would never catch up.[22] Put yourself in the justices' shoes. If you have struggled inordinately with a case already, and have already put as much of yourself into it as you can, and are faced with the avalanche that is threatening to overwhelm you, are you likely to delve back into the case on rehearing, or just resign yourself to the fact that you have made the best decision you can and just move on? I'm not suggesting I know that this analysis goes through the minds of justices on the courts of appeals, because I don't know—I'm just asking you the question. What would you do? And if you answer the question honestly, whatever the answer is, you may be on the way to putting yourself in a position to dispassionately evaluate one more aspect of the likelihood your motion for rehearing will succeed.

d. Whether the Court had previously granted oral argument seemed to mean less to the Court in granting relief on rehearing than it meant to us in filing rehearing motions.

Once again, this aspect of rehearing practice may tell us more about ourselves than about the Court. In the civil cases in which the Court granted some relief on rehearing, it had previously allowed oral argument about 34% of the time—which almost exactly matched the percentage of civil cases on which it allowed oral argument. So just because your case was initially the subject of oral argument does not mean the Court was more likely to grant relief on rehearing. In fact, the Court was not more likely to grant relief on rehearing just because it had previously heard oral argument in the case.

But that didn't stop us from acting like the opposite was true. Because practitioners collectively filed motions for rehearing in nearly 1/3 more cases that had seen oral argument than in those which had not—31 oral argument cases as compared to 23 cases which had been submitted on the briefs. For those of you who are males, liken this lesson to a previous life experience: just because she sat there and listened to you on the front porch at the end of the date does not mean she will go out with you again.

e. The presence of a dissenting opinion did not seem to enhance the likelihood of getting relief on the rehearing.

In about 11% (6 of 55) of the civil cases in which parties filed motions for rehearing a dissenting opinion had been issued. In about 16% (1 out of 6) of the civil cases in which some relief was granted on rehearing, a justice had dissented. Neither of these percentages seem large enough to really hang much hope on. But justices only dissented in about 5% of all the civil cases in which the Court issued opinions during the study period, so you might disagree with my assessment here. I suspect the real focus here should rest on the strength of the dissent, rather than its mere presence.

f. The request for an en banc rehearing did not seem to enhance the likelihood of relief.

In 6 of the 55 cases in which parties filed motions for rehearing, they requested rehearing en banc (at least, that's what appears from the Court's website—more cases may have involved an en banc request). None of the six cases in which the Court granted relief on rehearing involved en banc consideration. I have no reason to think that a request for en banc consideration reduces one's likelihood of relief, so that asking for the same does not hurt anything. But don't labor under the illusion that an en

[22] Comments of former Texas Supreme Court Justice Scott Brister at PRACTICE BEFORE THE TEXAS SUPREME COURT, Chapter 14 (2009).

banc request is a magic key that will open the door to success.

g. The most successful rehearing motions were in the cases in which the Court issued the longest majority opinions

In the opinions on the merits issued by the Court on civil cases in the study period, the length of the majority opinions averaged about 15.8 pages. The average length of the majority opinion in the Rehearing Cases was about 21.7 pages—or almost 50% longer than the average majority opinion by the Court in all its civil cases (and about 20% longer than the average length of the majority opinions in civil cases in which it subsequently denied rehearing). All page lengths are in terms of the number of pages in the pdf opinions posted on the Court's website.

I'm not sure this comparison will mean much. To know whether the opinion in your case was longer than average, you would have to know the Court's current average opinion length—and I know no one who keeps that statistic on an ongoing basis. Furthermore, the Court wrote lots of opinions in cases in which it denied rehearing which exceeded the average lengths cited above, so just because you got a long opinion would not necessarily mean anything. But I thought I would throw this out for your consideration, in case anyone else can glean something from it.

iii. After filing your Motion—are there harbingers of success?

Sometimes, things that happen after we file our motions for rehearing indicate success *might* come our way—but we mustn't overestimate our chances of success.

a. Sometimes, the longer you wait, the worse it gets—or maybe not.

Once you eliminate the delays associated with extensions of time and the like (of which there were surprisingly few, actually), it took the Court about 70 days post-motion for rehearing to grant relief on the same. It took the Court, on average, about 40 days to deny motions for rehearing. But there were some really aberrational cases in the denial category. In fact, if we removed the four cases in which the Court took the longest to deny the motion, the average denial time dropped to about 15 days.

In fact, if we remove the four cases in which the Court took the longest to deny the motion—and, for purposes of predicting the future, there are some reasons for doing so—we find something interesting. Of the cases in which a motion for rehearing was pending at least 45 days, the Court ended up granting some relief on the motion for rehearing about 50% of the time. So relief is still not a given, it's just a 50-50 proposition.

All that makes sense. And maybe, just maybe, if your motion survives that 45 day period, you can breathe a little easier, and perhaps negotiate with a little more confidence, if your adversary is so inclined. At the very least, everyone needs to check their hole card.

b. Court ordered responses sometimes foretell a promising ending.

The Court asked for responses to motions for rehearing in 6 of the 55 cases in which motions were filed. In 4 of those cases in which it asked for a response, it granted some relief. Sometimes the Court asked for the response as quickly as 8 days following the filing of the motion, and sometimes as long as 53 days after that filing. And sometimes the motions sat on file for hundreds of days with the Court neither requesting nor receiving a response. It does seem that, if the Court requests a response, the odds of the motion being granted increase, perhaps significantly. But as I can tell you from personal experience, that is not always true.

c. Don't file the motion just thinking it will generate a strategic advantage.

Sometimes, parties file a motion for rehearing in the courts of appeals to buy extra time (i.e., to either postpone the issuance of the mandate, or to postpone the deadline for filing a petition for review). Sometimes, parties file motions for rehearing in the hopes that the other side will file a response (either voluntarily or in response to the Court directing the same), thus giving a preview of what the movant can expect in the form of opposition to an eventual petition for review.

Of 55 cases in which parties filed motions for review, only 13 generated responses; the Court only asked for six of those responses. That's less than 25% and 11% of the cases, respectively. Given the expense involved in preparing a substantive motion for rehearing, the foregoing odds do not seem to make it worthwhile to file a motion for rehearing in the hopes of forcing your opponent to provide a preview of what they will file in response to a petition for review.

In terms of buying time, keep in mind that (after eliminating extensions of time), on average, filing a motion for rehearing which the Court eventually denied only bought you about an extra 39 days—and only about 15 days if you eliminate those four outlier cases (representing less than 6% of the rehearing docket) which took hundreds of days to deny. If you consider all of the Rehearing Cases, including those four outlier cases, less than 35% (19 of 55 cases) of the

Rehearing Cases exceeded this 15 day average disposal time, net of extensions. That means that 65% of the time a motion for rehearing resulted in 15 or fewer days of extra time. So the likelihood of gaining a scant extra 15 days, on an average unsuccessful motion, does not seem to justify the expense of the motion. You might think that you have one of those outlier cases in which a motion for rehearing gives you hundreds of days of breathing room. But before you file a motion for rehearing based on that prospect, please keep in mind that it is my opinion that your case will in all likelihood not enjoy the same dynamics which resulted in the extended decision periods in those cases.

iv. The analysis of the motions: keep it short and to the point, use it to correct clear mathematical errors, housekeeping errors, or DWOJs where the jurisdictional problems have been fixed or can be shown to not exist. Look for the almost nonexistent situations where the Court might do an about face on the merits.

An analysis of the successful motions give this guidance:

- keep it short and to the point.
- make sure to mention to the Court if it overlooked a housekeeping point (e.g,:
  - what should the trial court do with funds in the registry of the trial court;
  - if Court's judgment fails to carry through on relief its reasoning suggested you were entitled to;
  - the Court's judgment fails to implement the result its reasoning supports.
  - the Court makes a mathematical error, such as in a miscalculation of pre- or post-judgment interest.
- If the Court has dismissed your appeal for lack of jurisdiction, and you have now either fixed the jurisdictional defect (i.e., you nonsuited claims which prevented a judgment from becoming final) or a close examination of the record shows you actually did comply with the pertinent deadlines, a motion for rehearing pointing out those facts may succeed.

But in terms of convincing the Court to do a complete about face on the central issue in the case, it appears the odds are very much against your success. Only one motion for rehearing accomplished that goal during the study period—and that case reflects some interesting dynamics that might help us identify those very limited situations in which the Court might do such an about face.

a. Keep it Short.

Motions for rehearing are limited by the rules to 15 pages. TEX. R. APP. P. 49.10. The successful motions averaged about 8 pages; the longest such motion was 13.5 pages, and only two of the motions exceeded 8 pages. Three of the successful motions were 6 pages or less.

b. Keep it to the Point.

And when I say "the" point, that's about what the successful motions indicate. None of the successful motions had more than 3 points, they averaged 2 points. The Court typically granted rehearing on only one point. In the one rehearing motion with three points, the points were interrelated, and probably could have been stated together.

c. Do not expect the Court to do a complete about face—but look for signs when it might.

In only one case did the Court do a complete about face on the outcome of the entire case in response to a motion for rehearing. In that case, *Texas Department of Public Safety v. Gilfeather*, No. 02-07-459-CV, 2009 Tex. App. LEXIS 1502, at *7 (Tex. App.–Fort Worth Mar. 5, 2009, reh'g granted, op. withdrawn), an administrative law judge had decided to suspend the driver's license of the appellee. The trial court decided there was insufficient evidence to support the ALJ's decision. The Second Court initially sustained the trial court's decision. In response to an en banc motion for rehearing, the Second Court changed its decision to reflect that the trial court erred, and that there was sufficient evidence to support the ALJ's suspension of the appellee's driver's license. *Tex. Dep't of Public Safety v. Gilfeather*, 293 S.W.3d 875 (Tex. App.–Fort Worth 2009, no pet.). Some interesting things about this case, which may give you some things to think about that may lead to a complete change in the Court's opinion:

1) this was the only successful motion which was an en banc motion;
2) the motion for rehearing pointed out that the Court's decision directly conflicted with the holding and result it had reached in several prior cases;
3) the original opinion of the three justice panel consisted of a majority opinion, one justice concurring without an opinion and one justice issuing a written dissent (later, the dissent and majority authors switched places on the en banc decision).

In other words, the original opinion indicated at least some lack of agreement among all three justices on the panel, and the Court's prior case law indicated that the original opinion was out of step with what other justices on the Court had done before.

