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# A PRACTICAL GUIDE TO CERTIORARI

*Stewart A. Baker\**

How much difference does good advocacy make in Supreme Court cases? Perhaps not as much as we lawyers would like to think. The Supreme Court's majority and dissenting opinions frequently brief the case better than the parties did. With nine Justices of widely varying philosophies and more than thirty law clerks, the Court often compensates for advocates' failures in argued cases.

The same cannot be said about the earliest stages of Supreme Court review. When an appeal or petition for certiorari is first presented to the Court, good advocacy can make all the difference, and mistakes are frequently fatal. The reason is not hard to find. Sheer volume prevents the Justices, and even their law clerks, from going very far behind the lawyers' papers at this stage. Every week the Court receives between seventy-five and eighty new requests for review—a handful of appeals and a raft of petitions for certiorari.<sup>1</sup>

The unending flow has forced the Justices to treat petitions with dispatch. Eight of the nine Justices delegate the initial screening of cases to law clerks, who prepare memos summarizing the case and recommending whether it should be heard. Two Justices have their own law clerks review every case. In order to meet their responsibilities in argued cases, which may range from preparing bench memos to providing first drafts of opinions, these law clerks must move through the cert petitions rapidly, they dispose of the average petition in half an hour or less. Six Justices have “pooled” their law clerks. The petitions are divided among the six chambers, and each petition is assigned to a single law clerk, whose memorandum is circulated to all six chambers. Law clerks in the pool can spend

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\* J.D. 1976, U.C.L.A. School of Law. Member, Steptoe & Johnson Chartered. This article began as part of a panel discussion among former Supreme Court law clerks, and it draws heavily on the expertise and counsel of my two fellow panelists—Jim Asperger, Assistant U.S. Attorney for the Central District of California, and Elliot Gerson, Deputy Attorney General of Connecticut. I owe a great debt to their thoughtful comments; it has been a personal and professional pleasure to work with both men.

1. Because petitions for certiorari predominate, this article ordinarily speaks of all requests for review as petitions except when the context requires a distinction between certiorari and appeal.

more time on each case but even they rarely devote more than an hour or two to the average petition.

Once the law clerks' memos are done, they go to the Justices, who frequently read the briefs as well as the memos before going to the weekly cert conference. But the Justices have even less time for each case than their clerks, and no one on the Court has time for substantial amounts of independent research. Everything turns on the quality of the briefs themselves.

Good advocacy is especially important for petitioners. True enough, review will be granted if as few as four Justices wish to hear the case. This is the "Rule of Four," and on its face gives petitioners an advantage. In fact, though, anyone asking for Supreme Court review of his case faces daunting odds. Each year the Court hears and decides about 160 cases on the merits. This number has grown very little over the past forty years. Requests for review, however, have mushroomed. More than 4,000 are now filed every year. Faced with so many suitors, the Court can afford to be picky, and it is. Over the last several terms, petitioners were successful in winning a full hearing about six percent of the time.<sup>2</sup> In fact, even though it only takes one Justice to put a case on the conference agenda, three-quarters of the requests for review are rejected without discussion.

The cert process is devoted more to finding the flaws in apparently certworthy cases than to uncovering deserving cases hidden by weak advocacy. It is easy to see why. If the Court makes a mistake in granting review, it will live with that mistake for months before finally dismissing cert as improvidently granted or deciding the case on a ground wholly unrelated to the original reason for granting review.

Every time the case comes up for discussion the Justices and clerks who recommended the grant are embarrassed anew. Such mistakes are hard to forget. If the Court makes a mistake in denying review, on the other hand, the case will not be heard from again; then too, the mistake is never fatal, at least not for the Court. If the issue is truly one on which lower courts need the Court's guidance, it will recur time and again. New petitions will be filed in new cases, and the Court can grant one of them. If no new cases arise, then the first denial was not a mistake; an issue that arises only once is almost by definition one the Court need not hear.

### I. THE PETITION FOR CERTIORARI

If you are petitioning for certiorari, these facts teach two lessons. The

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2. See 1981 ATT'Y GEN. ANN. REP. 1.

first is that your petition must be good—and good in a way unlike any other form of appellate advocacy. That is because deciding which 160 cases the Court should hear is a task different from any other in the federal judicial system. It is scarcely a judicial task at all, for the question is how best to allocate scarce resources. Everyone knows that Supreme Court opinions make law, and the question at the cert stage is where and when the Court ought to be making law. Is this area of the law badly in need of the Supreme Court's authoritative voice? Is this case likely to produce an opinion that will give useful guidance to the lower courts? What would be the national impact of letting the lower court's decision stand?

In preparing your petition, it may help to imagine all the arguments you would use in persuading a member of Congress that a uniform national law is needed to deal with cases like yours. Your petition should address these points—as well as the usual appellate questions such as whether the lower court properly applied the law to the facts.

The second lesson is that your petition must be easy to follow. The Court's time and attention span are very short at this stage. Use headings and other "organizers" in the text so that the reader can skip easily from one point to point. Polish your first paragraph so that it piques the reader's interest immediately and foreshadows your best arguments. Above all, keep the petition short.

Under the Court's rules, a petition may be as long as thirty printed pages. That is almost always too long. Twelve to fifteen pages is the ideal length, and twenty should be your informal maximum. A Justice or law clerk doing a forced march through the week's petitions is likely to start each new case with the thinnest brief, the brief that promises to tell him most efficiently what the case is about. You want that brief to be yours. If your brief is overlong, it tells the Court that the case presents no clear conflict among the lower courts and no issue of obvious national importance, for these are almost always issues that can be identified crisply and quickly.

