

PETITIONING THE UNITED STATES SUPREME COURT FOR CERTIORARI: A PRIMER

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You have just been handed an unexpected defeat in the federal court of appeals or state supreme court. Your client calls, complaining that the appellate ruling is legally insupportable and totally unjust. She wants relief; *she wants you to take the case to the United States Supreme Court*. You picture yourself arguing before the Justices and your name appearing in the U.S. Reports. You ponder where on your office wall to hang, suitably framed, the feather quill pen given to all counsel who argue before the Court.

If at this point your reverie is broken by the realization that you know next to nothing about "taking a case to the Supreme Court," do not worry. A lack of knowledge about Supreme Court practice and procedure is nothing to be ashamed of. Although law school instruction largely revolves around studying Supreme Court decisions and most law students know that you ask the Court to hear a case by filing a petition for writ of certiorari, hardly anyone leaves law school knowing the practicalities of getting a case to the High Court. Our aim here is to provide a brief primer on the certiorari process. For much more detail on seeking Supreme Court review, including a wealth of illustrations and useful forms, be sure to consult [Stern](#), Gressman, [Shapiro & Geller](#), [Supreme Court Practice](#) (7th ed. 1993), *the Supreme Court practitioner's bible*. You'll also need to study the current Supreme Court Rules.

Long Odds

Lawyer and client contemplating filing a petition for certiorari need to understand that obtaining Supreme Court review is a daunting task. According to the last Harvard Law Review round-up, over 7000 petitions for certiorari were filed during the 1994 Term of Court: 2151 in paid (i.e., non-indigent) cases and 4,979 in in forma pauperis (IFP) cases. The Court granted review in 83 paid cases (3.9%) and 10 IFP cases (0.5%). It disposed of another 66 cases by summary affirmance or reversal or (most commonly) by simply vacating the judgment below and remanding for further proceedings in light of some intervening Supreme Court decision (a resolution referred to as a "GVR" — Grant, Vacate, and Remand). The tenure of Chief Justice Rehnquist has seen a sharp decline in the number of cases the Court hears on the merits. Only 90 cases were argued in the 1995 Term, compared to 167 in the 1987 Term and 116 in the 1992 Term.

Even these uninspiring numbers exaggerate the chance that the Court will grant a private party's petition. Many argued cases involve federal, state, or local government petitioners; government entities were parties in 31 of the cases heard during the 1994 Term. The United States, in particular, has an enviable record when it petitions for certiorari. Moreover, many cases on the argument docket involve criminal law issues. If you include habeas corpus cases, no fewer than 23 of 1994's argued cases lay on the criminal side of the docket. So if your case involves a business issue, the odds that the Court will show any interest are even longer.

Some Petitions Just Should Not Be Filed

It is an often-expressed view among members of the private Supreme Court bar that the Court now passes over quite a few cases that it should hear. Even so, there is no doubt that most of the responsibility for the extremely low rate of grants of certiorari lies with petitioners. It is as true today as when Justice Harlan voiced the complaint in the late 1950s that "a great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court" and have no chance whatever of being granted. These petitions receive dismissive treatment. Justice Brennan routinely decided that a case was not certworthy by looking at the "Questions Presented" on the first page of the petition — and reading no farther. Justice Brennan could decide so quickly, he explained in a 1973 law review article, because 60% of paid petitions he saw were "utterly without merit." The Chief Justice, in a more recent article, has chided that 2000 petitions each year

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are so implausible that "no one of the nine [Justices] would have the least interest in granting them."

A sure-fire way to guarantee rapid denial of certiorari is to file a petition disputing findings of fact rather than determinations of law; presenting questions of state rather than federal law; or asking for review of a decision that rested on adequate and independent state law grounds even if the court below also addressed a federal issue.

Do not file a certiorari petition that falls within these categories. Filing a hopeless petition disserves the client, who must pay the \$300 filing fee and many times that amount in counsel fees for preparing the petition. It also has some potential to harm the lawyer. The Court has an institutional memory, so counsel who repeatedly file frivolous petitions may find that their briefs receive progressively less attention from the Justices and law clerks. If your petition is clearly meritless, the respondent may not even bother to file a brief in opposition. See [Bishop](#), *Opposing Certiorari in the U.S. Supreme Court*, *Litigation* 31, 32 (1994) (discussing the procedures surrounding waiver of the brief in opposition to certiorari). So save your client some money and preserve your own reputation: file a petition for certiorari only if, upon careful review of the standards that the Court applies in ruling upon petitions, you think that there is a chance that you can persuade four Justices — the minimum number necessary to grant the writ — that the Supreme Court should hear your case.

