



Tips *on* Petitioning *for* Certiorari In the U. S. Supreme Court

By Timothy S. Bishop, Jeffrey W. Sarles & Stephen J. Kane ¹

For many lawyers, representing a client in a case that is a candidate for review by the United States Supreme Court is a once in a lifetime experience. Yet the art of seeking certiorari in the Supreme Court—with its focus on conflicts among lower courts and the importance of the case to non-parties—is decidedly foreign to many litigators, who spend their days engaged in the underlying merits of a dispute. This article seeks to make certiorari practice a little less foreign by providing some tips on the factors the Supreme Court considers in deciding whether to review a case. For more detail on seeking and opposing certiorari, be sure to consult the Supreme Court practitioner’s bible, Stern, Gressman, Shapiro & Geller, *SUPREME COURT PRACTICE* (8th ed. 2002), as well as the current version of the Supreme Court Rules.

Petitioners Face An Uphill Battle Obtaining Supreme Court Review

The first question that any prospective Supreme Court petitioner should consider is whether to file a petition at all. While the number of petitions filed in the Supreme Court has increased from roughly 4,000 in the mid-1970s to 7,496 in the 2004 Term, the number of annual grants has decreased from about 150 to only 80 during that same period. Whatever the cause of the Court’s shrinking docket—the theories include repeal of much of the Court’s mandatory jurisdiction, changes in the composition of the Court, increased reliance on clerks, and homogeneity in the lower courts—the stark reality for petitioners is that the chances of a grant are slim at best. In fact, the approximately 4 percent rate at which the Court grants certiorari in paid cases (as opposed to petitions filed in *forma pauperis*, which are granted at an even lower rate) is misleadingly high because petitions filed by governmental entities stand a far better chance of success than do petitions filed by private litigants. The Office of the Solicitor General — the entity that represents the federal government in the Supreme Court—

Continued on page 29

¹ Tim Bishop and Jeff Sarles are partners and Steve Kane is an associate at Mayer, Brown, Rowe & Maw LLP. Mr. Bishop, clerked for Justice Brennan and has argued four cases in the Supreme Court, briefed over fifty more, and is co-authoring the Ninth Edition of *SUPREME COURT PRACTICE*. Mr. Sarles, who is co-chair of Mayer Brown’s Supreme Court and Appellate Practice Group, and Mr. Kane have briefed numerous cases in the Supreme Court.

Petitioning for Certiorari

Continued from page 28

has a particularly impressive track record, with the Court granting about 44 percent of the petitions filed by the SG in the ten terms between 1995 and 2004. What's more, much of the Court's docket is taken up by criminal and habeas cases, leaving few openings if your case involves a business issue.

The Justices have frequently commented on the ease with which they are able to dispatch many petitions. Justice Brennan observed that 60 percent of paid petitions are "utterly without merit," while Chief Justice Rehnquist remarked that "several thousand" of the petitions filed each year are so implausible that "no one of the nine [Justices] would have the least interest in granting them." Brennan, *The National Court of Appeals, Another Dissent*, 40 U. Chi. L. Rev. 473, 476-78 (1973); Rehnquist, *THE SUPREME COURT* 233 (2d ed. 2001). One of the principal reasons why so many petitions are poor candidates for review is that they reflect a fundamental misconception about the role of the Supreme Court. As Chief Justice Vinson noted over fifty years ago, "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, *Work of the Federal Courts*, ADDRESS BEFORE THE ABA (Sept. 7, 1949). Today's Supreme Court Rule 10 confirms that a petition "is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law." Yet litigants continue to flood the Court with petitions arguing that review is warranted in large part because the lower court erred. To be sure, the merits are not irrelevant at the certiorari stage. The Court affirmed in less than 28 percent of the cases it reviewed on a writ of certiorari and decided with a full opinion during the 2004 Term, suggesting that the Court is more likely to issue a grant when it



believes that the lower court got it wrong. But the fact that the court below erred is generally not nearly enough to merit a spot on the Supreme Court's docket.

Conflicts, Issues of Great Importance, and Other Factors Affecting Certiorari

So if an error by the lower court is insufficient to merit certiorari, then what does the Court look for? Unfortunately, the Justices have themselves been less than clear on this score. Chief Justice Rehnquist, for example, said that the question whether to grant certiorari is "a rather subjective decision, made up in part of intuition and in part of legal judgment." Rehnquist, *supra*, at 234. To make its decision-making process even more difficult to decipher, the Court almost never publicizes the reasons for denying certiorari and the explanations in its merits opinions for granting the writ rarely go beyond the perfunctory.