Interestingly, the motion for rehearing in *Gilfeather* was one of the two longest successful motions, but it was not unnecessarily long, and its length is consistent with the need to say what needs saying as succinctly as possible.

d. DWOJs sometimes result in rehearings.

This Court diligently screens cases on the front end for jurisdictional problems. During this pre-briefing jurisdictional screening, the Court usually informs the parties by letter when it perceives the existence of a jurisdictional problem, and gives the parties an opportunity to cure the problem or explain why the Court has an erroneous perception. Given the jurisdictional screening of cases by the Court, I doubt most appellants represented by counsel will find a need to seek rehearing in response to a DWOJ.

But there have been instances, in cases in which appellants were either pro se or functionally pro se, when the Court has reinstated an appeal following a DWOJ. In one case, after the Court of Appeals signed its DWOJ order, certain claims remained pending in the trial court which prevented the trial court's judgment from becoming final; the Court of Appeals signed its DWOJ order based on that lack of finality. *Clewis v. Safeco*, No. 02-08-184-CV, 2008 Tex. App. LEXIS 4596, at *1-2 (Tex. App.–Fort Worth June 19, 2008, reh'g granted, op. withdrawn) (mem. op.). The trial court thereafter signed agreed orders of dismissal that disposed of the claims and parties which prevented the prior trial court judgement from being final. The motion for rehearing pointed out that fact, and the Court of Appeals granted rehearing (*Clewis v. Safeco*, 2008 Tex. App. LEXIS 7930, *1 (Tex. App.–Fort Worth October 9, 2008)), though it subsequently affirmed the trial court judgment complained of by the Appellant. *Clewis v. Safeco Ins. Co. of Am.*, 2009 Tex. App. LEXIS 6156, *19 (Tex. App.–Fort Worth August 6, 2009, no pet.). And if you can succinctly explain that your Notice of Appeal was filed on the last day of the extension period, and that the Court should interpret that filing to include a request of an extension of time to file the Notice (because you didn't realize the attorney whose advice you were relying on had a suspended license), the Court might rethink its prior DWOJ (*Triple R Auto Sales v. Fort Worth Transp. Auth.*, 2008 Tex. App. LEXIS 6079 (Tex. App.–Fort Worth May 29, 2008, rehearing granted by *Triple R Auto Sales v. Fort Worth Transp. Auth.*, 2008 Tex. App. LEXIS 3973 (Tex. App.–Fort Worth August 7, 2008)) and proceed to rule on the merits of your case. *Triple R Auto Sales v. Fort Worth Transportation Authority*, 2009 Tex. App. LEXIS 437 (Tex. App.–Fort Worth January 22, 2009).

e. Other cases resulting in grants of rehearings.

Other than the foregoing DWOJ cases and the case in which you had a difference of opinion among all members of the panel, the other cases in which the Court granted rehearings involved the following rather limited relief:

i. The recalculation of prejudgment interest.

In *GuideOne Lloyds Insurance Co. v. First Baptist Church of Bedford*, 268 S.W.3d 822, 833 (Tex. App.–Fort Worth 2008, no pet.), in the face of motions for rehearing from both sides, the Court decided that it had failed to correctly apply a tender of settlement in its calculation of prejudgment interest in its initial opinion. This resulted in an increase in the prejudgment interest of about $12,000 or so.

ii. Housekeeping

Sometimes, even the best housekeeper cleans the abode to spic and span condition, but leaves a candlestick askew. Similarly, the Court sometimes missed a stitch in making sure its Conclusion wraps up all the claims in a way consistent with the rest of its Opinion. When that happens, a short reminder helps tidy up the case. For example:

The Pro Se who pointed out that the Court said he was entitled to replead his injunctive claim against the individual employee of the state agency, but then affirmed the trial court's take nothing judgment disallowing him that opportunity.

In *Leachman v. Dretke*, 261 S.W.3d 297, 303 (Tex. App.–Fort Worth 2008, no pet.), the Court changed a complete affirmance to an affirmance on all causes of action save one. As to that one cause of action, it reversed and remanded with instructions that the trial court allow the plaintiff an opportunity to replead said cause of action. This change was in response to the Pro Se Appellant pointing out that he had only sued one individual defendant for injunctive relief in his §1983 claim, and that §1983 allowed him to sue an employee of a state agency in his individual capacity for injunctive relief. The Court had actually discussed this fact out in its original opinion (*Leachman*, 261 S.W.3d at 306, but just omitted to follow through on that fact in its Conclusion and Judgment.

The Court failed to address the disposition of funds in the registry of the trial court.

In a case involving the Prompt Payment to Contractors Act (), in *AMX Enterprises, LLP, f/k/a AMX Enterprises, Inc., v. Master Realty Corp.*, 2009 Tex. App. LEXIS 147, 46-47 (Tex. App.– Fort Worth January 8, 2009), the Court of Appeals had reversed portions of the trial court's judgment, had rendered judgment that the appellant recover a specific sum in tolled interest due it under the Act, and remanded the case to the trial court for a trial on the reasonable and necessary attorneys' fees due the appellant under the Act. In response to the motion for rehearing filed by the Appellant, the Court added one more aspect to the remand: it remanded for further proceedings the disposition of the funds in the trial court's registry. *AMX Enters., LLP v. Master Realty Corp.*, 283 S.W.3d 506, 525 (Tex. App.–Fort Worth 2009, no pet.).

C. The Third Court of Appeals (Austin-Zachary Hall, Staff Attorney).

IMPORTANT DISCLAIMER: The following analysis reflects the opinions and observations of the author alone and not those of the Third Court of Appeals or any of its justices.

i. The Method

I examined all civil cases (excluding original proceedings) in which the Third Court of Appeals issued opinions on the merits between September 1, 2008 and August 31, 2009. Using the Court's Case Management software, I identified the cases in which parties had filed motions for rehearing and obtained as much information as possible concerning those cases. I then analyzed the motions for rehearing in which the Court changed its opinion as a result of the motion (either by granting the motion and changing the outcome of the case or overruling the motion but rewriting the opinion to some degree) and compared the opinions the Court originally issued with the substituted opinions resulting from the rehearing process.

ii. The numbers

a. Your chance of success is slim.

Parties filed motions for rehearing in 71 cases. The Court granted the motion in 6 of those cases. In 13 other cases, the Court overruled or denied the motion but withdrew its original opinion and issued a new opinion. So your motion for rehearing has an approximately 8.5% chance of being granted, and an approximately 18.3% chance of being denied but resulting in a rewrite. Thus, the chance of the Court doing *something* in response to your motion is not horrible—approximately 26.8%. But let's be real—your clients likely define a successful motion for rehearing as one that convinces the Court to change its mind. In the Third Court, that will happen less than 9% of the time. Moreover, as I explain in more detail below, a motion for rehearing that is denied but results in a rewritten opinion might have the undesired effect of making it less likely that the Supreme Court will grant your petition for review.

b. The types of cases involved

Motions for rehearing were filed in a wide variety of cases, ranging from an arbitration proceeding to a workers' compensation case. However, there were four categories of cases that were predominant: torts (14 cases); pleas to the jurisdiction (11 cases); administrative appeals (8 cases); and contract disputes (8 cases). Other types of cases that had multiple motions for rehearing were: property disputes (5 cases); suits for declaratory relief (4 cases); tax disputes (4 cases); DTPA / fraud claims (3 cases); divorce disputes (2 cases); and oil & gas cases (2 cases).

The number of motions for rehearing filed in certain cases bears little relationship to the types of cases in which the Court granted motions for rehearing. In fact, out of the 6 motions for rehearing granted, 2 of them involved cases that are not in the above categories. One of the grants involved an expunction petition, and another involved inmate litigation. The 4 other grants involved pleas to the jurisdiction (2 cases), a tax refund (1 case), and a personal-injury lawsuit (1 case).

There was greater variety in the cases in which the Court overruled or denied the motion but issued a rewritten opinion: torts (3 cases); pleas to the jurisdiction (3 cases); administrative appeals (2 cases); contract disputes (2 cases); a class action (1 case); a tax dispute (1 case); and a property dispute (1 case).

The only type of case that shows up multiple times in all three rehearing categories analyzed (motions filed, granted, and overruled but resulting in a rewrite) is the plea to the jurisdiction. This is not surprising. Cases involving pleas to the jurisdiction are usually complicated and difficult to resolve. In deciding whether to file a motion for rehearing, focusing on the type of case is probably less important than focusing on the complexity of the case. It appears that the more complicated the issues involved in the case, the more likely the motion for rehearing will be either granted or result in a rewrite.

c. The fact that the Court previously granted oral argument in a case does not increase the likelihood of success on rehearing; in fact, the opposite might be true.

Don't make the mistake of thinking that an oral-argument case is a better candidate for a successful motion for rehearing than a case submitted on briefs. In fact, of the 6 cases in which the motion for rehearing was granted, 4 were not argued (approximately 67%). Similarly, of the 13 cases in which the motion for rehearing was overruled but resulted in a rewrite, 8 were submitted on briefs alone (approximately 61%). Thus, the majority of successful motions for rehearing *do not* involve oral-argument cases.

d. A dissent or a concurring opinion does not mean the case is ripe for rehearing—not at all.

Of the 71 cases in which a motion for rehearing was filed, 11 of the cases had issued a dissenting or concurring opinion. Of those 11, the motion for rehearing was granted in 0 cases. A substituted opinion was issued in just 3 of the cases in which there had been a dissent or a concurring opinion. Keep this in mind—if there is a separate opinion issued, all that means is the panel is not united on your case. Do not make the mistake of believing that a divided panel means your motion for rehearing has a greater chance of success. It just means that the panel will likely be similarly divided on your motion for rehearing.

e. Filing a motion for en banc reconsideration does not appear to make a difference in the outcome.

Out of the 71 motions for rehearing filed, 14 of them were accompanied by a motion for en banc reconsideration. In some cases the motion for en banc reconsideration was filed in addition to the motion for rehearing, while in other cases it was the only relief requested. *See* Tex. R. App. P. 49.7. It did not matter. Rehearing was granted in only one of the cases in which en banc reconsideration was requested, and in that case, the motion for en banc reconsideration was dismissed as moot because the motion for rehearing was granted. A substituted opinion was issued in just 2 of the cases in which a motion for en banc reconsideration was requested, and in neither case was the motion for en banc reconsideration granted.

iii. What the numbers mean

a. It is possible to change the minds of at least two of the three panel members—and that is all you need.