What Makes a Case Cert Worthy?

The first and most difficult thing to remember in analyzing the certworthiness of your client's case — and certainly the most difficult aspect of Supreme Court practice for clients to grasp — is that the merits of the case that have been the main issue throughout the litigation are not of primary concern at the petition stage. The Supreme Court is not a court of error; it does not intervene simply to correct injustices and misapplications of the law. See S. Ct. R. 10 (the writ is rarely granted "when the asserted error consists of * * * the misapplication of a properly stated rule of law"). A petition devoted exclusively to showing why the lower court made a mistake will almost certainly fail.

That is not to say that the merits are irrelevant. Statistically, the Court reverses a majority of the decisions it elects to review. Indeed, observation suggests that even when an issue is clearly certworthy, the Court will sometimes pass over that issue in cases that it expects to affirm, granting a petition only when it finds a case that it is likely to reverse. For this reason, persuasive petitions for certiorari nearly always explain why the judgment below was wrong. But they do so in a relatively short section at the end of the petition, not as the lead argument. The idea is not to argue the merits in the depth you did below and that would be necessary later if certiorari were granted, but to say enough to give the Court a degree of confidence that commonsense and justice are on your side. You will not be able to devote more than a few pages of the 30 pages allotted for a petition for certiorari to this discussion, for there are more important matters that must be fully addressed.

Circuit Splits And Issues Of National Importance

What are the indicators of certworthiness that should be the focus of your petition? Supreme Court Rule 10 sets out factors that, while "neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers." These are that (1) the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law; (2) the court below decided an important federal question in a way that conflicts with rulings of the Supreme Court; (3) the court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict; or (4) (a category into which very few grants fall) the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Ideally, then, the certiorari petition will demonstrate both that the lower courts are in disarray on the issue the Supreme Court is being asked to review *and* that the issue is of considerable national importance. The conflict upon which you rely should be a real one, with cases truly addressing the same issue and reaching different conclusions. One study concluded that although 60 per cent of the petitions surveyed alleged a conflict, that

conflict was real in only 6 per cent of the cases. If you are really lucky, the decision below may discuss cases from other jurisdictions and acknowledge that a conflict exists. Short of that, be careful to demonstrate that the holdings of the cases you rely on are at odds. Inconsistent dicta or conflicting statements of general principle generally are not sufficient; nor are conflicts within a single court of appeals or with a district court.

The fact that the lower courts are in conflict is not enough by itself. You also have to show that the issue is one where uniformity counts — that the conflict is going to be difficult to live with. For example, one of us recently filed a petition on behalf of a pre-trial detainee who contended that his constitutional privacy rights were violated in Cook County Jail when he was routinely observed undressed and showering by female prison guards. The Seventh Circuit, in an opinion by Judge Easterbrook, held that prisoners lack any right to bodily privacy. Judge Posner dissented, so the case was immediately arresting because of this sharp division of opinion between two respected jurists. Seven other circuits have held that prisoners do have bodily privacy rights that in a particular case must be weighed against the needs of prison officials, so there was also a clear circuit split. By all objective indicators, the case was certworthy. The court nevertheless denied certiorari. Though the petition argued that the issue was important both because it involved human dignity and, more practically, because prisoner privacy suits are very common, take up a lot of resources, and could more efficiently be handled under a settled rule of law, we suspect that most Justices thought the issue was not quite important *enough* to warrant review. Such denials of certiorari in the face of a circuit split are not unusual. Justice White counted 56 during the 1989 Term (and thought this far too many). *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990).

The burden of showing that the federal issue presented for review is of national importance becomes all the greater when there is no conflict. The best way to meet this burden is to show that the decision below has a significant impact not just on the petitioner but on a whole industry or large segment of the population. For example, the Court granted the certiorari petition one of us filed in *Hartford Fire Insurance v. California*, No. 91-1111, to decide whether agreements between insurers on the terms of standardized coverage forms were exempt from antitrust prosecution by the federal McCarran-Ferguson Act. Though there was no conflict among lower courts, the petition and amicus briefs filed by insurance industry associations argued that the industry depends upon agreements as to terms; that such agreements are necessary for insurers and beneficial to consumers; and that antitrust scrutiny would therefore have tremendous practical consequences.

Studies have found that the filing of amicus briefs in support of a petition increases the likelihood of a grant, so you should actively seek out amici to help you persuade the Court that the issue presented is of broad concern. You have a little extra time to mount this effort, since amicus briefs are due not when the petition is filed but "within the time allowed for filing the brief in opposition," which is 30 days after the petition is filed, barring an extension. S. Ct. R. 15.