## II. QUESTIONS PRESENTED

Keeping the petition short and simple begins with the questions presented. There is no surer way to put off the Court at the start than to present six or eight separate questions. Certworthy questions are few and far between. It would be a minor miracle if a single case really presented more than one. Every question you add makes it clearer that you don't have much confidence in any of them. Do not present more than two or three, and always present the most certworthy first.

It sometimes happens that a petitioner's most certworthy issue is not the best issue on the merits. Even in this situation, show restraint in preserving additional questions; it is all right to include one extra issue. For example, I usually include the one issue that seems strongest on the merits, especially if the most "certworthy" point doesn't look like a winner on the merits. If you want to rely on such an issue later, it must be included now; the Court will not consider an issue unless it is fairly comprehended by the questions presented. But it is risky to try to hedge your bets by throwing too many extra issues into the petition. If you offer more than two or three, you increase the chances that the Court will limit its grant to the single issue it considers most certworthy.

The common wisdom is that each question should be stated so that the only possible answer is the one you want. Forget this advice. If the answer were so obviously in your favor, you would not have lost below. Besides, the Court does not sit to decide obvious cases. Trying to "load" the questions too heavily starts you out on the wrong foot; it makes you look like someone who cannot even be trusted to state the issues in a fair and straightforward way.

Rather than trying to argue your case in the questions presented, concentrate on stating the issues clearly. No one wants to read questions that look like a West headnote, bristling with subordinate clauses and unnecessary facts. The questions presented are the first—and sometimes the only—part of the petition the law clerks and Justices read. Their first impression should be that the brief will be clear and easy to follow. Ask someone who does not know the case to read your questions. If he has to read them twice, they need editing. Do not be afraid to simplify the question by using shorthand phrases that are used frequently in federal cases. If you simply cannot eliminate the complexity, either because the facts are involved or because several questions are interrelated, use an introductory sentence followed by numbered or lettered subquestions.

At the same time, do not simplify the questions by making them so general that they do not explain what the case is about. The reader seeking a quick overview of the case is hardly enlightened by questions like "Was the defendant's right to due process of law denied by the trial court?" Such vague questions are usually an effort to dress up in constitutional clothes a batch of ordinary complaints about evidentiary and similar rulings below. Faced with such a vague question, the Court is likely to turn immediately to the lower court's opinion to figure out what the issues really are. If the opinion suggests there are not any, the Court may not turn back.

### III. BOILERPLATE

After the questions presented, the Court's rules require a batch of tedious but occasionally vital information—a list of the parties, a table of contents and authorities, citations to the ruling below, and a statement on jurisdiction. It is impossible to mold this material into an effective introduction to the case. These “boilerplate” sections are consulted only when the Court needs specific information. The best tack is to dispose of them with as little fuss as possible, using short, dry, factual sentences to present the necessary data.

Only the jurisdictional section offers any temptation to be chatty. Jurisdictional issues are often crucial at the cert stage but this is not the place to discuss hard questions. Save real jurisdictional problems for the statement of the case and the argument sections. This jurisdictional section is for the benefit of the Clerk's Office and the law clerks. They need enough information to tell whether the petition is timely. What statute confers jurisdiction (and determines the filing deadlines)? Was your filing date extended by one of the Justices? When was rehearing denied? What was the date of the judgment below? (In answering the last question, do not forget that at least in the federal courts of appeals the judgment is not the opinion; the judgment is ordinarily a separate piece of paper, and its date may not be the same as the opinion's.) Give the clerks this basic information and move on to the meat of the petition.

### IV. STATEMENT OF THE CASE

As always, the job of advocacy begins with the statement of the facts. Unfortunately, this is a lesson too many petitioners have learned too well. We all know the old maxim that a case well stated is half won, but good advocacy is not the same as shading the facts. Never gloss over bad facts. After all, the opinions of the courts below are attached to the brief, and the law clerks and Justices will probably turn to those opinions to learn the facts as soon as they have read your questions presented.

If you want to rely on facts those opinions do not mention, be sure to include a record citation. In many cases, of course, the Court will not actually have the record; the Clerk's office actively discourages lawyers from sending in the record at this stage. But putting in the citations shows that you are happy to have opposing counsel check your assertions. This in turn will comfort the Court, which relies on the respondent to dig out any inaccuracies.

Think long and hard before introducing new facts, though, especially facts that may start a fight about the record. There is no surer way to

sabotage an otherwise certworthy case than to suggest that the Court will have to resolve a messy factual dispute in order to reach the juicy legal issues. In any event, at this stage the Supreme Court has no great interest in the details of your case. Except in the most grotesque cases, the Court does not grant cert to correct individual injustices. In fact, the more detailed and "special" you make the facts seem, the less likely the Court is to grant review. The Court's job is to make law, especially in areas where the lower courts are confused, divergent, or rebellious. They cannot be brought into line by a Supreme Court decision that turns exclusively on the facts of one particular case. In law clerks' shorthand, such cases are "fact-bound," and they are rarely granted.

In short, the Court prefers to take cases in which the facts are simple and clear and the legal issue is presented crisply. This means that simplicity in stating the facts is not just virtuous. It is critical to the success of the petition. So if you are having trouble holding your petition under twenty pages, look again at your statement of the facts. Is every fact you present necessary to give the Court an understanding of the issues? If not, cut it.