Do not let the numbers get you too discouraged. It is possible to succeed on rehearing, even though the odds are against you. All you need to do is get two of the three panel members on your side. In 2 out of the 6 cases in which the motion for rehearing was granted, one of the panel members dissented from the grant of rehearing. In *Texas Dep't of Pub. Safety v. Nail*, No. 03-08-00435-CV, 2009 Tex. App. LEXIS 4881 (Tex. App.—Austin Jun. 24, 2009) (mem. op.), the Court, in a unanimous decision, held that the trial court did not abuse its discretion in granting an expunction petition. The opinion was authored by Justice Patterson.

In its motion for rehearing, DPS argued that expunction was simply not allowed under the circumstances present in this case, and the trial court had no discretion to misapply the law. The other members of the panel, Justices Pemberton and Waldrop, agreed. Justice Pemberton, writing for the majority, concluded that the petitioner was not entitled to an expunction and reversed the trial court's order granting the expunction. *See* 305 S.W.3d 673, 685 (Tex. App.–Austin 2010, no pet.) (op. on reh'g). Justice Patterson dissented, maintaining her original position that the trial court had not abused its discretion. *See id*. at 685-87 (Patterson, J., dissenting).

In *7-Eleven, Inc. v. Combs*, No. 03-08-00212-CV, 2009 Tex. App. LEXIS 7067 (Tex. App.–Austin Aug. 31, 2009, reh'g granted, op. withdrawn), a tax-refund case, the Court, in a unanimous decision, reversed a summary judgment in favor of the State, rendered judgment that 7-Eleven was entitled to a partial sales-tax refund with respect to software that it had transferred to its franchise stores, and remanded to the trial court the portion of the cause pertaining to software that was delivered to its out-of-state company stores. *See id*. at *46-7. Chief Justice Jones authored the opinion, and he was joined by Justices Puryear and Henson.

In its motion for rehearing, the State argued ***for the first time*** that the software-development charges at issue in the case could not be allocated because they represented the purchase of a single piece of tangible personal property. This contention raised a threshold question "as to precisely what 7-Eleven purchased and whether that purchase could properly be allocated between 7-Eleven's franchise and company stores." *See* 311 S.W.3d 676, 695 (Tex. App.–Austin 2010, pet. filed) (op. on reh'g). On rehearing, Chief Justice Jones, joined by Justice Puryear, remanded the cause in the interest of justice "for a determination of these threshold issues raised by the State and, as necessary, any further proceedings to resolve the fact issues regarding 7-Eleven's alleged use of the software before and after removing it from its tax-free inventory." *See id*. at 696 (citing TEX. R. APP. P. 43.3(b)). Justice Henson dissented, believing that the State waived this issue by raising it for the first time in its motion for rehearing on appeal. *See id*. (Henson, J., dissenting).

The lesson to be learned from the above cases is that motions for rehearing can succeed. In *Nail*, DPS made essentially the same arguments on rehearing that it had made in its brief on original submission. This time, however, DPS was able to convince two of the panel members that DPS's interpretation of the expunction statute was correct. Similarly, in *7-Eleven*, the State raised a new argument in its motion for rehearing, and was able to convince two of the panel members to grant relief based on that new argument. Remember, you don't need a unanimous panel to get a rehearing. All you need is a majority.

b. Don't read anything into how long your motion has been sitting at the Court.

Of the motions for rehearing that were granted, 2 of them were decided six weeks after the motions were filed, 1 was decided after two months, 1 after three months, 1 after five months, and 1 after six months.

While it is generally true that it takes longer for the Court to grant a motion for rehearing than it does for the Court to deny a motion for rehearing, that is not always the case. While the vast majority of the overruled motions were denied less than a month after they were filed, several of the motions were denied more than four, five, and even six months after they were filed. This does not necessarily mean that the motions that took longer to deny were "closer calls" than the ones that were resolved quickly. It just means that the Court has a lot on its plate, so to speak, and it will decide your motion for rehearing as soon as it possibly can.

c. If a response is requested, your chance of success just improved significantly.

The Court requested responses in 13 of the 71 motions for rehearing that were filed. In 6 of those cases, the motion for rehearing was granted. Thus, if a response was requested, your motion for rehearing had approximately a 46% chance of success. Those are much better odds than the less than 9% chance of success for all motions for rehearing. Additionally, in 3 of the 13 cases, the Court issued a substitute opinion. In only 4 of the 13 cases did the Court do nothing after requesting a response.

What this also means is that if the Court requests a response from you, you better treat it seriously. There is now at least a 46% chance the Court is going to change its mind, and you need to do everything in your power to make sure that does not happen. In the *Nail* case discussed above, although the Court requested a response, no response was received. That is inexcusable. When a response is not received, or the response does an inadequate job of addressing the issues raised in the motion for rehearing, this increases the likelihood that the motion for rehearing will be granted. ***Always*** file a response when one is requested, and treat the response every bit as seriously as you would treat a responsive brief.

d. If a response is not requested, it is probably best to "let sleeping dogs lie."

Does the above analysis mean you should always file a response to a motion for rehearing, even when a response is not requested by the Court? No. An unsolicited response is generally a bad idea, for at least two reasons. First, it is likely a waste of your time and your client's money. Remember that there is a less than 9% chance that the Third Court will grant a motion for rehearing. Accordingly, there is at least a 91% chance a response is unnecessary. And, if a response is necessary, the Court will let you know. *See* Tex. R. App. P. 49.2 ("A motion will not be granted unless a response has been filed or requested by the court."). Second, an unsolicited response might send a signal to the Court that the motion for rehearing deserves serious consideration. Otherwise, why would you bother filing a response? That is not the message you want to convey to the Court.

Most practitioners apparently realize that an unsolicited response is a bad idea. Of the 71 motions for rehearing that were filed, in only one case was a response filed without the Court requesting one. The response was apparently unnecessary, as the Court denied the motion for rehearing. *See Senna Hills, Ltd. v. Sonterra Energy Corp.*, No. 03-08-00219, 2010 Tex. App. LEXIS 246 (Tex. App.—Austin Jan. 15, 2010, no pet.) (mem. op. on reh'g). On the other hand, it should be noted that this was an opinion that the Court rewrote on rehearing, which is an indicator that the Court believed some point raised in the motion for rehearing had merit. Thus, perhaps in this case, filing an unsolicited response was somewhat justified. However, as a general rule, I believe an unsolicited response has the potential to do more harm than good for your client and should be filed only in rare circumstances.

e. Do not file "frivolous" motions for rehearing, ones that you believe have little to no chance of success.

This should go without saying, but I am amazed at how many poorly drafted motions for rehearing I have reviewed in my over four-and-a-half years working at the Third Court. In many cases, it is painfully obvious that the attorney is not taking the motion for rehearing seriously. Yet the attorney has filed the motion anyway, perhaps to delay the issuance of the Court's mandate or to postpone the deadline for filing a petition for review with the supreme court. DO NOT

DO THIS. Do not waste the Court's time, your time, and your client's money by filing motions for rehearing that you know will fail. You have very little to gain and a lot to lose by doing so, most importantly your credibility with the Court in future cases.

f. Beware the rewrite.

As I explained above, when you file a motion for rehearing, it is more likely that your motion will persuade the Court to rewrite the opinion than change the Court's mind on the disposition of the case. This is probably not good news for your client. What I have found is that when the opinion has been rewritten, the substituted opinion is "stronger" than the original opinion, meaning that the substituted opinion either provides more detailed analysis, includes a more comprehensive discussion of the arguments raised, or addresses additional authority that the Court did not discuss in the original opinion. *See, e.g.*, *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 881-82 (Tex. App.– Austin 2010, pet. dism'd) (op. on reh'g); *Senna Hills, Ltd.*, 2010 Tex. App. LEXIS 246 at *30-41; *Munters Euroform GmbH v. Am. Nat'l Power, Inc.*, No. 03-05-00493-CV, 2009 Tex. App. LEXIS 9860, *13-19 (Tex. App.–Austin Dec. 31, 2009, pet. filed) (mem. op. on reh'g); *Texas Dep't of Pub. Safety v. Allocca*, 301 S.W.3d 364, 369-70 (Tex. App.–Austin 2009, pet. filed) (op. on reh'g); *Bastrop County v. Samples*, 286 S.W.3d 102, 105-08 (Tex. App.–Austin 2009, no pet.) (op. on reh'g); *Mitchell v. Timmerman*, 2008 Tex. App. LEXIS 9710, *13-19 (Tex. App.–Austin Dec. 31, 2008, no pet.) (mem. op. on reh'g); *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 914-19 (Tex. App.–Austin 2008, no pet.) (op. on reh'g).

Why does it matter whether the opinion is rewritten if the result remains the same? It matters if you intend to appeal the Court's decision to the supreme court. The "stronger" the Court's opinion on rehearing, the more difficult it might be to convince the supreme court to grant your petition for review. In 5 of the 13 cases in which the motion for rehearing was overruled but resulted in a rewritten opinion, no petition for discretionary review was filed. *See Senna Hills, Ltd.*, 2010 Tex. App. LEXIS 246; *Samples*, 286 S.W.3d 102; *Hackett v. Littlepage & Booth*, 2009 Tex. App. LEXIS 1166 (Tex. App.–Austin Feb. 20, 2009, no pet.) (mem. op. on reh'g); *Mitchell*, 2008 Tex. App. LEXIS 9710; *Bechtel*, 271 S.W.3d 898. At the time this paper was written, in 3 of the remaining 8 cases in which a petition had been filed, the supreme court had not yet ruled on the petition. *See Smith v. Abbott*, No. 03-06-00358-CV, 2010 Tex. App. LEXIS 1359, *48-52 (Tex. App.–Austin Feb. 26, 2010, pet. filed) (op. on reh'g); *Munters*, 2009 Tex. App. LEXIS 9860; *Allocoa*, 301 S.W.3d 364. However, in 3 of the cases, the petition was denied. *See Texas Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91 (Tex. App.–Austin 2009, pet. denied) (op. on reh'g); *Reynolds Metals Co. v. Combs*, No. 03-07-00709-CV, 2009 Tex. App. LEXIS 2466 (Tex. App.–Austin Apr. 8, 2009, pet. denied) (mem. op. on reh'g); *Dunn v. Calahan*, No. 03-05-00426-CV, 2008 Tex. App. LEXIS 9498 (Tex. App.–Austin Dec. 17, 2008) (mem. op. on reh'g). In another case, the petition was dismissed. *See Save Our Springs Alliance, Inc.*, 304 S.W.3d 871. In only 1 of the 8 cases has the petition been granted. *See Travis Cent. Appraisal Dist. v. Norman*, 274 S.W.3d 902 (Tex. App.–Austin 2008, pet. granted).

