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by Rex S. Heinke and Orly Degani

You have worked hard on your client's case and believe strongly in it, but nonetheless the highest state court or a federal court of appeals has decided against you. What now? The only tribunal left is the U.S. Supreme Court, but as every seasoned advocate knows, the path to that forum is heavily congested. Many litigants vie for the Court's attention, yet few are selected to receive it. Given that reality, how can you maximize the chances that the nation's high court will hear your case?

Long Odds

The Supreme Court does not exist to correct every flawed decision issued by a lower court. Even with the help of their law clerks, the nine justices could not possibly handle the enormous volume of cases generated if every aggrieved party could call upon the Court to review the merits of each controversy as a matter of right. Therefore, with very limited exceptions, Supreme Court jurisdiction can be invoked only by filing a petition for writ of certiorari (cert petition), which the Court can grant or deny at its discretion. When the Court denies cert, that is the end of the litigation road; the Court will not consider the case on its merits, and the lower-court decision will stand, rightly or wrongly.

To make matters more difficult, the odds of persuading the Supreme Court to grant cert have always been small, but they have decreased even further in the past two decades. The volume of cert petitions filed has increased while the numbers granted each term have declined. Between 1989 and 2009, the Court averaged 7,500 cert petitions each term, yet it granted an average of only 93. Those figures translate into a "grant rate" of only 1.2 percent, down from about 7 percent from 1970 to 1988. Even if the typically unmeritorious in forma pauperis petitions are removed from the calculus, the success rate is not much better, rising only to about 3.7 percent.

Given the extremely long odds, what is a lawyer to do? Many times, the best course is to do nothing. Your client likely will be best served by forgoing the cost of preparing and filing a cert petition and just accepting the lower court's decision, even if you believe strongly that the decision is wrong. But in cases where the issue is important enough, or the dollar value of the judgment is quite substantial, the added expense of petitioning for cert may be justified, despite the unfavorable odds. In such cases there are ways to maximize your chances of persuading the Supreme Court to grant cert and review the merits of your case.

Follow the Rules

No matter how meritorious your case may be, it will not succeed at the Supreme Court if you fail to follow the proper procedures. The first vital procedural step is to file your cert petition on time, typically within 90 days after entry of judgment (Supreme Court Rule (SCR) 13.1, 13.3). If a petition for rehearing was filed in the lower appellate court, the 90-day period runs from the denial of that petition or, if rehearing is granted, from the entry of the new judgment or decision (SCR 13.3). This period may be extended "for good cause" for up to 60 days by the justice assigned to the circuit in which the case arose, but such requests are disfavored and should be avoided whenever possible (SCR 13.5, 22.3, 30.3). An application for extension of time must be filed at least 10 days before expiration of the original 90-day filing deadline, except in the most "extraordinary circumstances" (SCR 13.5, 30.2).

The opposing party is not required to file an opposition to the cert petition unless the Court specifically requests it, but the party may do so within 30 days of the case being docketed (SCR 15.3). In practice, the Court always requests an opposition if it is seriously considering granting cert. So, as a practical matter, opposition to a cert petition is rarely filed absent the Court's request.

If an opposition is filed, the petition and related briefs will be distributed to the justices approximately 10 days later, assuming the Court is in session (between October and June). A reply brief from the petitioner should be filed within this 10-day period, or it may not be considered.

Why This Case?

It is essential to convince the Court that your case, out of the thousands presented for review each year, is

important enough to be among the few the Court will review on the merits. Although an unfavorable decision that was based on erroneous factual findings or a misapplication of the law may be frustrating to you and your client, it will not lead to a grant of cert. The Supreme Court only devotes its limited time and resources to cases that present issues of national importance, beyond the particular facts and parties involved.

Such "cert-worthy" cases raise questions that fall into three general categories: (1) important federal questions on which the circuit courts are split; (2) decisions that conflict with governing Supreme Court precedent; and (3) important federal questions that have not been, but should be, settled by the Court. (*See* SCR 10.) The Court rarely grants cert in cases that do not fit within at least one of these categories.

What are the most common mistakes? Seeking review of factual findings or of decisions about state law, or arguing only that the lower-court decision was wrong. Such matters are not cert-worthy. Supreme Court review is confined to legal errors involving federal law, and even then only when issues of particular national significance are implicated.

The Cert Pool

The Court has a screening process for identifying cert-worthy petitions. Each petition is assigned to a law clerk from a "cert pool" made up of all of the justices' clerks. That law clerk reads all the briefs and subsequently drafts a memo summarizing the case and the parties' arguments. The clerk then recommends whether the Court should grant cert. The memo is then distributed to the justices, who have individual procedures for further consideration within their own chambers.

At some time before the justices' weekly conference, the chief justice circulates a "discuss list" of all the cases for which a cert pool memo recommended granting review, as well as any additional cases the chief justice considers significant. Any justice may add any case to the discuss list before the conference, but only cases that appear on the discuss list are considered by the justices in conference; the rest are automatically denied without discussion or vote. Thus, for a case to have any possibility of success, it must make the discuss list. Cert is granted only to cases that receive favorable votes from at least four justices.

Every cert petition must begin with a statement of the question(s) presented for review (SCR 14.1(a)). This statement is the most critical part of the petition because it signals how seriously the petition should be considered. The stated questions should highlight in clear terms that the case merits review, specifically indicating why the case fits within the SCR 10 categories. The statement should be short, concise, and non-argumentative; but because the Court will consider only issues "fairly included" in the question(s) presented (SCR 14.1(a)), the statement also must be drafted broadly enough to encompass all the arguments necessary to obtain the desired result.