This section of the petition also typically includes a discussion of what the lower courts did. Since their opinions are already in the appendix, this discussion can be brief. In the ordinary case, the Court will be interested in the appellate court's reasoning and the trial court's findings. While it is important to avoid distortion, this is the place to begin making the lower court's decision look bad. If the court's rationale sweeps broadly, quote from the broadest passages. (For example: "The plaintiff pointed out that this reasoning could expose several hundred companies to retroactive liability totalling more than \$200 million; the court of appeals, however, declared . . . .") If the court treated sympathetic facts as irrelevant, note the facts and then the ruling. ("The trial court found that the defendant was handcuffed to the bars of his cell for six hours before and during the questioning. The court of appeals, however, concluded that there was 'no substantial evidence of undue coercion or restraint.'") At the same time, all this should be done within the context of a fair summary of the proceedings below. Do not argue your case here. Let the facts and the lower court's own words do that for you.

## V. REASONS FOR GRANTING REVIEW

The heart of the petition is the section setting out the reasons for granting review. It should answer the two questions that are asked of all petitioners:

(1) Does the decision of the court below create an intolerable conflict among the nation's lower courts?

(2) Did the court below commit an error so important that it must be corrected immediately?

Both questions should be answered in every brief seeking Supreme Court review. This includes appeals. As we will see, the simple fact that the lower court was wrong will theoretically justify plenary review if the case is an appeal. In practice, however, the standard applied to appeals is little different from the standard for certiorari.

*A. Does the decision of the court below create an intolerable conflict among the nation's lower courts?*

Not every conflict is intolerable. Despite the widespread view that a conflict between courts is a free ticket to Supreme Court review, there are plenty of conflicts that do not even come close. Some are obvious. A conflict between two panels in a single federal circuit, for example, can be resolved by an *en banc* hearing within that circuit, there is no need for the Supreme Court to step in. The same point applies *a fortiori* to conflicts between a circuit court decision and the ruling of a district court in the same circuit.<sup>3</sup> If the district court is located in a different circuit the conflict has some value, but not much. The respondent—and very likely the Court—will ask why the issue cannot wait until the district court's opinion has been reviewed by its court of appeals. If the district court opinion will never be reviewed because it was not appealed, how important can the issue be?

Conflicts involving state courts, too, are sometimes treated as tolerable. State courts, even state supreme courts, are not experts in federal law, and they are more likely to make mistakes in following the twists and turns of Supreme Court doctrine. A state court decision that differs from a federal circuit court ruling may reflect simple error, not an intolerable ambiguity in federal law. Unless you are petitioning for review of the erroneous decision itself (and the error is one on which the Justices have strong views), the Court may let the "conflict" slide.

A petitioner forced to rely on state court conflicts can counteract this tolerance by showing that the issue creating the conflict typically arises only in state courts. This is true of a wide variety of federal questions,

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3. The same can be said of another false conflict. Although the Supreme Court's rules encourage you to talk about a "conflict" between the lower court's ruling and the decisions of the Supreme Court itself, this is really just another way of saying that the lower court committed an important error. See *infra* text § B.



including many that involve Indian rights, constitutional limits on state taxation, and federal preemption of community property laws. Finally, whatever the Court's general attitude toward most state court conflicts, one is uniformly regarded as intolerable. When a state supreme court and the federal circuit responsible for that state have reached opposing conclusions about the constitutionality of some state practice and neither will back down, the Supreme Court will almost always step in.

Apart from such direct confrontations between state and federal courts, the conflicts most likely to result in Supreme Court review are conflicts among the federal circuit courts of appeal. But do not relax just because you can point to such a conflict. An able respondent can often explain the conflict away. If the courts split without citing each other, the respondent will argue that one of them might change its mind—or at least give better reasons—in later cases when the conflict has been drawn to its attention. If the conflicting cases are separated by ten or fifteen years, the respondent will argue that the first court should have a chance to reconsider its precedent in the light of changing doctrine. The Supreme Court will often deny review if it appears that the conflict was unintentional or that it may clear up by itself if left alone.

Even when one circuit openly disagrees with another, review is not guaranteed. The split should arise from the courts' holdings; *dicta*, after all, may be reconsidered. Even a square holding may not be enough. The respondent can sometimes show that the cases are distinguishable on their facts, perhaps by supplying a distinction that was never mentioned in either opinion. The office of the Solicitor General in particular excels at opposing certiorari by supplying *ex post facto* distinctions between apparently conflicting decisions. Such tactics sometimes succeed, not because the Court is fooled but because it is usually eager for a reason to let issues "percolate" through the lower courts. Each additional decision may shed new light on the way the issue should be analyzed. While it makes for temporary uncertainty, this process of percolation is ultimately good for the law. Better ten wrong decisions in the lower courts than one half-baked opinion from the Supreme Court. The Court's reluctance to jump into issues prematurely, however, also means that it may deny cert in those first ten cases on fairly flimsy grounds.

Indeed, even square conflicts of long standing may escape Supreme Court review. Sometimes the issue is too trivial for the Court. May high schools constitutionally regulate students' hair length? Who cares? Not the Court apparently; this is one of the circuit-splitting questions that the Court has refused for years to decide. Sometimes the issue is too hot for

the Court. It took the Court years to address the application of *Brown v. Board of Education* to antisegregation laws. Sometimes the issue is just too boring. For years it was almost impossible to get the Court to review patent cases, which are justly famous for their dry complexity, despite radical differences in the circuits' hospitality to patents. And sometimes the Court's inaction is simply baffling. The Court has refused innumerable opportunities to decide whether the competence of criminal trial counsel should be judged under a "farce and mockery" or a "reasonably competent assistance" standard; we may never know why.<sup>4</sup> So if your conflict has been hanging around the circuits for a while without attracting Supreme Court review, do not overlook the possibility that the Court has simply decided not to decide it.

