

## PETITIONS FOR CERTIORARI: UNDERSTANDING THE HIDDEN PROCESS

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Approximately 9,000 petitions for certiorari are filed each year in the United States Supreme Court. It takes skill—and a bit of luck—for your petition to be one of the 70-80 cases selected for briefing and argument. At the 2007 AJEI conference, a distinguished panel of presenters attempted to demystify the process with an insider's look at how the Court analyzes and selects petitions.

The discussion began with a presentation by Chris Vasil, Chief Deputy Clerk of the U.S. Supreme Court. Chris noted a recent trend among Supreme Court practitioners of timing a cert. petition filing so that it will be considered at a conference assumed to be more favorable to the petitioner. (For example, a petitioner may hope for a January conference, when the Court is trying to fill its April oral argument calendar.) However, because the Court's docket has been light this year and last, Chris predicted that the Court would be willing to consider any cert-worthy case filed at any time. He encouraged practitioners not to delay their cert. petition filings.

Chris also recommended that parties who prevail in the lower court always (or nearly always) file a brief in opposition to the cert. petition. Although the Court will not grant a cert. petition without requesting a response when one has not been filed, there is a significant danger that a clerk in the cert. pool who believes an unopposed petition should be granted may not be easily swayed from that view by a late-filed submission.

Chris also encouraged parties to quickly file their reply briefs in support of a cert. petition so that the pool memo writer will receive that brief in the same package from the clerk's office that includes the petition and brief in opposition. Consider sending the Court a .pdf copy of any reply brief, because the off-site security screening process can cause delay. Alternatively, file the reply in the clerk's office before 2 p.m. and in an open container, and the office will receive it the same day.

Chris observed that the pool memo clerks tend to focus on the following factors when deciding whether to recommend that the Court grant a petition: (1) jurisdiction (finality, independent state grounds, etc.), (2) whether there is an important federal question or a conflict among the circuits, (3) the presence of *amici* filings, and (4) whether there is another case that may be a better candidate for certiorari than the one under review (if your case is scheduled for a conference, no decision issues, and the Court does not immediately reschedule the case for the next conference, there is a strong possibility the Court is considering whether to take a similar case in its place).

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The panel then turned to Carter Phillips, a partner at Sidley Austin LLP. Carter emphasized that in deciding whether to file a petition, you must always consider your audience.

The truth is that no Justice is likely to even read your cert. petition. The audience is a group of 25- to 27-year-olds who have generally been out of law school for only one year. Moreover, only two sets of eyes will ever view the petition: the eight-Justice pool clerk and one of Justice Stevens' clerks. You have to capture the clerks' attention immediately, because the amount of work they have is staggering. Accordingly, you should draft the question in a way that will grab their attention and try to make the petition user friendly.

You must always look for a legitimate way to claim a conflict in the circuits on the point of law relevant to your petition. If there is a circuit split or a split among state supreme courts, there is a reasonably good chance of having certiorari granted, so mention that fact early and often. Cite liberally from a dissenting opinion that discusses the split.

Carter discouraged practitioners from using the maximum pages available for a cert. petition. If there is a clear circuit split, there is no need to use all of the available pages. Spend some time discussing the merits, but not a lot. You can also spend less time discussing the importance of the issue. In the absence of a split, it is crucial to explain why an issue is of national importance.

*Amicus* support at the cert. stage is tremendously important. The best *amicus* for a petition is the Solicitor General, but the office's practice is not to file a brief in support of a petition unless the Court invites the Solicitor to file. On the other hand, states will often do so, and that is also an important advantage. In Carter's opinion, it is more important to have an *amicus* brief at the petition stage than on the merits, because it shows the issue is of importance to someone other than the litigants. Carter noted that as a petitioner, he always accedes to a request to file an *amicus*, even if in support of the respondent. Even a hostile brief shows that the case is important enough to warrant an organization spending time and money to oppose it.

In Carter's opinion, it is risky to ask the Court to summarily reverse. That request suggests there is no split of authority and that the petitioner is simply asking the Court to engage in error correction.

Finally, Carter noted that interlocutory status is not as important when appealing from a federal court, but it is extremely important when appealing from a state court. Unless you have a case from the Supreme Court that decides the issue, generally do not bother filing a petition for certiorari from an interlocutory state court decision.

The next presenter was Assistant Solicitor General Dan Himmelfarb. He noted that while cert. petitions are generally granted at a rate of less than 1%, the Solicitor General's petitions are regularly granted at a rate in excess of 50%. Last term, for example, the Court granted seven of the Solicitor General's petitions and denied only two. The Court is likely to give weight to the Solicitor General's view, and to maintain institutional credibility with the Court, the United States tends to file only when it thinks cert. will be granted. It does not hurt the Solicitor General's odds that when a federal agency's work is impaired by a lower court, it tends to always

involve an issue of national importance. The Court is most likely to deny a Solicitor General's petition only when the lower court has exclusive jurisdiction (e.g., Federal Circuit) and there cannot be an inter-circuit split, or where an asserted split in the circuits is not actually a true split.

Solicitor Himmelfarb also mentioned that the United States waives its right to respond in 80-90% of the cases where an adverse cert. petition has been filed. He noted that although lawyers are often concerned when the Court requests a brief in opposition where one has not been filed, it is still far more likely that the Court will deny the petition rather than grant it.

In Solicitor Himmelfarb's opinion, a brief in opposition should address the merits but not at great length or in detail. An advocate need not convince the Court that the decision is right, but the advocate must demonstrate that the lower court is not obviously wrong. The most important discussion is whether there is a circuit conflict. If not, the brief in opposition should prominently discuss that fact. If the petition asserts a split: explain that (a) there is no real split, (b) the issue is not of sufficient importance, and/or (c) the case before the Court is not a suitable vehicle for resolving the conflict.

Sometimes the respondent will agree that certiorari should be granted and acquiesce in a petition. The Court will usually grant the petition in those circumstances, but not always. A respondent can also request that the petition be held pending resolution of another case for which the Court has already granted the petition.

Solicitor Himmelfarb noted that the United States is not a typical *amicus* party. For example, the Court routinely grants the Solicitor oral argument time as an *amicus* when other *amici* are not. In addition, the Court often invites the Solicitor General to file an *amicus* brief at the petition stage. In the past four terms, the Solicitor General has submitted only one *amicus* in support of the petition without being asked by the Court. The Court agrees with the Solicitor General's recommendation at the cert. stage more than 50% of the time.

The panel presentation concluded with an address from Professor Orin Kerr of the George Washington University Law School. He emphasized that a pool clerk may not be able to spend much time on a case and accompanying memo, so the petitioner must signal why this petition requires more attention. The question presented should state a clear legal issue and should also note the circuit split. In addition, the petition must be letter-perfect and demonstrate that the outcome will be different if the Court reverses. When measuring the likelihood that a petition will be granted, a published opinion from the court below is far more important than an unpublished opinion. A petition must avoid at all costs the suggestion that it is seeking mere error correction. To do so writes the four-sentence memo recommending denial.

Keep in mind as well that Supreme Court clerks enjoy reading appellate blogs (e.g., How Appealing and SCOTUS Blog); if you can persuade a prominent blog to say that your issue is interesting, that recommendation may serve a purpose similar to that of a supporting *amicus* brief.