In most cases only one or two questions should be presented. Very few cases raise more than one or two truly cert-worthy issues, and listing more issues tends to dilute the argument and cast doubt on the petition as a whole. If necessary, you should include a short introductory paragraph to frame the issues, but it should not exceed a few sentences. The entire statement of the question(s) presented typically takes up one page, preferably even less.

The petition also must include a jurisdictional statement (SCR 14.1(e)), which is especially important if you are challenging a state court decision. You must show that the federal question presented was properly raised and preserved at every level below (SCR 14.1(g)(i)).

The remainder of the petition will discuss why review should be granted. Remember that simply demonstrating that an error occurred below is not enough. Explain why the issue is important to the nation, emphasizing the broad practical consequences if the Supreme Court fails to address it. If the issue recurs frequently, threatens to further increase litigation, or impacts a large number of people, those are all indications of its importance that you should include in your petition.

Whenever possible, show that there is a conflict of authority on the issue, as this is the most common basis on which the Court grants review. Indeed, the more conflicting decisions exist, the better the odds of acceptance.

The odds also improve if the conflict is real and direct, not just divergent dicta from different courts. Finally, if the Supreme Court has addressed a related issue but left decision of the particular issue raised in your case for another day, then the Court has already signaled that it considers the issue important. The focus should then be on why your case is the ideal vehicle for resolving the open question.

Friends Help

One of the most effective ways of enhancing your prospects of securing high court review is to solicit the filing of amicus briefs. Amicus briefs can be filed by individuals or organizations that are not parties to the case but who nevertheless have an interest in the Supreme Court deciding the question(s) presented by the cert petition (SCR 37). Such briefs help demonstrate that the issues are important, and at least one study shows that amicus briefs improve the odds of getting cert granted. (See Gressman, *Supreme Court Practice* (9th ed., 2007) at 512-513). The working maxim is: the more amicus briefs filed, the better the chances of success. However, amicus briefs should not merely repeat the points made in the cert petition. They should inform the Court of "relevant matter not already brought to its attention" by the petition, preferably a perspective that the amicus is uniquely qualified to present (SCR 37.1).

Amicus briefs supporting cert must be filed within 30 days after the case is docketed, with no extensions possible. Either the written consent of the parties or the Court's permission is required (SCR 37.2(a)). Although SCR 37.2(b) states that motions for leave to file amicus briefs are not favored, in practice the Court is fairly liberal in granting such motions if they show that the applicant has a legitimate interest in the case and something to add beyond what has been raised in the cert petition.

Solicit the Best Friend of All

The most significant amicus brief is one that comes from the solicitor general's office, which represents the interests of the United States (and all of the country's constituent departments and agencies) in the Supreme Court. The solicitor general's office appears before the Court far more frequently than any other lawyer or law firm, and the Court naturally accords a high degree of deference to the views of the United States, granting cert in an average of about 60 to 70 percent of the cases in which the solicitor general requests it. (See Thompson and Wachtell, AN EMPIRICAL ANALYSIS OF SUPREME COURT CERTIORARI PETITION PROCEDURES: THE CALL FOR RESPONSE AND THE CALL FOR THE VIEW OF THE SOLICITOR GENERAL, 16 GEO. MASON L. REV. 237, 242 (2008-09).) If the solicitor general files an amicus brief supporting a grant of cert in your case, the dismal 3.7 percent chance of success will increase exponentially.

Although it is rare for a private party to persuade the solicitor general to file an amicus brief supporting a cert petition, in about 12 to 15 cases each term, when at least four justices concur, the Court issues orders known as Calls for the View of the Solicitor General, or CVSGs, requesting the solicitor general's opinion whether cert should be granted. The solicitor general always responds to such orders. (See Millett, WE'RE THE GOVERNMENT AND WE'RE HERE TO HELP: OBTAINING AMICUS SUPPORT FROM THE FEDERAL GOVERNMENT IN SUPREME COURT CASES, 10 J. APP. PRAC. & PROCESS, 209, 212-15 (2009).) These cases typically implicate a government interest that is not represented by the parties, or questions of sufficient public concern to make the government's views relevant. Most often, they involve the interpretation and application of a federal statutory or regulatory scheme, or they impact an international treaty, international law, or some other aspect of foreign relations.

If your case is one that could support a CVSG, your cert petition should suggest the issuance of such an order (in addition to urging an outright grant of cert), at least if you have reason to believe the solicitor general's position would align with yours. The petition should emphasize the federal government's special expertise in the area at issue and the likely impact of the decision on the operation of a federal government program below, the federal government's policy interests, or legal positions or rules of law that affect the federal government (such as federal preemption, federal-state cooperation, sovereign immunity, agency deference, and executive privilege).

If the Court issues a CVSG, you should promptly contact the solicitor general's office to request a meeting with the staff attorneys assigned to the case. The solicitor general's office traditionally honors such requests from both sides of a dispute, and it considers their arguments in formulating the government's position. It is best to submit in advance of the meeting a short memorandum (three to five pages) outlining the reasons the federal

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government should support your view of the case. Prepare for the meeting as you would for a moot court exercise, anticipating that you will begin the discussion and be questioned extensively.

Representatives of the affected federal government agencies and interested offices within the Department of Justice are also likely to be present at the meeting, so be prepared to address their questions and concerns as well as the solicitor general's. Indeed, try to contact them before the meeting to lobby for their support, as the solicitor general will seek their input.

There is no way to guarantee that cert will be granted in any given case, but following these suggestions will markedly improve your chances.

Rex S. Heinke is a partner at Akin Gump Strauss Hauer & Feld in Los Angeles and heads the firm's appellate practice group. Orly Degani is senior counsel in Akin Gump's appellate practice group in Los Angeles.