One final word about conflicts: If you do not have one, don't try to fake it. Whatever other shortcuts the Court may take, it will never grant cert because of an asserted conflict without reading the cases carefully. If you have overstated the conflict, cert will be denied. What's more, the Court will remember—perhaps not you, but quite probably your firm or your office. And the next time you file a petition, the benefit of the doubt may go to your opponent.

*B. Did the court below commit an error so important that it must be corrected immediately?*

By now you may be wondering how the Court manages to find 160 cases each year to fill its argument calendar. The answer is that most of the reasons for treating a conflict as tolerable fall by the wayside if the Court can be persuaded (1) that the lower court was very likely wrong and (2) that the error will have serious consequences soon. Indeed, in those circumstances, the Court may not require a conflict of any sort. I will not presume to tell you how to show that the lower court was wrong. You have been briefing that point all the way up the appellate ladder. But as you start to lay out your arguments once more, remember: you cannot show that the lower court was wrong just by showing that other courts have disagreed. These are the big leagues, and "wrong" means inconsistent with accepted Supreme Court precedents, common sense, or public policy. Having thirteen opposing precedents from other jurisdictions may help you show there is a conflict, but it will not persuade the Justices that

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4. This long stretch of indifference may have come to an end at last, thanks to the Solicitor General's decision to seek review of a decision holding a federal defendant's counsel inadequate. See *United States v. Cronin*, 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983), *argued*, 52 U.S.L.W. 3531 (U.S. Jan. 4, 1984).

the lower court was wrong. The biggest single mistake made by Supreme Court advocates, whether at the cert stage or on the merits, is to overestimate the importance of case law and underestimate the importance of policy considerations. The Court sets virtually irreversible precedents for the entire nation, and it must think long and hard about whether its rulings make good sense and good policy; your petition should devote itself to showing the result below was neither.

It must also show that the lower court's error is important. It should discuss any important aspect of the decision—the number of people affected, the amount of money involved, the number of similar cases pending. Do not focus narrowly on the record below. Make reference to findings in other cases and to published sources of all sorts. If the ruling below struck down a state law, attach an appendix of similar laws from other states to show the sweeping consequences of the lower court's reasoning. If you are challenging a new theory of liability, list all the cases based on that theory that have been filed recently around the country (and for good measure total up the damages claimed).

It is also possible to argue that a decision is so important that certiorari should be granted even in the absence of a conflict. This is an uphill fight, but the odds will be better if you can show that the ruling in your case effectively forecloses further "percolation," either because this one judicial ruling is likely to govern future behavior (e.g., a tax ruling that affects financial planning) or because the court below is the court that will decide almost all of the cases raising that issue (e.g., the Ninth Circuit for certain Indian and federal lands issues, the Federal Circuit for patent and trade questions).

To find out what the Court thinks is important, look at its recent decisions. The Court has a propensity for digging into certain areas of the law and not digging its way out for years. Each opinion in the area seems to turn up new questions and to reserve in a footnote for a later case. The next wave of petitions cites the footnote and offers the Court a chance to resolve the issues it reserved. Because the Court usually leaves questions open only if they seem difficult and important, this tactic frequently works. Studying the Court's past decisions can pay other dividends, too; particularly if you concentrate on what was not decided. Your chances for review are measurably increased if you can remind the Court that it once granted cert on an issue but then failed to resolve it, perhaps because the case became moot or went off on other grounds or because the writ was dismissed as improvidently granted.

One final bit of advice about how *not* to show the importance of your

case: Do not tell the Court that your case is unique. Unique is another word for "fact-bound," and that label is the kiss of death.

## VI. APPEAL V. CERTIORARI

As I promised earlier, it is now time to talk about the differences between bringing an appeal and seeking certiorari. Of course the procedures and timetables vary, as do the names of the briefs (instead of a petition, an appeal is presented in a "jurisdictional statement"). From a tactical perspective, though, the key is that every appeal requires a ruling on the merits. In theory, the Court may not reject an appeal on purely discretionary grounds such as the need for more percolation or the triviality of the issue.

That is the theory, but if the Court scheduled arguments in every appeal there would be no room on its docket for cases arising by way of certiorari. In fact, the Court consistently refuses to hear 75% to 80% of all appeals. In most of these cases, the Court decides without argument to affirm the judgment below or to dismiss the appeal for want of a substantial federal question. Either way, the Court's summary action may be cited to show that it thought the lower court was right. If the Court ultimately writes an opinion in the area, it may not pay much attention to these summary rulings, but in the meantime the lower courts must treat them as binding.

Knowing this, the Court is more likely to hear an appeal simply to correct a lower court's error. The figures bear this out. Stingy as the Court may seem in granting hearings in only 20% to 25% of all appeals, remember that petitions are granted only 6% of the time.

Ordinarily, then, parties seeking review will want to characterize their cases as appeals. But beware: the chances are still three or four to one against review, and a judgment denying review will become a binding precedent. It is for this reason that defense lawyers in death penalty cases rarely cast their cases as appeals even though they could easily do so. They sacrifice a better shot at Supreme Court review in order to open wider (and far longer) avenues for collateral attack on the sentence.