If the question raised in your petition is of consequence to the federal government, the Court may ask the Solicitor General to file a brief expressing the views of the United States before voting on your petition. If that occurs, you would do well to contact the Solicitor General's office and the relevant federal agencies to discuss the position the United States will take in its brief. If you can persuade the SG that your case deserves further review, the battle is more than half won. A 1992 study reported that the Court granted 88 per cent of petitions where the SG filed a brief supporting the petitioner and denied 60 percent of petitions where the SG supported the respondent.

Petition Practice

A petition for certiorari must be filed within 90 days after the entry of judgment below (or denial of rehearing), absent an extension. The petition must be in the Clerk's Office on the 90th day; the exception is that you may mail your petition on the 90th day if you use U.S. Post Office mail and get an official postmark (not a postage meter stamp). Do *not* send the petition out on the 90th day by overnight courier. S. Ct. Rule 29.2. You may be able to get up to a 60 day extension in which to file your petition, if you move for one at least 10 days before the petition is due, but this depends on the whim of the Justice assigned to your Circuit. Justice Stevens (Sixth and Seventh Circuits) grants extensions in appropriate cases, for example, but Chief Justice Rehnquist (D.C. and Fourth Circuits) usually denies extension requests. See S. Ct. Rule 13.

The "counsel of record" on the petition must be a member of the Supreme Court Bar. Membership costs \$100 and obtaining it is not onerous, but young lawyers are ineligible to join the Bar until they have been admitted to practice before the highest court of a state for three years. S. Ct. Rules 5, 9.

The contents of a petition are set out in Rule 14 and we will not repeat them all here. The critical parts of a petition are three in number. The first page of the petition is devoted to the all-important Question(s) Presented. Try hard to limit yourself to one, two, or at most three questions; more indicate an unfocused advocate aiming with a shotgun rather than a rifle and reduce the chance your case will receive serious consideration. By all means include a *short* introductory paragraph to the question(s) if this is helpful to bring home the certworthiness of your issues.

The Statement is also extremely important. It is a history of the case and any relevant background, including a description of the trial and appellate court rulings. Here is an opportunity to soften up the Court to think your petition is meritorious. If there was a good dissent in the court of appeals, make the most of it here. If the industry background of the practice at issue is important and in the record, lay it out. Remember that the Court likes to review "clean" cases, in which there are no remaining factual disputes to muddy the water and no procedural problems such as potential waiver of the issues presented or a jurisdictional bar to decision. Do not run into the trap of disputing factual findings in your Statement. If you think the Court may have procedural concerns, try to show that there really are none or at least that they do not make the case unsuitable for review.

The heart of the petition is the section entitled "Reasons for Granting the Petition." This is where you describe the conflict among the lower courts, persuade the Court of the practical importance of questions presented (and of the need to address them now rather than after further "percolation" in the lower courts), and briefly describe why you are right on the merits.

The petition (in a paid case) is filed in booklet form, which can either be typeset by your printer or produced by you in camera-ready format ready for the printer to copy and bind. An appendix setting out the decisions below must be bound at the back of the petition. When you cite to those decisions, cite to the pages of the appendix. Be sure to follow the rules as to the proper format of the petition. See S. Ct. Rules 33, 34.

Once your petition is filed, the respondent has an opportunity to file a brief in opposition showing why the case is unworthy of the Court's attention. You then have 10 days in which to file a reply. S. Ct. Rule 15.5. Be sure to do so — it is important to get in the last word and to rehabilitate the claims made in your petition — and to reply in a timely fashion. The clerk will then circulate all the briefs to the Justices and their law clerks.

Justice Stevens has his clerks read all the petitions. The other Justices, however, have formed a "pool" to review petitions. A single clerk from the pool is assigned to each case and writes a memorandum to guide the Justices who participate in the pool. That memo discusses the certworthiness of the petition and makes a recommendation as to its disposition. While the pool memo does not always carry the day, it is immensely important. The Chief Justice says that "with a large majority of the petitions" he does not "go any further than the pool memo." Rehnquist, *supra*, at 264-65. Remember, when you are crafting your petition, that your initial audience is one extremely busy law clerk who is as likely as not reading your handiwork in the middle of the night. Keep your papers short and readable, make your points in as simple and direct a way as possible, and avoid rhetoric (which gets old for clerks reading hundreds of petitions).

If one or more Justices have an interest in your case, it will be put on the "discuss list," which means it will be discussed at conference and then voted upon. About 15-30 per cent of petitions make it to the discuss list; the others are automatically denied. Following the Court conference for which your case is set, you'll soon learn whether you are one of the lucky few or will have to await another opportunity for that feather quill.

This Mayer, Brown & Platt article provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

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