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Tips for Seeking Discretionary Review from State Supreme Courts

All appellate practitioners have been there. You thought you had a strong position on an appeal, and then you receive an opinion that makes clear the appellate court did not agree. But if that decision is from an intermediate appellate court, you still have a chance to prevail by seeking further review from the state supreme court. In most cases, however, state supreme courts have discretion over which appeals to hear, much like the U.S. Supreme Court in deciding whether to grant a writ of certiorari.

Parties seeking state supreme court review usually must file a motion or petition explaining why the court should grant review. And while state supreme courts typically grant review in a higher percentage of appeals than the 1% of certiorari petitions that are granted by the U.S. Supreme Court, most still grant discretionary review in only a small minority of cases where it is sought. Thus, the challenge to advocates is to persuade state supreme court justices that your appeal is one of the few that requires the court to weigh in. This article offers some tips on how to do just that.

1. Focus on Legal Issues, Not the Facts

In the trial court, facts win. Persuading the decision maker that your client is in the right, or that your opponent acted badly, goes a long way toward winning the case. But state supreme courts are more focused on establishing legal rules that will have significance far beyond the specific facts of your case. No matter how sympathetic your client may be, a state supreme court is unlikely to commit its limited time and resources to a case just to undo a perceived wrong to a specific party. Your petition should, therefore, focus on explaining why the lower court opinion could be used to support a legal rule that will have undesirable consequences in future cases beyond the present controversy. That does not mean you ignore the facts. There is always value in making your client sympathetic. But the focus should be the law, not the facts.

The caveat to this point is that you still should consider whether there are facts that make your case an especially good or bad vehicle to decide a legal question. Messy or complicated facts may make it difficult to articulate a clear legal rule. For example, if you want the state supreme court to adopt a rule that one contract party's actual knowledge of some fact excuses the other party's failure to give formal notice of that fact in the manner specified by the contract, it is helpful if the facts are clear or undisputed concerning the opposing party's actual knowledge. That is, even if the supreme court were interested in deciding the legal issue, a case where the facts concerning the key element of knowledge are heavily contested or unclear may not be the best one to address that issue since the factual disputes may complicate or overwhelm the legal question.

2. Keep the Issues Limited and Focused

A petition for review is also likely to be more *appealing* (pun intended) to the state supreme court if it focuses on a small number of big issues—maybe only one or two—rather than raising a host of issues. At a certain level, it is unlikely that any appeal will raise a multitude of legal issues that truly require supreme court review, so a petition that raises a large number of issues may be perceived as an attempt to throw everything at the wall to see what sticks. It may convey the impression that none of the individual issues, by themselves, are really worthy of discretionary review.

Also, an appeal that presents a vast number of issues may not be a very good vehicle to address any one of them. There are only so many words or pages allotted to a party's brief. Even if one or more of the issues presented is truly worthy of review, it may not receive the depth of attention it requires if there are many other issues that need to be briefed alongside it.

This too comes with a caveat, however. The practitioner should always be aware of any rules in their jurisdiction about whether issues that are not raised in a discretionary review petition can be argued on the merits if the supreme court grants review. It can be a pyrrhic victory to get review granted for your appeal, only to be

precluded from arguing a potentially winning issue because it was not included in your petition for review. There are ways to address this, including having a short catch-all section where additional issues are raised very briefly at the end for preservation purposes, without diluting the focus of the motion.

3. Identify Unsettled Issues

An issue does not only need to be important or interesting for a high court to grant review; it typically also must be an issue that has been left open by existing supreme court decisions. It should go without saying that a high court will typically not look to hear an appeal that raises an issue it addressed only a term or two ago. So, practitioners do well to focus on couching the issue as one that is not clearly answered by existing precedent. This consideration informs how you frame the issue in your petition for review. It is possible, for example, that the high court has addressed the legal principle recently, but its articulation of the principle may have left some ambiguity as to how the principle should apply to a particular fact pattern that is likely to recur. If you can find cases from the intermediate court of appeals expressly stating that the state supreme court has not spoken to a particular question, that is a plus.

4. Look for Conflicts Among Lower Courts or Between Jurisdictions

A state supreme court is more likely to feel the need to address an issue if courts have reached differing conclusions about how it should be resolved. This principle is well understood in certiorari practice before the U.S. Supreme Court, which is always more likely to take a case if there is a so-called “circuit split”—i.e., different federal circuit courts have adopted a different rule on an issue. But it also is a powerful consideration in state court appeals.

In states that have distinct geographic appellate districts, the application of this idea is straightforward. If the appellate court for one part of the state disagrees with the appellate court for another part, the need for the state supreme court to step in and decide the

issue is clear.

However, conflicts may also arise when lower courts reach inconsistent results based on uncertainty over the correct meaning and interpretation of a legal principle. It may be that all courts purport to apply the same principle, but they may do it in a way that causes disparate or conflicting outcomes in cases that one would think should be decided similarly. Thus, it can be useful to discuss lower court cases that have reached seemingly disparate results to illustrate the need for more definitive guidance from the state supreme court about how to apply the relevant legal rule to particular circumstances.

Practitioners should also focus on conflict between jurisdictions. In many cases, state supreme courts will not want their state to be an outlier or unnecessarily at odds with the rule adopted in other jurisdictions. While states are laboratories of democracy, and free to adopt different state law rules, most judges recognize the value of ensuring some level of consistency across states. That is particularly true for laws affecting businesses or other organizations that may operate in multiple states at once. Thus, identifying ways that a state's laws have diverged from other states' approaches can be an effective way to get the high court's attention. At a minimum, a state supreme court is likely to feel that if that state's laws are going to conflict with other states' approaches, the decision should be made by the supreme court itself—and not left to intermediate appellate courts or trial courts.

5. Focus on the Policy Underlying the Rules

In trial courts and intermediate appellate courts, lawyers are sometimes reluctant to rely too heavily on policy arguments—i.e., arguments why a particular rule is good public policy or would promote good social outcomes. These arguments can be met with skepticism by courts that think a reliance on policy arguments signifies that the advocate does not have the law on their side, or that it is not courts' role to make such policy judgments. But state supreme courts are where policy arguments are most likely to shine.

State supreme courts, for better or worse, are often making policy judgments in resolving overarching legal rules. When there is more than one plausible way to approach a given legal question, it only makes sense that courts would want to adopt the approach that promotes the best policy outcomes. And the significance of the policy issues underlying a particular rule is likely to be a weighty factor when state supreme courts decide which cases to hear in a given term. So, the petition for discretionary review should be very sensitive to the policy considerations underlying the legal rule at issue and the approach you are advocating. It is critical not only to articulate what rule you want the court to adopt, but also why it is a good rule for the state as a whole.

Key Takeaway

Of course, every case is unique. What works in some cases may not be persuasive in others. And state supreme courts may have other reasons for granting or not granting review in particular cases, no matter how well crafted a motion for review may be. The key point underlying all of these suggestions is that supreme court justices are going to be far more focused on their own institutional role in handing down and clarifying the law for the state as a whole than they are in making sure the right result is reached in any specific piece of litigation. If you approach a petition for review with that in mind, your chances for getting discretionary review granted are likely to be much greater.

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