The Supreme Court Rules do, however, provide guidance for prospective petitioners concerning the types of cases that may warrant certiorari. Rule 10 sets forth several factors that "indicate the character of reasons that the Court considers," though the Rule notes that these factors are not "controlling" nor do they "fully measur[e] the Court's discretion." These factors can be

broken down into four categories: (1) the decision below conflicts with the decision of a federal court of appeals or a state court of last resort on "an important federal question"; (2) the lower court decided "an important question of federal law" in a way that conflicts with a Supreme Court decision; (3) the court below "decided an important question of federal law that has not been, but should be, settled" by the Supreme Court; and (4) the lower court "has so far departed from the accepted and usual course of proceedings" as to require the Court's "supervisory power"—a power rarely exercised.



Petitioning for Certiorari

Continued from page 29

The Rule recognizes the obstacles that petitioners face, noting that “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion,” and that the Court will grant a petition “only for compelling reasons.”

Justice Clark once said that conflicts among the lower courts are “the safest vehicle for a grant,” and that statement remains true today. Clark, *Some Thoughts on Supreme Court Practice*, ADDRESS BEFORE UNIV. OF MINN. LAW SCH. ALUMNI ASS’N (1959). During the 2003 to 2005 Terms, for example, nearly 70 percent of the cases in which the Court granted certiorari presented a conflict among the lower courts. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. __ (forthcoming 2007). But not just any conflict will do. Rather, as Rule 10 suggests, the conflict must concern an issue of federal law and must be at the level of the federal courts of appeals or state courts of last resort. Conflicts with decisions issued by federal district courts or lower state courts are generally insufficient to merit certiorari because the court of appeals or the highest state court may clear up the conflict and eliminate the need for Supreme Court intervention. Intra-circuit conflicts are likewise poor candidates for review because, as Justice Harlan explained, “such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.” Harlan, *Manning the Dikes*, 13 Rec. Ass’n B. N.Y. City 541, 552 (1958). Moreover, the petitioner generally must show that the conflict is such that lower courts faced with the same or very similar facts would decide the cases differently. Inconsistencies in dicta or in general principles will not suffice. The deeper the split among the lower courts, the better the chances that the Court will issue a grant. As a general rule, the Court prefers to wait to resolve important issues of federal law until the issues have “percolated” sufficiently in the lower courts.

A direct conflict with a decision of the Supreme Court provides another basis for certiorari. For obvious reasons, a lower court is unlikely to reject a Supreme Court decision expressly. But the chances of a grant improve if the petitioner can show that the lower court’s decision is in tension with a decision of the Supreme Court, if the Court’s precedents in the

area are confused, or if the Court has expressly “left open” the issue for future resolution. Occasionally a petitioner succeeds in obtaining a grant where the lower court based its decision on a Supreme Court precedent that the Court has signaled is ripe for reexamination and possible overruling or limitation.

Even if a case involves a direct conflict among the lower courts or with a decision of the Supreme Court, that provides no guarantee that the Court will grant certiorari. A study of the 1989 Term estimated that the Court denied review of more than 200 petitions that presented inter-circuit conflicts. Hellman, FED. JUDICIAL CTR., UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM 34-64 (1991). The 1995 amendments to Rule 10 confirmed that the Court does not consider all conflicts to be equal by adding the word “important” to the reference to conflicts that warrant certiorari. Thus, petitions generally must present issues of great importance to merit the Supreme Court’s review, with the burden of demonstrating importance even higher where there is no conflict in the lower courts.

A case may be sufficiently important to merit Supreme Court review if the impact of the lower court’s decision extends beyond the narrow interests of the litigants to affect an entire industry or a large segment of the population. For example, decisions that invalidate federal or state statutes on constitutional grounds are ordinarily of sufficient importance to warrant review. Other earmarks of importance include issues that recur frequently and consume substantial judicial resources, as well as lower court decisions that involve enormous financial liabilities.

In addition to conflicts, the importance of the issue presented, and (to a much lesser extent) the merits of the dispute, there are numerous other factors that affect whether the Court grants certiorari. The Court prefers cases that provide good “vehicles” for resolving the issue presented, *i.e.*, cases that do not involve messy factual disputes or jurisdictional defects that may affect the Court’s ability to reach the issue it granted certiorari to resolve. The identity of the court below can affect the likelihood of intervention—witness the disproportionate number of cases the Court has taken in recent years from the Ninth Circuit—while a dissent from a well-respected judge improves the chances of a grant.