Most lawyers do not have the luxury of this tactical choice because their cases cannot be presented as appeals in any event. The standards are set forth in title 28 of the United States Code and explained in *Supreme Court Practice*.<sup>5</sup> Without recapitulating Stern and Gressman's excellent presentation, a few points are worth noting. First, as the death penalty strategy makes clear, nothing obligates the party who lost below to seek review by way of appeal; certiorari is almost certainly available whenever an appeal

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5. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 503-40 (5th ed. 1976).

would be proper. Second, it is rarely fatal to bring an appeal when the proper vehicle is certiorari. Thanks to section 2103 of title 28, cases improperly cast as appeals will ordinarily be treated as cert petitions. This means that in doubtful cases you can file a jurisdictional statement; it ought to contain all the arguments you would put in a certiorari petition, but that is true in any event.

Finally, a word or two about the most common appeals: those from a state court that has upheld a state statute against a federal constitutional challenge. This is one of the few areas of federal procedure where everything turns on the form of words used in the pleadings. An appeal is proper only if the state court rejected a constitutional challenge to the validity of a state statute.<sup>6</sup> If the state court simply rejected a claim of constitutional right or immunity, the only route to review is certiorari.<sup>7</sup> If you cannot see the practical difference between the two, do not worry. There is none. The only difference is how the challenge was presented to the state courts. The case is a proper appeal if the challenge was stated one way ("If state tax laws permit me to be taxed for this activity, then those laws are unconstitutional as applied"). It is not a proper appeal if the same challenge was presented in a slightly different way ("This activity is constitutionally immune from state taxation").

Since everything turns on the words used below, anyone asserting federal rights in state court should frame his case from the start with one eye on the standards for appeals to the Supreme Court. Not everyone does this, so it is often possible to attack appellate jurisdiction by introducing statements from your opponent's state court briefs showing that he either did not use the magic words at all or did not use them consistently.

## VII. ON NOT SEEKING REVIEW

All of this raises an obvious question. What do you do if your case does not meet the strict standards for certiorari described above? The best answer is the obvious one: Do not seek review. If there is no conflict and the court of appeals affirmed in a garden-variety, two-page per curiam, it is a waste of your time and your client's money to file a cert petition.

Institutional litigants have an additional incentive not to seek review promiscuously. Those with a sustained policy of restraint in seeking certiorari get more attention when they do ask for review. The best example is the Office of the Solicitor General. The Solicitor General and his staff exercise virtually absolute control over the federal government's access to

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6. 28 U.S.C. § 1257 (1982).

7. *Id.* § 1257(3) (1982).

the Supreme Court. With rare exceptions, no federal agency may take a case to the Supreme Court without the approval and participation of the Solicitor General. The Solicitor General's office wields its authority in an extraordinarily tight-fisted way. Although the federal government loses more than six hundred appellate cases every year, the Solicitor General rarely seeks review in more than fifty of them. The Court rewards the Solicitor General's selectivity by granting three-quarters of its petitions. This 75% success rate contrasts starkly with the long odds against your petitions and mine.

To some extent, the Solicitor General's success in gaining plenary review simply reflects the office's reluctance to present losing petitions to the Court. But it is also true that the office's standards are well-known to the Court. When the Solicitor General tells the Court a case is so important that certiorari should be granted even without a conflict, the Court listens.

State governments and other institutions that appear before the Court regularly can get similar respect if they also exercise restraint. For example, the Manhattan federal public defender's office is noted for its understanding of the Court's standards for certiorari. Unlike most federal circuits, which have adopted the woolly-headed rule that appointed counsel must seek certiorari whenever the defendant feels like it, the Second Circuit will relieve counsel of the obligation if the petition would be wholly frivolous. The Manhattan defender does not (and should not) have a cert policy as restrictive as the Solicitor General's; an individual defendant, for example, can hardly be asked to forego his petition because the same issue may arise later in a case with better facts. Even so, petitions from the Manhattan defender have a credibility that petitions from defenders in other circuits often lack.

Adopting a similar policy will save your office money immediately; establishing a reputation for selectivity will take more time. Rather than leave your reputation entirely to word of mouth within the Court, you may want to keep a record of cases that you could have brought to the Court and did not. Once a policy of selectivity has been in effect for a year or two, your petitions could begin with a brief statement of the office's policy, with supporting statistics.

Of course, a policy of selectivity is easier to recommend than to implement. There are sometimes powerful political reasons for taking a case "all the way to the Supreme Court" even though its chances of success are remote. No one suggests that you commit political suicide in order to demonstrate your selectivity to the Supreme Court. Even the Solicitor General, with a century of tradition behind him, bows a few times each

term to political realities and asks the Court to review cases that do not meet the Court's usual standards. Still, you may be surprised at how many cases can be washed out if someone familiar with the Supreme Court's standards simply sits down with the client and explains just how unlikely Supreme Court review is. The federal public defender's office in San Diego is stuck with a Ninth Circuit rule requiring that it seek certiorari unless the defendant signs a statement agreeing not to. Even so, after explaining the standards used by the Court and the odds against a grant, that office finds that half of its clients agree not to seek cert. Finally, if explaining the hard facts of life does not work, and you find yourself forced to take up a case whose chances are poor, consider the possibility of seeking a remedy other than full-fledged argument before the Court.

### VIII. ALTERNATIVE REMEDIES TO PLENARY REVIEW

Although the 160 cases in which the Supreme Court hears arguments each year get all the attention, the Court also acts without argument in 100 to 200 more cases. Particularly if you have doubts whether your case really meets the standards for full-fledged review, you should consider shooting for one of these "alternative remedies."