Although it is impossible to predict what the supreme court might do in the three cases in which it has not yet ruled on the petition, it is readily apparent that in the majority of cases in which the motion for rehearing was overruled but the opinion was rewritten, that is the end of the road for the losing party. Thus, this is another reason why practitioners should exercise caution when deciding whether to file a motion for rehearing. You might succeed only in strengthening the Court's decision against your client. If you believe you have a better chance with the supreme court on discretionary review than you do with the appeals court on rehearing (or if you believe you cannot win at either court), you should probably not waste your time and your client's money by filing a motion for rehearing.

iv. Analyzing the successful motions

a. Whatever worked, worked

There is no magic formula for drafting a successful motion for rehearing. As the *Nail* case discussed above demonstrates, you can succeed simply by making essentially the same arguments you made the first time around. Or, as the *7-Eleven* case also discussed above shows, you can succeed by making a new argument for the first time on rehearing (however, keep in mind that a new argument will be successful on rehearing only in the rarest of circumstatnces). What all successful rehearing motions have in common, however, is a compelling reason for granting rehearing. In order to successfully convey that compelling reason, you should treat your motions for rehearing with the same seriousness with which you treat your briefs. Obviously, the motions should be much shorter than your briefs, *see* TEX. R. APP P. 49.10, and thus also more "to the point," but you should focus on your best arguments and not waste time and space on extraneous matters that will serve only to distract the Court's attention away from what you believe to be the key issue that is critical to your case. Don't belabor the point, but certainly emphasize it.

b. What issue is the biggest "winner" on rehearing? Hands down, it's jurisdiction.

In 3 of the 6 cases in which rehearing was granted, jurisdiction was the critical issue. This is not surprising. Jurisdiction is fundamental, and without it, courts have no power to act. Of course, it can also be raised at any time, including for the first time on appeal (or rehearing).

Conversely, the Court can determine for the first time on rehearing that it does have jurisdiction. For example, in *Lindig v. City of Johnson City*, No. 03-08-00574-CV, 2009 Tex. App. LEXIS 8188 (Tex. App.–Austin Oct. 21, 2009, no pet.) (mem. op. on reh'g), the City sued the Lindigs seeking a temporary injunction and civil penalties after the Lindigs continued construction on their Blanco County property without obtaining a building permit from the City. The Lindigs counterclaimed against the City, challenging the validity of the building-permit-fee ordinance and seeking damages against the City and the City officials for an unconstitutional taking and civil conspiracy. The district court dismissed the Lindigs' claims against the City and the individual defendants for lack of subject-matter jurisdiction.

In its original opinion, the Court held that neither it nor the trial court had jurisdiction over the Lindigs' claim for declaratory relief regarding the constitutionality of the City's ordinance because the record contained "no indication that the Lindigs served the Attorney General with a copy of their petition, as required by section 37.006(b)" of the UDJA. *See* 2009 Tex. App. LEXIS 6384, *17-18.

However, in their motion for rehearing, the Lindigs pointed out that the certificate of service attached to their first amended petition showed that the attorney general was in fact served with a copy of the pleading. The Court agreed and thus remanded to the trial court the Lindings' claim for declaratory relief regarding the constitutionality of the City's ordinance. *See* 2009 Tex. App. LEXIS 8188 at *36-37.

Another way to win on rehearing is when the supreme court clarifies a key jurisdictional issue at around the same time the appeals court issued its original opinion. That is what happened in *Texas Dep't of State Health Servs. v. Holmes*, 294 S.W.3d 328 (Tex. App.–Austin 2009, pet. filed) (op. on reh'g). In that case, the Department brought an interlocutory appeal from the trial court's order denying its plea to the jurisdiction and granting a temporary injunction in favor of appellee Nancy Holmes, lifting the Department's embargo on a laser device owned and operated by Holmes for the purpose of providing laser hair removal services. In its original opinion, the Court affirmed in its entirety the trial court's order denying the Department's plea to the jurisdiction. *See* 2009 Tex. App. LEXIS 3385, at *15.

However, in its motion for rehearing, the Department drew the Court's attention to the supreme court's recent decision in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Under *Heinrich*, a plaintiff may not bring declaratory actions against governmental entities to determine their rights under a particular statute, but are limited to bringing ultra vires suits against officials in their official capacity. *See id*. at 372-73. Finding that certain claims in the case were controlled by *Heinrich*, the Court reversed the trial court's order to the extent it denied the plea to the jurisdiction as to Holmes's statutory ultra vires claims against the Department.

Even pro se inmates can succeed on rehearing when a jurisdictional issue is involved. In *Houser v. Dretke*, No. 03-08-00693-CV (Tex. App.–Austin May 12, 2009) (order on reh'g), available at http://www.3rdcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=18094, Houser sought to appeal from a district court order dismissing his lawsuit for want of prosecution. In its original opinion, the Court found his appeal to be untimely and, therefore, dismissed the appeal for want of jurisdiction.

On rehearing, Houser alleged that the Court should consider his notice of appeal timely filed based on excusable delay caused by Hurricane Ike. The Court requested a response from appellee, who conceded in his response "that the Court may find that the delay[s] in [Houser]'s timely filings were a result of excusable delay." The Court, based on appellee's concession, granted the motion for rehearing and reinstated the appeal.

Finally, in one of the cases in which the motion for rehearing was overruled with a substituted opinion, the motion for rehearing raised a jurisdictional issue that, even though it did not change the outcome of the case, resulted in the Court holding that it lacked subject-matter jurisdiction to grant appellate relief to one of the appellants. *See Smith v. Abbott*, 2010 Tex. App. LEXIS at *50. In their motion for rehearing, appellees pointed out for the first time that one of the appellants failed to file an amended notice of appeal as required by the Court's order. The Court agreed with appellees that this deprived the Court of jurisdiction to grant that appellant any relief and dismissed that appellant's "appeal." *See id*. at *13-14.

c. Waiver is another "winner."

Again, this is to be expected. The Court should not address issues that have been waived, and whenever it becomes apparent that the Court has done so, it will change course. That is what happened in *Brooks v. Mass Mktg.*, No. 03-07-00658-CV, 2010 Tex. App. LEXIS 2529 (Tex. App.–Austin Apr. 6,

2010, no pet. h.) (mem. op. on reh'g). In *Brooks*, the appellant sued appellee for injuries he sustained in a slip-and-fall accident. Brooks obtained a favorable jury verdict of $ 75,000, and the appellee filed a motion for judgment notwithstanding the verdict. The trial court granted the motion in part and reduced Brooks's award to $ 25,000. In its original opinion, the Court reversed and rendered, finding that the trial court erred in granting the motion. *See* 2009 Tex. App. LEXIS 9433.

On rehearing, appellee pointed out that Brooks had failed to attack all of the grounds stated in the motion. The Court agreed, holding that Brooks "waived [his] right to question" at least two of the grounds for judgment notwithstanding the verdict. Accordingly, the Court affirmed the judgment. *See id.* at *7.

v. Conclusion

As the above cases demonstrate, motions for rehearing can be successful. However, you must present a compelling argument or issue in your motion to overcome the odds against you obtaining relief. Jurisdiction is a good example of a compelling issue, as is waiver. However, use caution when deciding whether to file a motion for rehearing, as the motion might end up strengthening the Court's decision against your client. Finally, when a response to a motion for rehearing is requested by the Court, file a good response that addresses all of the points raised in the motion. If a response is not requested, however, leave it alone.

D. The Fourth Court of Appeals (San Antonio—Keith Hottle, Clerk of the Court).

We do not have a commentary from the San Antonio Court concerning its rehearing docket, though we do have their numbers: in the fiscal year ending August 31, 2009, motions for rehearing were filed in 76 civil cases, with the Court granting 6 of those. It denied the remainder, and issued substituted opinions in response to 11 such motions. So the Court only granted 8.1% of the motions for rehearing in civil cases, and issued substituted opinions while denying motions for rehearing in civil cases about 14.8% of the time.

E. The Fifth Court of Appeals (Dallas—paper by Cliffie Wesson, Chief Staff Attorney; panelist, Marilyn Houghtalin, Deputy Chief Staff Attorney).

DISCLAIMER: The following reflects the analysis of Cliffie Wesson alone, and does not necessarily reflect the analysis or opinions of the Fifth District Court of Appeals or any of its justices.

i. The Method.

With Deputy Chief Marilyn Houghtalin's and the Clerk of the Court Lisa Matz's help, we identified the motions for rehearing filed in the last fiscal year, from September 1, 2008 through August 31, 2009. (For reference, the Court issued 1383 opinions in that fiscal year, 666 civil opinions and 717 criminal opinions.) Using both the internal case management system and the website, we gathered as much information as possible concerning those cases to create a spreadsheet. We then compared the original cases with any new cases issued following a motion for rehearing, regardless of whether the motion was granted or denied.

ii. The Numbers.

a. In fiscal year 2009, Dallas granted 7.5% of motions for rehearing.

Parties filed motions for rehearing in 132 cases in the last fiscal year. Of those, the motions were granted in 10 cases, or in 7.5% of the cases. However, new opinions were issued following denials of motions for rehearing in 10 cases, likewise 7.5% of rehearing cases, for a total of 15%. By comparison, in the same fiscal year, the Dallas Court granted relief in about 16% of mandamus proceedings filed in the Court.

iii. Types of Cases.

The rehearing cases involved 16 broad categories of cases. The top five categories involved the following:

Contract disputes (30)
Family law (17)
Texas Tort Claims Act (9)
Health Care Liability claims (9)
Landlord/Tenant disputes (9).

Of the 10 cases in which rehearing was granted, one was a family law case and the other a contract case. The remaining eight were cases which were administratively dismissed for failure to pay fees, failing to pay for the clerk's record, or failure to file a brief. Of the cases in which new opinions were issued following a motion for rehearing (regardless of whether the motion was granted or denied), six were in contract cases, two in family law, two involved special appearances, one was a tax case, and one a health care liability case.

iv. Why rehearings are granted.

a. Cure following administrative dismissal.

The most common reason for granting motions for rehearing in Dallas is following an administrative dismissal of the case. These motions are akin to a motion to reinstate in the trial court. For example, eight of the 10 motions for rehearing that were granted followed dismissal of the case for failure to pay filing fees, failure to pay for the clerk's record, or failure to file an appellant's brief. Following the dismissals, the cases were reinstated on rehearing after the defects were cured.

b. Changes in the law after the opinion is issued.

