

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 13, No. 8

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August 2005

Obtaining Certiorari In The United States Supreme Court

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By the time you consider petitioning the Supreme Court for certiorari ("cert"), you will have already expended a significant amount of time and money trying to obtain a favorable result. Having already invested so much, the desire to take your case to the Supreme Court to set things right can be almost irresistible. Unfortunately, the chances of obtaining Supreme Court review are slim. This article provides the information you need to make an informed decision about seeking cert, the procedure to be followed, and advice on crafting a certworthy petition.

The Numbers

Over the past five years, the Court has received an average of over 6,000 cert petitions annually. (2000-2004 Reports of the Director on the Judicial Business of the United States Courts ("Report"), Tables B-2, available at <http://www.uscourts.gov/judbususc/judbus.html>. Some cases are left over from previous terms.) Although this represents a 30 percent increase over the petitions received in 1997, the acceptance rate has dropped from 2.5 percent in 1997 to 1.6 percent in 2004. (1997 Report, Table B-2; 2004 Report, Table B-2.) In the 2003/2004

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term, the Court received 6,391 petitions and granted only 104 of them, of which only 28 involved private civil litigants. (2004 Report, Table B-2.) Thus, the odds of obtaining cert are tiny. Nevertheless, for a company faced with an adverse, precedent-setting decision, an unsettled rule of law that creates uncertainty about how to legally conduct your business, or a large judgment, investing in a well-crafted petition may be a necessity.

Getting Started

The first step is to obtain a stay of the mandate, or state equivalent, from the last court of decision. Otherwise, the case will be returned to the trial court. In federal court, this must be done within seven calendar days of entry of judgment (Federal Appellate Rule of Procedure (FRAP) 41(b)), so you need to think about whether you will petition for cert even before you

receive a ruling on your pending appeal.

The petition for stay must demonstrate that a "substantial question" exists to support the cert petition. (FRAP 41(d)(2)(A).) Once granted, it is effective for 90 days. To continue it until the Supreme Court rules on your cert petition, you must notify the court clerk in writing that a cert petition is pending. (FRAP 41(d)(2)(B).)

Timing

The cert petition must be filed with the Supreme Court within 90 days of entry of judgment by the last court of decision. (Supreme Court Rule (SCR) 13(1).) If a petition for rehearing is filed below (or a petition for discretionary review in state court), the 90-day period runs from the denial of that petition, or, if review is granted, the entry of judgment. (SCR 13(1), 13(3).) This deadline may be extended for good cause for up to 60 days

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by the circuit justice assigned to the circuit from which the case originated. Such requests are not routinely granted, and some justices view the good cause requirement more strictly than others, so it is best to avoid such requests if possible. Any request for extension should be delivered more than 10 days before the petition's original filing deadline. (SCR 13(5).)

The opposing party's opposition must be filed, if at all, within 30 days of the case being docketed. (SCR 15.3.) However, an opposing party may waive the right to file an opposition before it is due. If the opposition is waived, the cert petition will be distributed to the justices upon receipt of the waiver. (SCR 15.5.) *Amicus* briefs, if any, are due within the time allowed for filing the opposition. (SCR 37.2(a).)

If the opposition is received while the Court is in session (between October and June), the petition and related briefs will be distributed to the justices approximately 10 days after the opposition is filed. A reply brief should be filed within this period; otherwise, it may not be considered.

The Screening Process

Once the opposition to a cert petition is either filed with the Court or waived, the screening process begins. Screening is performed by a law clerk assigned from the "cert pool" of clerks working for each of the Supreme Court justices save Justice Stevens, whose clerks independently review every petition. The cert pool clerk will read all the briefs and will draft a detailed memo summarizing the proceedings below, the arguments for and against granting cert, and a recommendation for what action the Court should take. The cert pool memo is then distributed to the justices, who each have their own procedures for review.

Once the justices and their clerks have reviewed the cert pool memo, a few cases will be scheduled for discussion at the justices' weekly conference. For cert to be granted, four justices must vote in favor.

