Just as there are exclusive procedures and customs at the U.S. Supreme Court, there are unique nuances to Texas Supreme Court practice as well. In light of my experience in both courts (11 U.S. Supreme Court arguments and nine Texas Supreme Court arguments), this article will examine five unique aspects of practicing before the Texas Supreme Court compared to the U.S. Supreme Court.

**Pace of Questioning at Oral Argument**

One of the most striking differences between oral arguments at the Texas and U.S. Supreme Courts is the pace of questioning from the justices, even though both are nine-member courts. The pace of questioning that I have experienced in the U.S. Supreme Court (a question/answer exchange about every 30 seconds) was essentially twice as frequent as the questioning I received at the Texas Supreme Court (an exchange of about every 60 seconds). The pace of questioning at the Texas Supreme Court was about half that of the U.S. Supreme Court (a question/answer exchange about every 3 minutes). Multiple commentators and advocates have recognized the rapid pace of questioning in the U.S. Supreme Court. One recent study showed that for the 10 advocates who made the most total statements at oral argument throughout an entire term, these advocates made on average about two new statements per minute (that is, they fielded about two questions per minute). The statistics from my arguments at the U.S. Supreme Court confirm this trend.

In contrast, the pace of questioning in my recent arguments at the Texas Supreme Court was about half that of the U.S. Supreme Court. Of course, this statistic from my own experience in the Texas Supreme Court analyzes only a limited set of cases; in other types of disputes, the Texas Supreme Court might give advocates even more time to develop their arguments. But at minimum, this is some empirical evidence that the Texas Supreme Court allows advocates more time to carry on sustained explanation and develop their points in more detail than the U.S. Supreme Court.

**Motions for Rehearing**

Motions for rehearing—to reconsider actions the courts have already taken—are treated quite differently by the Texas and the U.S. Supreme Courts. As the U.S. solicitor general recently explained in United States v. Texas, “ordinarily, it is exceedingly rare for [the U.S. Supreme] Court to grant rehearing.”

The Texas Supreme Court, in contrast, grants motions for rehearing a few times each term. The overwhelming majority of rehearing motions are denied: During the court’s last term (September 2017 to August 2018), the court granted seven rehearing motions and denied 244—a grant rate of about 2.8%. Over the past four years, the Texas Supreme Court has an annual average of granting about seven motions for rehearing of petitions for review plus one motion for rehearing on causes (that is, after an opinion has issued).

Over the past four years, the Texas Supreme Court granted 27 motions for rehearing at the petition-for-review stage—about seven per year. After reinstating the petition for review, the court then disposed of these 27 cases as follows:

- Ten petitions resulted in overturning the court of appeals;
- Eight petitions resulted in affirming the court of appeals;
- Six petitions resulted in re-denials of the petition for review; and
- Three of these cases remain pending.

What may be most notable about these statistics is that about two or three times per year in this timeframe, the Texas Supreme Court granted a motion for rehearing of an already denied petition for review and subsequently overturned the decision of a court of appeals.

A few patterns emerge when examining the substance of the arguments raised in these granted motions for rehearing. The majority of these motions asserted negative statewide or widespread consequences if the court of appeals’ decision was left in place—especially in the oil and gas context that the court frequently addresses. Nearly half of the granted motions invoked recent or intervening new authority from the Texas Supreme Court, the 5th Circuit Court of Appeals, state courts of appeals, or statutes. And many asserted either governmental interests or issues implicating the proper scope of governmental power.

Amicus support during the petition-for-review rehearing phase is not necessary for the court to potentially grant this rehearing. And just because the court already has full merits briefing when it initially denies a petition for review that does not foreclose the granting of a rehearing motion.

**Motions for Shared Oral Argument Time With Amici Curiae**

Both the Texas and U.S. Supreme Courts allow a party to consent to share argument time with an amicus curiae. This practice, though, has been much more prevalent at the U.S. Supreme Court.