Occasionally, the law changes during the Court's plenary power to issue a new opinion. For example, in *Hildalgo v. Hildago*, 279 S.W.3d 456 (Tex. App.–Dallas 2008), *rev'd*, 310 S.W.3d 887 (Tex. 2010), the original opinion was largely based on the Texas Supreme Court's decision in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994) (per curiam). After the *Hildago* opinion issued, the supreme court overruled *Porter*. *See In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 231–32 (Tex. 2008) (when new trial is granted, case stands on docket as though no trial had been had and trial court has power to set aside an order granting motion for new trial any time before final judgment). In light of *Baylor*, the Court granted appellee's motion for rehearing and issued a new opinion.

c. Settlement.

Although not frequent, it is not uncommon for parties to settle following the issuance of an opinion. In the 2008-09 fiscal year, one such case occurred. *See Thos. S. Byrne, Ltd. v. Trinity Universal Ins. Co.*, 2008 WL 5095161 (Tex. App.–Dallas 2008, no pet.).

v. Why new opinions are issued without granting the motion for rehearing.

a. Housekeeping.

In at least two cases, the Court issued a new opinion to correct factual errors. Neither of the cases resulted in a different outcome.

b. Changed argument X to argument Y.

On original submission in *Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695 (Tex. App.–Dallas, 2008, no pet.), the Court read the parties' arguments to require construing the contract to determine whether appellant's interpretation of the contract was correct as a matter of law. *See id.* at 700. On rehearing, appellant claimed it had not asked the court to interpret the contract but rather to determine whether appellee had accepted a modification to the agreement. *Id.* Consequently, on rehearing, the court did not consider whether the agreement allowed appellant to reduce appellee's salary, but instead considered whether a jury question should not have been submitted to the jury because the agreement had been modified. *Id.*

c. Expanded/ clarified analysis in original opinion.

In eight cases, the Fifth Court denied the motion for rehearing but expanded or clarified the analysis in the original opinion. Because the outcome of the case did not change, the motions for rehearing were denied.

vi. Comments.

Similar to the other appellate courts' practice, the Dallas Court's granting of a motion for rehearing is not seemingly influenced by how much time was originally spent in deciding the case nor is it linked to whether the case was submitted with oral argument or the mere presence of a dissent. (In other words, I would agree with Mr. Hays that a strong dissent, not merely the presence of a dissent, influences the likelihood of a successful motion for rehearing.) Finally, requests for rehearing en banc do not enhance the likelihood of success.

In sum, short, sweet, and do not repeat!

F. The Sixth Court of Appeals (Texarkana—by Stacey Stanley, Chief Staff Attorney). *Some thoughts from the front lines.*

DISCLAIMER: The opinions expressed below are those of Stacy Stanley, and are not necessarily those of the Justices or of the Sixth Court of Appeals.

Some of the points made above about other courts deserve emphasis. Courts of Appeals are busy. For comparison—last year, the justices on our court wrote a total of 371 opinions—an average of 124 apiece. Last year, the nine-justice Supreme Court issued a total of 118 majority opinions.[23] In other words, any one justice on our court wrote and released more opinions than the entire Texas Supreme Court.

For Courts of Appeal, time is the enemy. If a justice ever gets behind in her caseload, catching back up is monumentally difficult—and remember that the legislature reviews the efficiency of courts of appeal not just on the raw number of opinions issued (the clearance rate: ratio of filings to opinions)—but also based on how promptly they are decided. The maxim "justice delayed is justice denied" lives.

[23] The Court also issued 47 concurrences or dissents. Divided by the nine justices, the average case output per justice is 13 opinions per year. (or 18 if you include concurrences/dissents)

In the midst of this monsoon of opinions, can an attorney get our attention? (2009 stats)[24]
Just the facts:

138 Civil opinions released.
17 motions for rehearing filed in civil cases.
3 motions granted with substituted opinion.
1—probate, 1—contract, 1—child custody

Of the 17, 14 were essentially repeats of the briefing. Those had no effect.

To set yourself above the throng—do not waste the Court's time rehashing old arguments. They already lost once. That is enough. Instead, show us how we got it wrong, and explain why. Brevity and clarity rule. If our opinion misstates or misunderstands something in the record—say so. That immediately gets our attention. If your argument revolves around that factual error—your chances just improved.

One of the three motions for rehearing we granted last year with a substituted opinion was exactly that scenario. Counsel saw that we had misunderstood a part of the record, and was able to show us how—and that impacted the ultimate decision so strongly that we came to a different conclusion.

The other two—one was housekeeping removing some less than precise language that allowed more than one understanding of our analysis (which counsel pointed out to us with clarity), and the other was the result of a very confused attempt to appeal by a pro-se who re-re-explained which of multiple orders he was attempting to appeal from—resulting in our withdrawal of the dismissal of his appeal.

In none of these cases had a dissent or concurrence been written.

For purposes of comparison—to get an idea of the realistic odds of prevailing—compare your chances with a motion for rehearing what is typically the least available remedy—mandamus. 25 original proceedings were filed last fiscal year, and three were granted—a 12% success rate. 3 of 17 motions for rehearing were granted—an 18% success rate. On the other hand, realize that only 12% of all civil cases had a motion for rehearing filed at all.

Practice note: Obviously, most of the time a winning party need not file a response to a motion for rehearing. But, if you get a request from the court for a response—per TEX. R. APP. P. 52.9, prick up your ears: the court "will not grant a motion for rehearing unless a response has been filed or requested". Your win may be in serious danger. Make your reply a good one.

[24] Fiscal year 2009—from Sept. 1, 2008 to Aug. 31, 2009.

G. The Seventh Court of Appeals (Amarillo—Numbers provided by Chief Justice Brian O'Quinn).

We do not have a commentary from the Seventh Court of Appeals concerning its rehearing docket, but once again the numbers seem to speak for themselves, and they show the overwhelming odds against the Court granting a motion for rehearing in a civil case:

Motions for Rehearing:	75
Motions Granted:	4 (5.3%)
Motions Denied w/ substituted opinion:	6 (8 %)
Motions Denied	65 (87.7%)

H. The Eighth Court of Appeals (El Paso—by Kim Anderson, Staff Attorney). *Rehearings on the Border.*

The Numbers:

- In fiscal year 2009 (September 1, 2008- August 31, 2009) the Court issued 102 opinions on the merits in civil cases.
- Twenty-two motions for rehearing were filed.
  - Zero motions were granted.
  - Only one opinion was withdrawn, and that was in accordance with a settlement agreement reached after the opinion issued.
- Of those 22 motions eight cases have subsequent history in the Texas Supreme Court.
  - one case was reversed
  - nine petitions were denied
  - one petition was granted, and the case remanded by agreement of the parties
  - one case remains "petition filed"
- The balance of the rehearing cases were either "no petition" or were mandamus cases, which with the exception of one petition which was dismissed by the Texas Supreme Court, no further action was taken by the relator.

The Bottom Line:

The Court has not "granted" a motion for rehearing in a civil case in at least the past ten years . . .

What follows is an attempt to explain the Court's reluctance to reconsider its decisions in civil cases:

- Along the lines of the commentary provided by our sister Courts, time is our constant enemy. All of the Appellate Courts in Texas are consistently asked to issue more decisions, on more and more complicated cases, in less and less time. The result is that the time devoted to a particular case is the single most precious expenditure the Court makes on a case-by-case basis.
- In addition to the concerns raised by our sister contributors, it is important to note that an appellate decision will only ever be as good as its supporting arguments and briefing. There is a disturbing trend to attempt to make up for shoddy briefing, research, and/or argument on rehearing. The Court does not look fondly on this practice, and it certainly does not increase the likelihood that the Court will be persuaded to reconsider a case. "Why didn't you tell us that the first time?" is not a question an appellate attorney wants an appellate justice asking as he or she reviews a motion for rehearing.

For the 8th District in particular, here are a few additional comments:

- In addition to the general time restraints and statistical concerns faced by all the appellate courts, the time our staff and Justices are able to devote to a particular case is further limited by the fact that the Court is comprised of a single panel. We do not have a rotating panel schedule. The practical result is that the three Justices typically sit on cases every month, from September to June, each year (generally the Court does not submit cases in July and August). When one also takes into account the other ongoing tasks which require the panel's attention in the midst of monthly submissions, such as motions, petitions for writs of mandamus, post-judgment and supersedes issues, etc., the practical conclusion is that there is simply not time for the Court to reconsider a case that has been decided, and an opinion issued.
- Also worth noting, since 1994, the 8th District has held fast to its general, and rather unique, policy of granting oral argument in any case in which argument is requested. The Court continues to take great pride in this policy, especially in light of the recent trend to forego argument in an increasing number of cases. However, the policy does result in an elevated number of "argument" cases. As a practical matter, those cases require additional time and staff resources, and must fit into the Court's already limited schedule. All in all, while the Court and those who practice before the panel genuinely appreciate and enjoy the opportunity to argue, the practical result is longer periods between filing and decision.

With this in mind, a lawyer considering whether to file a motion for rehearing on a case that has been argued should take into account the extraordinary time and resources the Court has already expended on that case. A prudent attorney, will seriously consider, and advise his or her clients, as to the likelihood that the Court will be willing to set aside its current caseload to reconsider a decision made at such expense.

- In a final "behind the scenes" note- since Texas Rule of Appellate Procedure 47 was amended in 2003, it has been policy of the 8th District not to issue "Memorandum Opinions" in *any* civil case on the merits. To put this policy in perspective, according to the Annual Report for the Texas Judiciary for fiscal year 2009, the percentage of memorandum opinions issued by the our sister appellate courts ranged from 58.3% (the 4th District), to 94.9% (the 9th District). In the same period, only 23.8% of opinions issued by the 8th District were designated as "memorandum." *The Annual Report for the Texas Judiciary: Fiscal Year 2009*, Carl Reynolds- Administrative Director, Office of Court Administration (December 2009). It is the Court's philosophy that publication of its decisions, making them available for citation as binding authority, is an essential part of the Court's role within the Texas judicial system. On the other hand, of course, the Court recognizes that published opinions have a greater tendency, due to their precedential value, to attract attention, be it positive or negative. Again in recognition of the part the Court plays within the larger system the Justices have made the choice to dedicate themselves to producing thoroughly researched, and meticulously crafted *published* opinions.