Continued on page 31



Petitioning for Certiorari

Continued from page 30

Cases that the lower court thought sufficiently important to review *en banc* present more attractive candidates for review, with one study finding that the Court is nearly three times as likely to grant petitions challenging *en banc* decisions as it is to grant petitions involving panel decisions. George & Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 Sup. Ct. Econ. Rev. 171, 195-96 (2001). Amicus briefs supporting a petition can also help to show that the issue presented is of widespread importance. According to one study, the filing of an amicus brief in support of a petition increases the likelihood that the Court will grant certiorari by 40 to 50 percent, and the filing of additional amicus briefs increases the likelihood even more. Caldeira & Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109, 1119-22 (1988). In addition, the Court is somewhat more likely to grant review of a case that presents issues arising in a “hot” area of the law. For example, the Court has recently shown great interest in reviewing cases that involve large punitive damages awards. Good timing may also help. A recent study found that the Court is about twice as likely to grant certiorari in petitions decided in October, November, or January as it is in petitions decided in February, March, or the summer recess. Cordray & Cordray, *The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking*, 26 Ariz. St. L.J. 183, 204 (2004). Finally, all other things being equal, the Court prefers to grant review in cases where the litigants are represented by experienced counsel who can brief and argue the issues presented in a sophisticated manner.

Petition Practice

If you decide to face the long odds and file a petition for certiorari in the Supreme Court, there are three initial steps you should take. First, if you are not already a member of the Supreme Court Bar, you should apply for admission. The requirements are not onerous. Sup. Ct. R. 5, 9. Second, you should determine the due date for your petition. A petition must be filed within 90 days after entry of the judgment below or the denial of rehearing. Sup. Ct. R. 13. The petition is timely if you file it with the Clerk within 90 days; send it to the

Clerk on the 90th day via U.S. mail with a postmark (not a commercial postage meter label); or deliver it on the 90th day “to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.” Sup. Ct. R. 29.2. Although requests for an extension of time are “not favored,” you may obtain an extension of up to 60 days “[f]or good cause” by filing an application with the Clerk at least 10 days before the date the petition is due. Sup. Ct. R. 13.5. Regardless of whether you obtain an extension, make sure that you calculate your due date correctly because the Clerk will not file an untimely petition. Sup. Ct. R. 13. Third, you should identify and contact potential amici. Although amici need not file their briefs until after the petition is due—generally 30 days after the petition is docketed—you should begin the critical process of obtaining amici early in the game. Sup. Ct. R. 37.2(a).

As for the petition itself, you have 30 pages to work with but should aim to use less if at all possible. Rule 14 sets forth the petition’s required content, which we need not detail here. There are three critical components to any petition. The Question Presented—which appears on the first page—may well be the most important part of the petition. Justice Brennan frequently decided that a case was not “certworthy” simply by looking at the Question Presented. To avoid that type of reaction, your question should briefly describe the essential features of the case while conveying the necessity of Supreme Court intervention. A short introductory paragraph is sometimes helpful to place the question in context. To determine whether your question is effective, try inserting the words “We hold that” before the question to make it an affirmative statement. If that statement reflects a clear and important ruling in your favor that would have an impact beyond your case, then you are well on your way. See Shapiro, *Certiorari Practice: The Supreme Court’s Shrinking Docket*, 24 Litigation 25 (Spring 1998). Finally, a cautionary note about the number of questions presented: try to limit yourself to one or two questions. There are few cases that present a single question that merits the Court’s review; it is unlikely that your case presents three or more, and you may lose credibility suggesting otherwise.

Continued on page 32



Petitioning for Certiorari

Continued from page 31

The second key component is the Statement, which provides a brief recitation of the factual background and a description of the decisions below. A punchy introductory paragraph that orients the reader about what is to follow is often useful. Make sure to keep the description of the facts to a minimum. A lengthy factual summary, loaded with references to the types of background controversies that are the focus of trial counsel, may only serve to show that your case is convoluted and fact-dependent — defects that usually result in a denial. If your case revolves around the interpretation of a statute or regulatory scheme, it may be helpful to write a brief section detailing that framework. Finally, in your description of the decisions below, be sure to emphasize any dissent or votes in favor of rehearing en banc and to note the identity of any judge(s) who saw things your way, particularly if they are well-respected.

The “Reasons for Granting the Petition” forms the heart of the petition. An introductory paragraph or two often helps to highlight the reasons why your case is certworthy. Like any brief, subheadings are useful to direct the reader to your key points and provide a roadmap of the argument. If your case presents conflicts among the lower courts, you might begin with a section captioned “The First Circuit Joined The Second Circuit In Expressly Rejecting Decisions From The Third and Fourth Circuits.” In this section, prove that the lower courts are deeply divided on an issue of federal law by quoting from the leading cases. If you are lucky enough that the lower courts have acknowledged the split, emphasize that fact. Regardless of whether there are conflicts, the petition must show that the issue presented is of great importance beyond the narrow interests of the litigants and that Supreme Court intervention is therefore imperative. This section might argue, for example, that the lower court’s decision threatens to open the floodgates to a dramatic increase in litigation or makes it impossible for litigants to comply with discrepant rulings from across the country. Finally, the petitioner should almost always include a short section at the end arguing that the court below erred, both because the merits play a minor role in the certiorari decision and because the Court on rare occasions simultaneously grants certiorari and summarily affirms.