The Texas Supreme Court has generously granted motions to share argument time with amici curiae, although these motions recently have only been filed about five times each year. In the past four years, 19 motions for sharing oral argument time with amici curiae have been filed, and all 19 have been granted. Once the supporting party’s consent has been given, the court appears to accept that party’s strategic decision and allows supporting amici to present oral argument—even if the opposing party objects. Moreover, the court has granted these argument motions for private parties as amici and not just the state.

The Texas Supreme Court’s sustained practice of granting the small number of these motions that actually get filed suggests that sharing oral argument time with amici curiae may be an underused facet of appellate advocacy.
Calling for the Views of the Solicitor General, or CVSG

Both the Texas and U.S. Supreme Courts have a procedure for asking a particular solicitor general to submit an amicus brief—that is, “call for the views of the solicitor general.”

The Texas Supreme Court has used its CVSG procedure far less than the U.S. Supreme Court. Before 2016, the Texas Supreme Court had gone a few years without a CVSG request. But the court has returned to this practice, issuing a CVSG in each of the last three terms. Given the limited number of cases in which the Texas Supreme Court has issued a CVSG, it is hard to extrapolate how the practice will affect any given case. But at the U.S. Supreme Court, a CVSG exponentially increases the chances that the court grants the certiorari petition and hears the case.

Petition-for-Review Versus Merits-Briefing Phase

Finally, a significant difference between the Texas and U.S. Supreme Courts is in their procedures to persuade the court to review a case in the first place. In deciding whether to consider a case, the Texas Supreme Court, as a practical matter, considers two rounds of briefing—both the petition- and merits-stage briefs. That is because the Texas Supreme Court generally orders merits briefing before it decides whether to grant a petition for review and hear oral argument.

In contrast, the U.S. Supreme Court only considers the petition-stage briefs in deciding whether to review a case. This occurs because the court only orders merits briefs if it grants the certiorari petition, which also generally sets the case for oral argument.

According to the Texas Supreme Court’s internal operating procedures, only about 1 in 3 cases where merits briefing has been ordered will result in a granted petition for review or per curiam opinion. So advocates must gear their arguments in a Texas Supreme Court merits brief to both the underlying merits as well as continuing to persuade the court to grant the petition for review and resolve the case—which creates its own set of strategic issues that do not arise in U.S. Supreme Court merits briefs.

Conclusion

Appellate advocacy before the Texas Supreme Court—like practice before the U.S. Supreme Court—has its own unique aspects. This article has briefly outlined five aspects that stand out to me when comparing Texas and U.S. Supreme Court practice. I hope these observations will help advocates serve their clients well in litigating at the Texas Supreme Court.

Notes

1. Both courts have nine justices, and both courts largely have discretionary dockets allowing them to unilaterally choose which cases to hear. Each of these features makes practicing before these high courts noticeably different than practicing before most appellate courts.

2. There are several possibilities that could account for this difference. One could be that the Texas Supreme Court’s distinct practices could cause its members to have more developed thinking about a case at earlier phases than the U.S. Supreme Court. For instance, the Texas Supreme Court generally gets full merits briefing before deciding to hear a case, and the court makes opinion-writing assignments before the oral argument. See Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 13, 19 (http://www.txcourts.gov/media/1419423/supreme-court-of-texas-internal-operating-procedures.pdf). This diverges from the U.S. Supreme Court’s practices. See Stephen M. Shapiro, et al., Supreme Court Practice 15 (10th ed. 2013).

3. Adam Feldman, The Hottest Bench in Town, Empirical SCOTUS (Sept. 25, 2018), https://empiricalscotus.com/2018/09/25/hottest-bench/ (As former U.S. Solicitor General Paul Clement put it, “I think the Supreme Court right now is about the hottest bench that the Supreme Court has ever been.”).


5. I have made about 1.75 new statements per minute or roughly a question-statement exchange every 34 seconds. In just under 300 total minutes of oral argument time at the U.S. Supreme Court, I made over 500 new statements. This data was compiled by reviewing the official transcript from the U.S. Supreme Court’s website, and it showed 519 total statements during 297 total minutes of oral argument time.