In terms of rehearing practice, the Court's publication policy should give the prudent attorney pause when considering whether a motion for rehearing is necessary to assist the Court's understanding of the record or a particular argument, in a way that will change the outcome of the case. The same lawyer should consider whether that clarification will have a practical effect on the Court's decision, in addition to the likelihood that the Court will be amenable to revisiting such a decision. In the event that the lawyer determines a motion for rehearing is necessary, it should be crafted in a way that recognizes, and respects the Court's prior consideration of the case, and concisely analyzes the attorney's concerns with the

decision.

Back to the Bottom Line:

The result of the interplay between the Court's policies and the practical realities facing our courts of appeal in general, is that the Court of Appeals for the 8th District has not "granted" a motion for rehearing in a civil case in at least a decade (as far back as the researcher was able to dig).

I. The Ninth Court of Appeals (Beaumont—Numbers from Carol Anne Flores, Clerk of the Court).

We do not have a commentary from the Beaumont Court concerning its rehearing docket, but once you look at their numbers provided us by Carol Anne Flores, the Clerk of the Court, you realize the numbers just sort of speak for themselves:

> FY09 (9-1-2008 to 8-31-2009) Motions for Rehearing:
>
> 1. Civil motion for rehearing—27
> 2. Granted—0
> 3. Denied with new opinion issued—0
> 4. Motions Denied—27

Three up, three down, no hits, no runs, no errors. *Res ipsa loquitur*, as Hunter S. Thompson used to say.

J. The Tenth Court of Appeals (Waco—Chief Justice Tom Gray, with thanks to Jill Durbin, Staff Attorney, and Nita Whitener, Opinion Secretary).

DISCLAIMER: Chief Justice Gray notes that he "can speak about no other Court or for no one other than myself."

In the Waco Court of Appeals during fiscal year end 2009, there were 32 motions for rehearing, or equivalents, filed in civil cases. Equivalents include motions for reconsideration and motions to vacate. And since 5 of the proceedings were identical, these were counted as one proceeding to keep from skewing the statistics. Consequently, 28 motions were filed in 2009. These motions were filed in 25 proceedings, meaning that two motions were filed in three of the proceedings. During the same time period, we issued 171 dispositive opinions in civil proceedings. Thus, motions for rehearing were only filed in 15% of the proceedings.

Of the 28 motions, 15 were summarily denied without a request for a response, without a voluntary response, and without any modification to the opinion or judgment. Additionally, 4 were summarily dismissed, primarily because we had no jurisdiction to consider them. Those motions were late, or were a second motion for rehearing, or were both. Thus, the initial odds were that 68% were denied or dismissed in a summary fashion. The average time pending of these motions was 37 days, as few as 4 days but as many as 80. If the two longest pending motions are excluded, the average time pending was only 14 days. Thus, consistent with other courts, a motion without something in it that gets the court's attention is not going to extend the proceeding very long. As an aside, for those who monitor judicial performance measures, the time a case is pending on motion for rehearing is monitored and goes on a monthly report. During 2009, a motion for rehearing went on that report after 30 days. That was changed, and it now goes on the report after 60 days.

Further, of the 28 opinions represented by the motions for rehearing, there were concurring opinions or concurring notes to 7 of those opinions and dissenting opinions or dissenting notes to 8 of those opinions. As discussed below, the presence or absence of either did not seem to improve the odds of a motion for rehearing being granted and, in all probability, worked against the motion being granted.

Before a motion for rehearing can be granted, a response must be requested or received. TEX. R. APP. P. 49.2. Thus, a court should not substantively rewrite an opinion in response to a motion for rehearing without a response. If you voluntarily file a response, you may increase the chances the court will deny the motion but you will not have the benefit in the interim of knowing if there was something in the motion that caused the court to want to see a response; because if you file a response, one does not have to be requested. The Waco Court requested a response to only four motions. Three of the four were subsequently summarily denied without modification of the opinion or judgment in any way. So just because the court requests a response, it does not mean that we are about to change the opinion. As necessitated by the time to file the requested response, the average time pending of these motions was longer: 41 days. But after the response was received, they fell into line with the average days pending for cases in which no response was filed.

In one proceeding, the Court substantially rewrote the opinion after a voluntary response was filed but did not substantively change the judgment. *In the Interest of S.N.*, 272 S.W.3d 45 (Tex. App.–Waco 2008, no pet.). Additionally, in two proceedings, in apparent contravention of the Rule, without requesting or receiving a response, the Court substantially modified

the opinion or wrote an opinion on rehearing. *Lopez v. Lopez*, 271 S.W.3d 780 (Tex. App.–Waco 2008, no pet.)[1]; *Merritt v. Davis*, No. 10-09-00222-CV, 2009 Tex. App. LEXIS 6100 (Tex. App.–Waco Aug. 5, 2009), *rehearing denied by Merritt v. Davis*, No. 10-09-00222-CV, 2009 Tex. App. LEXIS 6867 (Tex. App.–Waco, Aug. 26, 2009, no pet.). The modified opinion or opinion on rehearing addressed issues raised in the motion for rehearing. The modified opinion in *Lopez* also addressed issues raised in a dissenting opinion to the original opinion but which were not addressed in the original opinion. The judgments of the Court were not, however, modified as a result of the rewrites.

In only two proceedings was a motion actually granted which resulted in a substantial rewrite of the opinion and opportunity to change the judgment. I say opportunity because one motion for rehearing was based upon payment of the filing fee. *McDaniel v. Goosby*, No. 10-08-00377-CV, 2009 Tex. App. LEXIS 8005 (Tex. App.–Waco Oct. 14, 2009, no pet.). On granting the motion for rehearing, the appellant was given the opportunity to then pay the clerk's fee for the clerk's record. Having failed to pay for anything after the motion for rehearing was granted, even given another chance, the Court ultimately rendered another opinion with the same judgment-dismissal. The second opinion stated the basis of the judgment as want of prosecution rather than failure to comply with an order of the Court or notice from the Clerk to pay the filing fee.

Thus, in only one proceeding was the motion for rehearing successful to accomplish a substantial modification in the result. *Meece v. OCC Constr. Corp.*, 264 S.W.3d 928 (Tex. App.–Waco 2008)(order), *r'hg granted*, Jan. 21, 2009). Unfortunately for the practitioner, the study of the motion for elements of a successful motion will be of little help. The grant was entirely due to a change in the procedural posture of the case. One of the appellants filed a notice of bankruptcy with the Court. The Court, with one justice dissenting, sua sponte severed the appeal between the appellant that was not bankrupt and the appellants that were benefitting from the automatic stay. Two grounds were listed in the motion for rehearing or to vacate the severance order. First, unknown to the majority at the time of the attempted severance, the appellant not in bankruptcy was living in a house constructed on property which was the homestead of the appellants in bankruptcy and thus the issues could not be properly severed. And second, the automatic stay had been lifted so that the appeal could proceed. The majority of the Court that had severed the appeal decided that it would be put back together. Thus, due to the anomalies of the situation, you can only extrapolate that if the court tries to do something unusual, you may be able to bring in matters outside the record via a motion for rehearing to show the court that what it attempted to do or accomplish in the order or opinion is inappropriate.

Based on the forgoing analysis of the success of the motions for rehearing during fiscal year end 2009, in only 1 of 28 motions filed was the movant able to obtain a reversal of the Court's prior direction. That is only a .036 chance for success, and that single success was based on a procedural anomaly. Thus, if 2009 is any gauge of whether to invest in a motion for rehearing, it appears your money is better spent working on your petition for review, but that is for another paper.

ADDITIONAL OBSERVATIONS

What my review of the data and documents indicate, and extrapolating based on the data and personal recollection of 12 years on this particular Court, is that other than some very specific instances, motions for rehearing seldom result in any modification of the court's primary opinion. And while some motions result in a modification of the opinion, a substantive change in the result is very rare indeed.

While I can speak about no other Court or for no one other than myself, you should also note that the Waco Court was in the process of a change in the make up of the Court in 2009. Justice Bill Vance, a member of the Court for 18 years, retired and former Chief Justice of the Court, Rex Davis, was elected as a justice to fill that vacancy. And the Court is again in that process of change with Justice Felipe Reyna being replaced by former District Court Judge Al Scoggins at the end of 2010. Immediately after the change from Vance to Davis, there were a few opinions that were substantively modified on motion for rehearing. *See Meece v. OCC Constr. Corp.*, 264 S.W.3d 928 (Tex. App.–Waco 2008) (order), *r'hg granted*, Jan. 21, 2009). *See also e.g.*, *Guyton v. State*, No. 10-07-00070-CR, 2009 Tex. App. LEXIS 839 (Tex. App.–Waco Feb. 6, 2009, pet. ref'd); *Ex parte Doster*, 282 S.W.3d 110 (Tex. App.–Waco 2009), *vacated by, appeal dismissed by Ex parte Doster*, PD-0504-09, 2010 Tex. Crim. App. LEXIS 6 (Tex. Crim. App., Feb. 3, 2010). (While these two are criminal cases, they are representative of the opportunity when the make up of

[1] Original opinion: *Lopez v. Lopez*, No. 10-07-00002-CV, 2008 Tex. App. LEXIS 9920 (Tex. App.—Waco Aug. 13, 2008), *opinion withdrawn by Lopez v. Lopez*, 2008 Tex. App. LEXIS 8366 (Tex. App.—Waco Nov. 5, 2008) (order). Original dissent: *Lopez v. Lopez*, 283 S.W.3d 353 (Tex. App.—Waco 2008)(Gray, C.J., dissenting).

the panel changes.) Each had previously been a split decision and after the change in the make up of the Court, the judgment of the Court also changed. So if you find yourself in a court that is experiencing a change in the makeup of the panel that decided your appeal, be attune to the opportunity that change may present.