The most obvious is summary reversal. It is considered appropriate only when the decision below is plainly wrong. The best case for summary reversal is one in which the lower court made a procedural or technical error that can be demonstrated unequivocally. The second best case is one in which the lower court applied recent Supreme Court doctrine in a preposterous fashion. Although no figures are available, the best time to seek summary reversal is probably the summer and fall of each year. Cases presented at that time will be reviewed over the summer or early in the term, when the Court has more leisure to think about cert petitions and to write short per curiam reversals.

A petition presenting a serious error of federal law but no conflict should usually mention summary reversal as an alternative remedy. The Court is perfectly capable of reversing summarily even without such a request, but the reminder may help. At the same time, do not ask *only* for summary reversal. Those members of the Court who consider summary reversals inappropriate may treat such a request as a concession that the case is not worthy of plenary review.

Although summary reversal takes less time than a full briefing and argument schedule, it is still a substantial investment of judicial resources. It takes much less of the Court's time to grant certiorari, vacate the judgment below, and remand the case for reconsideration in light of some event that

has occurred since the ruling below. Most of the occasions when this remedy might be useful are obvious. If Congress has passed new legislation affecting the parties' rights or if the Court itself has changed the rules of the game, the Justices will almost always prefer to send the case back for reconsideration rather than try to resolve the issue themselves.

With this in mind, the Court has adopted a practice of identifying in advance cases in which a "grant, vacate, and remand" may be necessary. Once the Court has granted cert to resolve a particular issue, any later petitions raising the same issue are held without action until the granted case has been decided. The lawyers in a held case are not told that this has happened; the petition shows up on the Justices' conference list and then simply seems to wander off into limbo for six to ten months. Then, a week or two after the Court has decided the lead case, rulings come down in all the held cases. Most of the time, the Court either denies certiorari or grants, vacates, and remands in the light of the new Supreme Court precedent. Occasionally, the Court grants cert in one of the held cases to clean up an issue it missed when it decided the lead case.

Now that you understand the Court's practice you can help yourself and the Court in two ways. First, because you cannot count on the Court to keep in mind everything on its docket, always check *Law Week* to see whether your case resembles one that is already granted or pending. If it does, you should explicitly inform the Court of that fact and suggest that it hold your case or set it for argument as a companion to the pending case. Second, once you conclude that your petition has been held for another, follow the lead case closely, determine the ways in which yours is similar and different, and be prepared to file a memorandum within days of the Court's decision in the lead case. The memorandum should explain why it is now appropriate (or inappropriate) to grant, vacate, and remand your case in the light of the new decision. The Court will not wait for this memorandum before acting, so you must file it quickly. (Because time is so short, the memorandum should be filed first in typewritten form, with the printed version to follow; the Clerk's office will usually accept such filings if the need for haste is plain.)

Finally, bear in mind that the Court sometimes uses the power to grant, vacate, and remand as a way of showing its disapproval of an uncertworthy error below. As a technical matter, simply remanding for reconsideration does not mean the first ruling was wrong. But it is a pretty broad hint, and the Court sometimes tries to correct error on the cheap by remanding for reconsideration in light of a decision that has only a tangential bearing on the lower court's decision. The lower courts rarely take



such hints, so one may wonder why the practice continues. Whatever the merits of the practice, you should bear it in mind if the error in your case is not really certworthy. Scour the advance sheets for Supreme Court decisions that have some relevance to your case but were released too recently to be mentioned in the lower court's opinion. Suggest the possibility of a "grant, vacate, and remand" in your petition. This relief may not help in the end, but it is better than a flat denial of certiorari, and there is always a chance that the lower court will change its mind. Even if the court of appeals sticks to its guns, the detour will not be wasted; the Supreme Court is probably somewhat more likely to grant certiorari the second time around in such cases.

### IX. AMICI CURIAE

Is it a good idea to round up amicus curiae support at the certiorari stage? The answer depends on what side you are on. Good or bad, an amicus curiae brief establishes at least one thing: someone other than the parties considers the decision below an important one. That is just about the last idea the respondent wants to convey to the Court. So if you are opposing review, discourage all amicus support at this stage.

If you are the petitioner, on the other hand, a good amicus brief is mildly helpful even if no one reads it (and unless it has something new to say, very few will read it all the way through). A second or third amicus brief has little extra impact, especially if the additional amici simply repeat points made by other parties. Encourage the amici to work together on a single brief. Rather than rehashing legal arguments that the petition itself will cover, the amici should focus on how the challenged decision affects them and others in a similar position. An amicus brief persuasively showing that a whole industry or class of institutions is being disrupted by the lower court's ruling can often induce the Court to take a closer look at the petition. An amicus brief can also say things the petitioner may be reluctant to say. If the lower court relied on a wobbly Supreme Court precedent in ruling against you, your petition can emphasize the many reasons for distinguishing the precedent. The amicus brief can bear the brunt of arguing that the precedent should be overruled.

The best possible amicus support for a petitioner is the Solicitor General, with his 75% certiorari success rate. The Solicitor General does equally well when he files amicus briefs supporting cert; but he files only a handful each year, most of them at the request of the Supreme Court. If the Court does ask for the Solicitor General's views in your case, by all means make an effort to win the federal government over to your side.

The Solicitor General's staff is largely unresponsive to political appeals, but it is influenced by clear legal reasoning and by the concerns of its clients, the various agencies of the federal government. Try to drum up support for your position in the affected federal agencies and encourage them to communicate their views to the Solicitor General. Then ask for a meeting with the Solicitor General or one of his deputies and prepare as though the meeting is an oral argument, for the questions will be probing and difficult.