6. In my five oral arguments at the Texas Supreme Court between September 2017 and August 2018, during 54 total minutes of argument time I made 49 new statements—amounting to a question/statement exchange every 66 seconds. This data was compiled by examining the official transcripts posted to the Texas Supreme Court’s website. Here is the individual argument breakdown by total statements and minutes of argument time at the lectern:

- Graphic Packaging v. Glenn Hoger and Ken Paxton (12 statements, 20 minutes); Nazaret v. State (17, 20); Harris County v. Anneh (6, 4); City of Laredo (6, 5); and Hill (8, 5).

7. By no means does this ascribe any normative judgment that one court or the other is asking the “right” amount of questions. It simply reflects the reality that advocates before the Texas Supreme Court should expect a pace of questioning that is steady but noticeably less than the U.S. Supreme Court.


9. These statistics were compiled from the “Orders & Opinions” section of the Texas Supreme Court’s website: http://www.txcourts.gov/supreme/orders-opinions/. During this time, the court granted six rehearing motions regarding petitions for review, while denying 186 such motions. It granted one motion to rehear a cause, while denying a single such motions. And the court denied 30 motions to rehear mandamus petitions and two motions to rehear habeas petitions.

10. It is very difficult to completely turn around a case through a motion for rehearing on causes—that is, after the Texas Supreme Court has issued an opinion. In the past few years, the court has only granted four motions for rehearing in causes. In only a single case did the new opinion change the disposition (from affirming to reversing and rendering judgment)—and in that case, 14 amicus briefs were filed while the motion to rehear the cause was pending. Harris County Flood Control Dist. v. Ins. Co. v. Castillo, No. 15-0530 (Tex. April 12, 2016); and Guevara v. City of McAllen, No. 15-0688 (June 30, 2017); and Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass’n, No. 15-0599 (Tex. Feb. 24, 2017); and Exxon Mobil Corp. v. Insurance Co. of the State of Pa., No. 17-0200 (Tex. Feb. 15, 2019).

11. These are cases where the court denied the petitions for review but then, on reconsideration, allowed the petition for review to proceed.

12. These statistics were compiled from the Texas Supreme Court’s searchable website: http://www.txcourts.gov/supreme. Case-specific information discussed below can be found by going to this website and searching with the case number.


15. Seven resulted in denying the petition again through a short per curiam opinion directing the court of appeals to consider a recent Texas Supreme Court decision. Gulf Chem. & Metallurgical Corp. v. Manor Dekderick Construction, LLP, No. 13-0355 (Tex. Apr. 13, 2015). One resulted in denying the petition and allowing the merits briefing. Affilite Insurance Co. v. Rehab Alliance of Tex., Inc., No. 15-0426. Two resulted in denying the petition again without other actions. Ad Villar, LLC v. Pak, No. 16-0381; In the Interest of C.S., G.M.S., J.C.S., J.S., and R.S., No. 17-0283. One resulted in denying the petition, while the court has previously dismissed the
than two counsel argue for a particular party. Tex. R. App. P. 59.5. The Texas school finance case (Morath v. Tex. Taxpayer & Student Fairness Coal., No. 14-0776, (Tex. Aug. 14, 2015)) is an example where the court granted leave for three counsel to argue for the same party.

37. A shared argument motion was granted in Harris County v. Annap in opposing counsel’s objection. Almost all of these motions involved requests for amicus to take five minutes of argument time (out of a party’s typical 20-minute allotment). King Street Partners v. Texas Democratic Party is an example of a case in which the court granted the amicus motions to take five minutes of argument time, giving the state five minutes of argument time while allowing petitioner and respondent each to retain their 20 minutes — because the state in that case was not fully aligned with either side.

38. Six of the 19 shared-motion arguments were filed by amici other than the Texas Solicitor General’s Office.

Blake A. Hawthorne, Supreme Court of Texas Internal Operating Procedures 13, http://www.txcourts.gov/media/143842/supreme-court-of-texas-internal-operating-procedures.pdf (“Nothing in the rules, however, precludes the court from granting the petition before requesting a study memo or full briefing on the merits.”)

Scott A. Keller

is a partner in Baker Botts’ Austin and Washington, D.C., offices. He is chair of the firm’s Supreme Court and constitutional law practice. Keller served as Texas solicitor general from 2015 to 2018.