It is what remains constant rather than changes that should be most significant to the practitioner. With this in mind, I make the following observations:

- In a small court where there is evidence of disagreement among the justices, they have already hashed out your arguments, and possibly others. They have decided they cannot agree on the alterative positions presented. Thus, unless you can direct the court to an identifiable error or omission in the majority opinion the chances of a substantive change are less than when you have either a unanimous opinion or the option of en banc reconsideration/rehearing.
- While the author of a dissenting opinion appreciates your joinder, it is seldom, if ever, productive to tell the majority that the dissent got it right and the majority got it wrong.
- Technical corrections needed that are pointed out in a formal motion for rehearing from the victor are usually appropriately deferential. But if you lost the appeal—approach technical corrections with caution. Not only do you want to avoid a possible waiver argument if the issue is corrected, but it is also very easy to adopt a tone of: Not only did you get the law wrong, you cannot do math, etc., either.
- If a motion indicates you have truly studied the opinion that you seek to now modify, you stand a better chance of getting the attention of the court for reconsideration of the issue. By this, I go beyond some of the other observations about keeping the motion for rehearing short and pointed by addressing a limited number of issues. It is my view that the best motions for rehearing will be a valid critique of some specific facet or language of the court's opinion. The motion for rehearing must do more than argue what the law is or what the result ought to be, you must be able to articulate the error made by the court, in essence to explain the error. *See e.g. Fagan v. Crittenden*, 166 S.W.3d 748 (Tex. App.–Waco 2005) (order) (Gray, C.J., dissenting).
- Give the court the benefit of the doubt when you point out the court's error. You have to build the court a credible escape hatch, a way to exit graciously. If the response does not have a way to facilitate a change you may be met with subconscious resistance. Call the court's reasoning or result "illogical" and "ill conceived" and we become defensive. But if the same argument is described as "understandable based on the confusing precedent" or "perfectly logical as far as it goes" we are more likely to try to see where it was we failed to connect the dots. Ultimately we may not agree with you, but your chance of getting and maintaining our attention is not further diminished than it already is in looking at a motion for rehearing of arguments or considering issues we have already decided once.
- The court does not want to get reversed. If you have a technical correction that does not necessarily injure your client and a close call on a substantive issue that your client lost—a motion for rehearing allows the court of appeals to fix what is obviously wrong with little or no benefit to your client. Consider whether the best use of the obvious but inconsequential error is as a hook to get the Supreme Court's attention and then to use it as a fulcrum to get your petition in their door.

I cannot leave the topic without drawing your attention to one case decided by the Court just outside the time period under review and another by the Texas Supreme Court. In the first, a motion for rehearing was filed and a response was requested. The motion was granted and the result was a complete reversal. But it was not on the merits of the original appeal. The motion for rehearing was based on governmental immunity/lack of jurisdiction. Thus, a divided court's judgment in favor of an individual for breach of contract was withdrawn and replaced with a unanimous take nothing judgment in favor of the government. *See Berkman v. City of Keene*, No. 10-08-00073-CV, 2009 Tex. App. LEXIS 8497 (Tex. App.–Waco Nov. 4, 2009, pet. denied).

A similar result happened on petition for review of one of our decisions. We had addressed the merits of the issues as presented to us. The petition in the Supreme Court was granted and our decision affirming the county court was set aside. The case was remanded to the county court with instructions to transfer the case back to district court for further proceedings. The issue briefed in the Supreme Court was the county court's jurisdiction. It had not been an issue raised with us in the court of appeals. *Carroll v. Carroll*, 304 S.W.3d 366 (Tex. 2010).

The reason I mention these two cases is never give up because there is almost always an argument that is overlooked. This is why I discourage the trial lawyer from being the lawyer on appeal—different vantage points present different views and sometimes a

different view (arguments or issues) is what changes a loser into a winner. But spend your dollars wisely; rare is the case that the type of "routine" motion for rehearing that we typically see will get you the 180 degree change in result that you so often seek.

K. The Eleventh Court of Appeals (Eastland—Numbers provided by Nancy Hutto Hughes, Staff Attorney).

We do not have a commentary from the Eastland Court concerning its rehearing docket, though we do have their numbers: in the fiscal year ending August 31, 2009, motions for rehearing were filed in 36 civil cases, with the Court granting 1 of those. It denied the remainder, and did not issue a substituted opinion on any motion it denied. So the Court only granted 2.8% of the motions for rehearing in civil cases.

L. The Twelfth Court of Appeals (Tyler—Numbers provided by Cathy Lusk, Clerk of the Court).

We do not have a commentary from the Tyler Court concerning its rehearing docket, though we do have their numbers: in the fiscal year ending August 31, 2009, motions for rehearing were filed in 26 civil cases, with the Court granting 4 of those. It denied the remainder, and issued substituted opinions as to 3 of those motions it denied. So the Court granted 15.4% of the motions for rehearing in civil cases.

M. The Thirteenth Court of Appeals (Corpus Christi—Brandy Wingate, Staff Attorney).

IMPORTANT DISCLAIMER: The following analysis reflects the opinions and observations of the author alone and not those of the Thirteenth Court of Appeals or any of its justices.

i. The Method

Using case management, with the help of our amazing clerk Dorian Ramirez, I analyzed all the cases in which a motion for rehearing was either filed or ruled upon from January 1, 2008 through December 31, 2009 (a two year period). This query resulted in a sample of 159 cases in which motions for rehearing had been filed and ruled upon.

ii. The Numbers

a. Chance of Getting Rehearing

The chances of the Thirteenth Court of Appeals granting rehearing are slim. Of the 159 cases surveyed, the Thirteenth Court granted only six motions for rehearing, or 3.77% of the motions for rehearing filed. In five cases, or 3.14% of the cases surveyed, the court denied rehearing but withdrew the original opinion and rewrote it without substantial changes.

b. Types of Cases Involved

The cases in which the court granted rehearing typically involved issues of appellate jurisdiction or the failure to follow the appellate rules (4 of the 6 granted or 67%). For example, in a parental rights termination case, the court initially held that the appellant's notice of appeal was late, which the court held deprived it of appellate jurisdiction. On rehearing, the court reversed its position and decided the case on the merits. *See In re D.K.B.*, No. 13-08-00177-CV, 2009 WL 2462778, at *2 n.3 (Tex. App.–Corpus Christi Aug. 13, 2009, no pet.) (mem. op.); *see also Rubio v. Campirano*, No. 13-08-00345-CV, 2008 WL 4741999 (Tex. App.– Corpus Christi Oct. 30, 2008, reh'g granted) (dismissing appeal as moot); *Jones v. Wells Fargo Bank N.A.*, No. 13-08-00370-CV, 2008 WL 3892425 (Tex. App.–Corpus Christi Aug. 25, 2008, reh'g granted) (late notice of appeal). Curiously, in one case, the court dismissed the appeal for failure to arrange for payment for the clerk's record, granted rehearing and withdrew the opinion, and then dismissed the case again for the same reason. *Gorena v. Blackwell*, No. 13-08-00323-CV, 2009 WL 1886892, at *1 (Tex. App.–Corpus Christi July 02, 2009, no pet.) (mem. op.). The other two cases in which the court granted rehearing involved allegations of wrongful termination and medical malpractice. *See generally Ballesteros v. Nueces County*, 286 S.W.3d 566 (Tex. App.–Corpus Christi 2009, pet. stricken); *Streich v. Dougherty*, No. 13-05-00064-CV, 2008 WL 5191309 (Tex. App.–Corpus Christi Dec 11, 2008, no pet.) (mem. op.).

c. Effect of Oral Argument

Oral argument in the case did not increase the chance of rehearing. Of the 159 cases in which the court considered a motion for rehearing, 111 were submitted on the briefs, while 48 were submitted on oral argument. None of the six cases in which the court granted rehearing were submitted on oral argument.

d. Effect of a Dissent or a Concurrence

If there was a dissent or concurrence, the chances of getting rehearing increased significantly. Of the 159 cases in which a rehearing was considered, only 8 cases drew a concurrence or a dissent. Of the six cases in which the court granted rehearing, the two cases where the court reversed its position on the merits involved a concurrence or a dissent. *See Ballesteros*, 286 S.W.3d at 572 (Vela, J., dissenting) (on original submission, Justice Benavides concurred in the result;

on rehearing, Justice Benavides wrote the majority opinion, and Justice Vela dissented); *Streich*, 2008 WL 5191309 (on original submission, Justice Castillo dissented and argued to affirm a summary judgment in favor of the defendant; on rehearing, Justice Castillo was replaced by her successor in office, Justice Benavides, who joined the majority in affirming the summary judgment as suggested by Justice Castillo). Thus, it appears that if the court has addressed the merits of the appeal and a dissent or a concurrence was written, you should probably file a motion for rehearing.

e. Effect of a Motion for En Banc Reconsideration

Of the 159 motions for rehearing filed, 36 of them were accompanied by a motion for en banc reconsideration. In some cases, the motion for en banc reconsideration was filed in addition to the motion for rehearing, while in other cases it was the only relief requested. *See* TEX. R. APP. P. 49.7. The court appears to grant rehearing more frequently in cases in which a motion for en banc reconsideration was also filed—of the 6 cases in which rehearing was granted, 4 of those cases also involved a motion for en banc reconsideration. All of those motions for en banc reconsideration were either denied or denied as moot. The court did not grant a single motion for en banc reconsideration during the study period. Thus, it appears that these motions may help get the court's attention, but they are not likely to be granted.

f. Length of the Majority Opinion

I was curious as to whether the length of the majority opinion made any difference to the court when considering rehearing. To survey this, I looked at the opinions posted on the court's website and counted the pages in the .pdf version of the opinion. Only 127 of the 159 cases surveyed appeared on the court's website in .pdf format (as opposed to html format). Of those 127 cases, the opinions ranged from 1 page in length to 114 pages (wow!). The average length of opinion was 12.20 pages.

Of the six cases for which rehearing was granted, only four cases appeared in .pdf format. The average length of opinion for those cases was 2.75 pages, most likely because all four of the cases that appeared in .pdf format were initially dismissed for lack of appellate jurisdiction or failure to comply with the appellate rules.

g. Memo or Opinion?

I was also curious whether the designation of the opinion, as a memorandum or a regular opinion, affected the chances of obtaining a rehearing. Of the 159 cases surveyed, 127 opinions were designated as memorandum opinions. All of the cases in which a rehearing was granted were originally designated as memorandum opinions. Thus, the court's designation of the case as a memorandum opinion does not seem to hinder the party's ability to obtain a rehearing.

h. Response Requested by the Court

Of the 159 cases surveyed, the court requested a response in 26 cases, or 16%. Of the six cases in which the court granted rehearing, it requested a response in two of the cases.

i. The Re-Write

In 5 of the 159 cases surveyed, the court denied the motion for rehearing but withdraw its opinion and rewrote. None of these cases involved significant changes to the opinion.

j. Length of Time Motion Pending

Excluding time for extensions requested by the responding party, the time between the filing of a motion for rehearing and the court's disposition of the motion ranged from 1 day (in a mandamus proceeding) to 825 days. The average time that a motion was pending was 49.63 days.