In writing this section, focus on the Supreme Court’s own precedents, as well as any relevant constitutional or statutory language. Reliance on respected scholars in the field and public policy arguments may bolster your position. Above all else, keep this section short; there will be plenty of time to argue the merits if the Court grants your petition.

Be sure to comply with the Supreme Court Rules in putting your petition together. The Rules require that paid petitions be filed in booklet format, so you will need to finish your brief with enough time to spare so that a printing company can produce the petition. The Rules set forth specific requirements, including typeface, margins, bindings, covers, appendices, and service. *E.g.*, Sup. Ct. R. 29, 33-34. You also should study a helpful memorandum authored by the Clerk’s Office that highlights the most common procedural mistakes made by petitioners (available at <http://www.supremecourtus.gov/casehand/guidetofilingpaidcases.pdf>). The Clerk’s Office is normally very helpful in responding to inquiries from counsel about such matters, as are the leading printers of Supreme Court briefs.

The respondent has 30 days after the petition is docketed in which to file a brief opposing certiorari, called a “brief in opposition.” Sup. Ct. R. 15.3. The respondent can usually get an extension of up to 30 days from the Clerk. The petitioner may file a reply brief and should usually do so to answer the respondent’s key points. Keep in mind that the Clerk will distribute the certiorari papers to the Court “no less than 10 days after the brief in opposition is filed.” Sup. Ct. R. 15.5.

Thus, although the Clerk will provide the Justices with a reply brief filed after distribution of the petition and the brief in opposition, the petitioner should aim to file a reply within 10 days after the brief in opposition is filed so that the respondent’s arguments do not go (temporarily) unchallenged.

Continued on page 33



Petitioning for Certiorari

Continued from page 32

The Pool Memo, The Discuss List, And The Rule Of Four

It may surprise some litigants to learn that Chief Justice Roberts and the rest of the Court will not pour over your certiorari petition. Instead, eight of the Justices participate in a “cert pool” in which one of the Justice’s clerks — usually a recent law school graduate with a year’s experience as a clerk in one of the courts of appeals — writes a memorandum about each petition. (Justice Stevens is the lone holdout from the pool; one of his clerks drafts a memorandum about each case; see Jeffrey Cole and Elaine Bucklo, *An Interview With Justice Stevens*, 32 *Litigation* (Spring 2006)). The pool memo identifies the judges below, counsel for both parties, the questions presented, describes the facts and decisions, summarizes the parties’ positions, and recommends a grant or denial. Clerks have estimated that they spend from 15 minutes to (in rare cases) one day preparing pool memos, which typically run from 2-5 pages in length. Clerks in the other chambers annotate the pool memo or draft a supplemental memo to highlight any issues that might interest their own Justice. Chief Justice Rehnquist said that “with a large majority of the petitions” he did not “go any further than the pool memo.” O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 *J.L. & Pol.* 779, 801 (1997).

After the clerk circulates the pool memo, the Chief Justice compiles the “discuss list”— a list of petitions that the Justice will consider at conference — which is comprised of cases in which the pool memo recommends a grant and any other case that a Justice chooses to add. Somewhere between 10% to 30% of petitions make it to the discuss list, with the remaining petitions “dead listed” for denial without further consideration. At a conference held every week while the Court is sitting, usually on Fridays, the Justices vote whether to grant certiorari in each case on the discuss list. Under the “Rule of Four,” if four Justices vote to grant certiorari, the Court will review the case. Alternatively, the Justices may vote to call for the Solicitor General to file a brief expressing the views of the United States. If the Court asks for the SG’s views, then you

should contact the SG’s office and any federal agencies that may have an interest in the case, usually by letter with follow-up conference calls and meetings. You should work hard to convince the SG that the government’s interests are best served by coming out on your side because the Court gives great weight to the SG’s views. Because the Court does not always heed the SG’s position, a litigant faced with a brief filed by the SG in support of its adversary should quickly file a supplemental brief that responds to the government’s views. See *Sup. Ct. R.* 15.8.

* * * *

Writing a petition for certiorari presents unusual challenges for litigators. The natural instinct to focus on attacking the lower court’s decision on the merits must be tempered. By instead focusing on the factors that we have identified, you will be well on the road to a successful certiorari practice in the Supreme Court.