Certworthiness

While an unfavorable decision based on erroneous factual findings or an erroneous or misapplied legal rule is frustrating to a defeated litigant, none of these is likely to lead to a grant of cert. Rather, the Court seeks to decide cases that will have "immediate importance far beyond the particular facts and parties involved." (Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 221

(8th ed. 2002).)

Three general categories of cases may be "certworthy": (1) cases raising a federal question as to which the lower courts have offered conflicting answers on an important federal question, (2) cases clearly raising an important federal question and (3) cases decided in conflict with governing Supreme Court precedent. (SCR 10.) Although these categories are not "controlling" (*id.*), it is rare for cert to be granted if the case does not fall into one of these categories.

Crafting A Certworthy Petition

Certworthy issues are identified at the beginning of the petition as question(s) presented. This may be the only section of a petition that a justice reads personally, so it is quite important. The question(s) should be drafted concisely, but because the Court will not decide issues not "fairly encompassed" by the question presented, the question(s) must also be broad enough to incorporate all the arguments necessary to obtain your desired result. You may include a brief introductory paragraph providing relevant background to frame the question, but it should not exceed a few sentences.

Ordinarily, you should limit the questions to one or two issues that fall within the SCR 10 categories. It is a rare case that raises more than two issues that are truly certworthy. By identifying more than that in your petition, you cast doubt on the certworthiness of any issue you present.

In the seemingly innocuous jurisdictional statement, you must affirmatively demonstrate a basis for the Court's jurisdiction. The statement is particularly important if the challenged decision was in state court, because it must establish that the federal questions presented were properly presented and preserved at every level below. (SCR 14.1(g)(i).)

The bulk of your petition should explain why cert should be granted. The most common error in cert petitions is to argue only that the decision below was wrong. While that is helpful, the key to a successful cert petition is to explain why it is one of the handful of cases that warrant the Supreme Court's attention.

Other common errors are to seek review of factual findings or decisions about state law. Neither is certworthy. The Court decides legal, not factual, issues of federal, not state, law.

While in theory cert is available to cor-

rect legal errors of the lower courts, in practice review for that reason is almost non-existent. The Supreme Court simply does not sit to remedy every mistake of the lower courts.

Unfortunately, the Court seldom says anything about why it denies cert. When it grants cert, its decisions on the merits often contain a sentence on why cert was granted. The only two consistent themes are that the Court grants review when it concludes that the issue is important, especially if there is a conflict in the law (usually between federal circuit courts).

Your chances of review will increase if you demonstrate that the conflict is "deep," i.e., that there are many conflicting decisions. Your chances of obtaining review will also increase if you demonstrate that the conflict is "clean," i.e., that the decisions directly conflict and that the conflict is not just a misapplication of a legal rule to a particular set of facts, but conflict about what is the applicable rule.

The petition should also emphasize the importance of the issue it presents. Explaining the real-world problems that stem from leaving the issue unresolved helps demonstrate the issue's importance. It also helps to emphasize the principle or the amount of money at stake, and the likelihood of future litigation and how the Court's intervention is required to avoid it. If you are able to find a recent Supreme Court decision that addresses the issue, but leaves some questions open for future decision, it is likely that the Court has already deemed the issue important. The Court sometimes takes several cases in a row on a subject before moving on to something else. By showing that your case is a good vehicle for resolving one or more of these open questions, you increase your odds of success.

Support from *amici* also helps demonstrate that the issue is important because it shows that this issue affects people other than just the parties. The most important *amicus* is the United States. If the solicitor general files an *amicus* brief in support of review (on his own or due to a request from the Court), your chances improve markedly.

While none of these ideas guarantees that cert will be granted, they can certainly increase the odds. (For ideas on what your opponent may say to defeat cert, see Mr. Heinke's article "Opposing Certiorari in the United States Supreme Court," *The Metropolitan Corporate Counsel*, August 2004.)