## X. OPPOSING REVIEW

Anyone who has read this far may already know how to write a good brief opposing certiorari. By and large, an effective oppcert is just the mirror image of an effective petition. Like the petition, the oppcert should be short. Indeed, it should be shorter. The ideal length is ten pages. The informal maximum should be fifteen. Do not waste much time or space trying to "restate" the questions presented, even if you think they are unfair. It is ordinarily the petitioner's prerogative to decide what questions he is presenting, and his hamhanded efforts to skew the questions will not help him. If you feel that his questions are misleading or hard to understand, though, restating them in a simpler form may be effective and can also save a bit of space.

It is frequently possible to save space by drastically cutting the statement of facts, at least when the court below has stated them adequately. The law clerks and the Justices are likely to rely on the lower court's opinion and may skip the respondent's factual section entirely. At the same time, factual questions are often crucial to a successful oppcert. Try to show that the facts are more complicated and that they present the issue less directly than the petitioner claims. Rather than raising this point in a counterstatement of facts that may not be read, make it part of the legal argument, perhaps under the heading, "The Facts of This Case Do Not Present the Issues Raised by Petitioner." (This is not, by the way, the advice you will get from graduates of the Solicitor General's office. That office prides itself on helping the Court understand each case by presenting a full, clear summary of the facts in its oppcerts. This works for the Solicitor General because the Court trusts his office to state the facts fairly. Unless you are writing for an institution with a similar reputation among the Justices, however, your restatement of the facts will not get the same attention, and the safest assumption is that it will get none at all.)

Instead of a long preliminary discussion of procedural matters, weave procedural and jurisdictional issues into your main argument. Do not

leave them out entirely, for procedural defects can be crucial to the Court's decision. If the petition is jurisdictionally out of time, there is no need to say anything more. Timeliness is a surprisingly complex question. Some time limits are jurisdictional; others are not. The limits vary, and the method of counting days is occasionally tricky. Luckily, the Clerk's office knows the rules and performs the necessary calculations for the Court. If you think a petition may be time-barred, ask the Clerk's office what its count shows.

It can also be devastating to show that the petitioner did not raise or preserve below the issues he now presents to the Court. The Court has occasionally decided issues that were not preserved below, but in most of those cases, the Court was looking for another ground so it could duck a tough constitutional issue. There is almost no chance that the Court will take a case to resolve issues raised for the first time in the petition.

Lack of finality is another powerful procedural argument against cert. As a jurisdictional matter, the finality rule has been largely eaten up by exceptions, but as a discretionary consideration influencing the grant of certiorari, finality remains important. In fact, lack of finality often defeats review even in federal court cases, where it is not a jurisdictional bar. The reasoning behind this discretionary rule is clear enough: Why should the vast clanking machinery of the United States Supreme Court be mobilized to decide a question that may not make any difference in the outcome of the case? The respondent should always raise this question if the appeal is interlocutory. Petitioners too should bear the point in mind; if the Court refuses to review an interlocutory ruling, it is often wise to raise the very same issue again once the judgment below is final. Too many petitioners assume that the first denial means the Court has rejected the petition on the merits.

Another powerful procedural point in cases coming from state courts is the possibility that the ruling below rests on state as well as federal grounds. As a jurisdictional matter, the Court may review the federal ground unless the state court has plainly stated that state law provides an adequate and independent basis for the judgment.<sup>8</sup> As a matter of discretion, though, the Court usually is not eager to take a case if it thinks that reversing on federal constitutional grounds will simply lead the state court to reinstate its original ruling on state constitutional grounds. The same reluctance will sometimes defeat a grant in federal cases. Circuit court decisions that rest on two grounds—one certworthy, the other simply run-of-the-mill—are not usually good candidates for review. (This practice

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8. *Michigan v. Long*, 103 S. Ct. 3469 (1983).

has led to widespread speculation that some circuit court decisions have been deliberately made “certproof”—insulated from Supreme Court review by combining a humdrum alternative ground with a controversial new judicial rule.)

The substantive reasons for denying certiorari are more or less the flip side of the considerations I have already discussed. Your job in opposing review is to establish that there is no conflict, that if there is a conflict it is the wrong sort of conflict, and that if it is the right sort of conflict it is not a very important issue. This is an area where research can pay off. Check the back issues of *Law Week* for similar cases in which cert was denied. While certiorari decisions are discretionary and set no precedents, the Court may find its past denials persuasive. You cannot count on the Court to recall its past denials without prompting from you; remember that the law clerks, at least, are new this year.<sup>9</sup> If the cases appear to be in conflict but can be reconciled on their facts, offer the unspoken distinction as a ground for denying review. Look for intervening events that rob the issue of its significance. For example, has the law at issue been repealed or substantially amended so that the conflict is unlikely to recur? Even reenactment of the same law with new legislative history favoring one side of the conflict may justify further percolation. If other cases raising the same issue on more typical facts are pending below, suggest that the Court wait for those better cases.

Of course, it also helps to demonstrate that the decision below was right. Unless the petition relies exclusively on a claim of error below, however, this is definitely a secondary argument, for the Court frequently grants review even when the lower court was right. Like the petitioner, the respondent must avoid an unduly narrow concept of what “right” means. Do not rely on the authority of other courts. Try instead to show that reversing the court below would upset settled expectations, start the Court sliding down a slippery slope, or otherwise confuse the law.

Avoid sarcasm and hyperbole at all costs; it gives the Court the idea that you think your case is weak. Correct the petitioner’s factual errors with record citations, but there is no need to call him a liar. The best tone to adopt in response to a vehement petition is cool reserve. Imagine that you are addressing another adult over the head of a small but noisy child. Not only will this carry more credibility with the Justices, it will probably provoke your opponent far more than a vehement response would.