In the cases where the court granted rehearing, the motions in those cases were pending for an average of 322 days. In the four cases where the court granted rehearing after initially dismissing for lack of appellate jurisdiction or failure to comply with the appellate rules, the motion had been pending for an average time of 135 days. In the two cases where the court initially decided the merits before granting rehearing, the motion had been pending for an average of 697 days. Thus, it appears that the longer the motion has been pending, the more likely it is to be granted.

N. The Fourteenth Court of Appeals (Houston—Madison Finch, Staff Attorney).

DISCLAIMER: The following reflects the analysis of Madison Finch alone, and does not necessarily reflect the analysis or opinions of the Fifth District Court of Appeals or any of its justices.

We began by examining the subsequent history of every civil case for which the court issued an opinion in the fiscal year of September 1, 2008 through August 31, 2009. If the opinion prompted a motion for rehearing or for reconsideration en banc, we included it in the study unless the case was an original proceeding or the motion was filed in response to a summary

dismissal for a technical violation.[2] We were left with 77 cases in which one or more parties requested rehearing or en banc review—largely without success. Because no motions for en banc review were granted, and because such motions are first considered at the Fourteenth Court of Appeals by the panel that issued the original opinion, we draw no distinction here between motions for rehearing and for en banc review.

i. Odds of Reversal: 1 in 100

A movant who hopes to persuade this court to withdraw an opinion and completely reverse its position will almost certainly be disappointed. In the entire fiscal year we studied, this happened only once, representing a success rate of just over 1%.

That case, *Sharma v. Routh*,[3] was singular in other respects as well. Before the original opinion was issued, the case was under submission for 468 days—more than three times longer than the 144-day average of the remaining cases in the study. The opinion was accompanied by the longest dissent in our study. In fact, the dissent was 50% longer than the majority opinion. And finally, an amicus brief was filed in support of rehearing. Although such briefs occasionally are filed at the intermediate appellate level, particularly in connection with insurance cases, *Sharma* was a divorce case.

The combination of these factors would have marked the case as an outlier regardless of whether the court granted the motion for rehearing.

ii. Probability of Substitution: Less than 1 in 5

Although the court overruled the motions for rehearing in the remaining cases in our study, it responded to 19% of the motions by issuing a substitute or supplemental opinion. In eleven of the fifteen cases in which this occurred, the court appears to have issued the substitute or supplemental opinion solely to explain why the movant's arguments were rejected. In each of two additional cases, the court corrected a misstated fact that did not affect the court's analysis.[4] But in the two remaining cases, the court effectively afforded the movant some relief even as it overruled the rehearing motion.

In *McCloskey v. McCloskey*,[5] a factual correction led the court to modify the trial court's judgment, and the movant received part of the relief he sought, despite the fact that the court overruled his motion for rehearing. In its original opinion, the court incorrectly stated that the trial court had not characterized an award of attorneys' fees as child support. In the substitute opinion, the court not only corrected the statement but also modified the judgment to delete the trial court's mischaracterization.

A party sometimes may benefit from a rehearing motion even though the court overrules the motion, maintains its prior rulings, and grants none of the requested relief. For example, in *Rowan Cos. v. Wilmington Trust Co.*, the court issued a substitute opinion clarifying that, contrary to the parties' beliefs as represented in their rehearing motion and response, it had not ruled on a particular issue. 305 S.W.3d 698, 701 (Tex. App.– Houston [14th Dist.] 2009, pet. filed) (sub. op.). The original opinion in this breach-of-contract case contained a footnote in which the court paraphrased the trial court's orders severing a number of claims before the judgment at issue was entered. After the court reversed the judgment and remanded the case, the appellees argued that the court erred in excluding an alternative theory of recovery from the matters to be addressed on remand; the appellant responded that the court was correct in holding that no recovery was available on that theory. In its substitute opinion, the court explained that it did not remand the issue because it considered the alternative theory to be among the claims severed from the action. *Id.* at 717 n.27. The appellees therefore could consider the motion for rehearing to have been partially successful even though, from the court's perspective, nothing had changed.

iii. Likelihood of Response: Around 1 in 4

Sometimes a motion for rehearing produces a less tangible benefit. An argument that might be presented to the higher court often can be tested in a motion for rehearing or for reconsideration en banc. But the odds that your opponent will respond are not much better than the odds that the court will issue a substitute opinion.

Responses were filed to approximately 27% of the motions in our study. Although responses were filed

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[2] For example, some cases that were dismissed because the appellant failed to arrange payment for the record were reinstated after the appellant filed a motion for rehearing accompanied by evidence of payment. Because such motions are granted much more readily than motions for rehearing filed after a decision on the merits, we excluded them from the study to avoid skewing the results.

[3] 302 S.W.3d 355 (Tex. App.–Houston [14th Dist.] 2009, no pet.) (op. on reh'g).

[4] If you believe the court has misstated the facts, it is a good idea to check the record citations in the briefs before using the same citations in a motion for rehearing. The misunderstanding may be the result of a typographical error in the citation or the use of a "placeholder" citation to the cover page of a deposition or the first page of a lengthy document, rather than to the page on which the evidence you want the court to consider actually can be found.

[5] No. 14-06-00470-CV, 2009 WL 3335868, at *2 (Tex. App.–Houston [14th Dist.] Apr. 2, 2009, pet. denied) (sub. mem. op.).

most frequently in response to a request from the court, the court made such requests in fewer than 16% of the cases. In our review, we found only one instance in which the nonmovant failed to file a response requested by the court.

iv. Types of Cases in Which a Substitute Opinion Is More Likely

Rehearing motions were filed in cases from 26 areas of law, but nearly a third of the motions were filed in cases drawn from the areas of family law or breach of contract or warranty. Motions for rehearing were filed in these cases at twice the rate at which they were filed in any other subject area. Sixty percent of the court's opinions on rehearing concerned these areas of law, but the court issued a substitute or supplemental opinion in no more than one case from any other area of law.

Type of Case	Motions Filed	Overruled w/ Opinion	Granted
Family[6]	13	5	1
Contract/ Warranty	12	3	0

This outcome may be the result of probability: all other factors being equal, the court simply is more likely to act on a motion for rehearing in an area of law in which more motions are filed. Family law cases appear to be over represented in this study, but a more proportionate distribution might be seen if the study extended over more than one year.

v. Which Variables Matter?

Because only one motion for rehearing was granted during the study period, the sample was too small to draw conclusions about whether any factor would be helpful in predicting that outcome. To avoid misleading results, we therefore omitted that case from further consideration and looked instead for correlations between various factors and the issuance of a substitute opinion.

The most significant factor in predicting whether the court would issue a substitute opinion was a request by the court for a response. In fully half of the cases in which the court asked the nonmovant to respond, the court issued a substitute or supplemental opinion; with no such request, the court overruled the rehearing motion 91% of the time.

After creating tables showing the length of time between various case events, and comparing the results in cases in which the court simply overruled the motion with cases in which the court issued a subsequent opinion, we found that, on average, in those cases in which substitute opinions subsequently were issued, the court had taken more time to issue the prior opinion and to rule on the rehearing motion, but had taken less time to request a response to the motion. These relationships may be illusory. At best, they are visible only in hindsight, and only by calculating and comparing these averages.

Avg. # days between	**Motion Overruled**	**Motion Overruled w/Subst. Op.**
Submission & Opinion	141	158
Motion & Request for Response	20	10
Motion & Ruling	34	54

One also could not predict the outcome of a rehearing motion by considering the length of the opinion. When per curiam opinions were excluded, there was only a one-page difference between the average opinion length in cases in which the rehearing motion was overruled outright and those in which the court issued a substitute or supplemental opinion. When per curiam opinions were included, the difference increased to just two pages.

Finally, we found that rehearing motions filed in cases in which oral argument was granted fared no better than those in which no argument was presented (the difference in outcomes was less than 1%).

vi. Using These Results

Although these figures illustrate that, generally speaking, motions for rehearing or reconsideration en banc are unlikely to be successful, the data may be helpful in realistically assessing whether to file or respond to a motion for rehearing in a given case. In the sample year studied, motions were more likely to be successful if:

- The case was under submission for an exceptionally long time;
- The opinion was accompanied by a dissent that was significantly longer than the opinion;
- The case contained a misstatement of fact that could affect the court's analysis; or

[6] These categories are subjective and broadly defined. For example, in the category of "family law," we have included cases concerning divorce, child custody, child support, and termination of parental rights.

- The scope of remand was unclear.

Because the court almost always overruled motions for rehearing unless it had requested a response, nonmovants may wish to consider whether it is worthwhile to file a response to a particular rehearing motion absent a request from the court.

5. CONCLUSION.

The odds against a court of appeals granting a motion for rehearing are long—and, for some courts, virtually zero. The courts pour their hearts and soul into trying to get the opinion right the first time. The avalanche of cases facing the courts, and the concomitant time constraints that avalanche places on the courts, dictate that the courts cannot reconsider from scratch every opinion. To become one of the infinitesimally small group of movants whose rehearing motions succeed, your motion must succinctly and compelling show the error in "the Court's understanding of the record or [the law] in a way that will change the outcome of the case." Unless you can draft such a motion, perhaps the wiser course is to not invest your client's resources and the court's time in a motion for rehearing.

APPENDIX ONE: GRANT RATES

Motion for Rehearings, Grant Rates, Texas Courts of Appeals
Fiscal Year Ending 8/31/2009*
(For 13th Court, two consecutive fiscal years ending 8/31/2009; for Fort Worth Court, fiscal year 4/1/2008-3/3`/2009).

Court	Filed	Granted	Denied/ Withdrawn	% Granted	% Den./ Withdrawn
1st (Houston)	122	17	6	13.9%	4.92%
2nd (Fort Worth)	54	6	7	11.1%	12.96%
3rd (Austin)	71	6	13	8.5%	18.31%
4th (San Antonio)	74	6	11	8.1%	14.86%
5th (Dallas)	132	10	10	7.6%	7.58%
6th (Texarkana)	17	3	0	17.6%	0.00%
7th (Amarillo)	75	4	6	5.3%	8.00%
8th (El Paso)	22	0	1	0.0%	4.55%
9th (Beaumont)	27	0	0	0.0%	0.00%
10th (Waco)	28	1	3	3.6%	10.71%
11th (Eastland)	36	1	0	2.8%	0.00%
12th (Tyler)	26	4	3	15.4%	11.5%
13th (Corpus Christi)	159	6	5	3.8%	3.14%
14th (Houston)	77	1	15	1.3%	19.48%