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9. Petitioners can also benefit from special research in this area; an examination of the respondents’ briefs in the earlier denials may show that the reasons for denying cert in those cases are not present in yours.

Finally, there are two points about oppcerts of particular interest to state and local government attorneys. First, under the Court's rules, the response to a typewritten *in forma pauperis* petition may itself be typewritten. Take full advantage of this rule; never file printed responses to typewritten pleadings. A printed response costs more than a typewritten one, and the printing consumes valuable days when you need them most, at the end of the drafting process. Some counsel continue to file printed responses under the impression that "they look better." Maybe so, but they will not get any more weight for that. The United States types its oppcerts whenever possible, and they are still read eagerly. Indeed, spending a lot of money to print the brief may suggest that the cases are more important than you want the Court to believe. Finally, a printed response sometimes gums up the machinery of the certiorari process. Because typed pleadings are a different size from printed pleadings, they are distributed to the law clerks and Justices in separate piles. Each *in forma pauperis* petition and oppcert are held together with a rubber band and can be handled as a unit—at least when both are typed. A printed oppcert, however, is more likely to slip out of the stack of petitions and end up—unread—at the bottom of the Justice's briefcase or on the back seat of the law clerk's car.

A second point of special interest to state and local governments is the rule that permits respondents to waive response. Take advantage of this rule, too. The waiver should always be done by a letter; there is no excuse for simply filing nothing and leaving the Court guessing about your intentions. As a rule, the Court will not grant certiorari without calling for such a response, so waiving response is not especially risky; the letter lets you cut the risks even further by making it clear that you are willing to file a response if any member of the Court so desires. The obvious advantage of waiving response is that you do not have to write a brief in a frivolous case. A second advantage is less obvious. Many frivolous petitions are filed to delay the start of a jail sentence or the payment of damages. Waiving response can cut that delay by thirty days. As soon as your letter waiving response is received by the Court, the case goes on the calendar, and the petition is distributed to the Justices' chambers. In May, when the Court's summer recess is rapidly approaching, a quick waiver may be the difference between a denial in June and one that must wait until the first week of October.

While waiving response has its advantages, it should not be done irresponsibly. Particularly in dealing with confused and confusing *in forma pauperis* petitions, the Court needs your assistance. If the lower court did not write an opinion, you must tell the Court what the case is about.

Waive response only if the lower court has addressed the issues in a reasonably detailed way and you have little to add to its opinion.

## XI. THE REPLY BRIEF

In most cases, the respondent's brief in opposition is the last paper filed with the Court. This is because the case is sent to the Justices' chambers as soon as the oppcert arrives. Although the Rules allow reply briefs, the early distribution means that the reply will not arrive in the Justices' chambers along with the other papers. And at some times of the year, a reply that is not filed within a week of the oppcert may arrive too late for the Justices to read before they vote on whether to grant review.

Replies are not expected and should be filed only if the oppcert contains surprises or serious errors likely to affect the Court's decision. Of course, you cannot know in advance what the oppcert will say, so it is best to save time to do emergency research, drafting, and printing as soon as you get the oppcert. To find out the practical filing deadline for your reply, ask the Clerk's office when the papers in your case will be distributed to the Justices and when the Justices will hold a conference to discuss your case. In the late spring and summer, the papers may be distributed months before the conference at which the case is discussed. This allows you plenty of time to write a reply brief. At other seasons of the year, however, the reply must be filed immediately to have any effect.

Whatever the schedule, it is always best to assume that the reply brief will arrive in the Justices' chambers after the other papers have been read and digested. This means the reply must stand on its own. Do not write a brief that can only be understood by someone who has just finished the oppcert. Instead, the reply brief should very briefly recall the case to the reader and state the theme of the oppcert; only then should it attack the points on which the oppcert is vulnerable. This scene-setting prelude can be crucial. If the law clerk's memo has already been prepared and distributed, the significance of your rebuttal may be entirely lost if you do not put it in context.

The other key to an effective reply brief will sound familiar by now: it must be short. Ten pages is the maximum allowed under the rules. Three pages is ideal. If the papers have already been digested by the clerks and Justices, only points that go to the heart of the case are likely to change their minds. Do not quibble about the oppcert's efforts to restate the facts or the questions presented unless the points are crucial to the case. If you do catch the respondent misstating the record and the error bears directly on review, do not simply assert that the respondent was wrong. Prove it.

The Court has no time to check the record and decide who is right about a factual dispute; it may deny cert simply because of the dispute unless your reply contains conclusive proof that you are right. So if the respondent says that you did not properly raise an issue below and you did, attach the relevant pleadings in an appendix. If the respondent says there was no evidence on a particular point at trial, attach the two or three transcript pages that establish this error. Finally, if you are lucky enough to catch the respondent in an error of this sort, do not gloat. As in the oppcert, a straightforward correction is far more effective.

## XII. PETITIONING FOR REHEARING

Not long after the reply brief is filed, the Court will rule. Most petitioners lose. If this happens to you, don't petition for rehearing unless an intervening lower court opinion has suddenly created a conflict. If you petition for rehearing based on a sudden conflict, tell the Court (if you know) whether the losing party in the new case intends to seek certiorari. If he does, the Court may wish to reserve judgment on your rehearing petition until it has seen the cert petition in the new case.

## XIII. FOOLPROOF ADVICE

This is just a sketch of certiorari tactics. It is not a guide to all the procedural and substantive intricacies of Supreme Court review. That is because everything you need to know about matters of that sort can be learned from two sources:

- (1) *Supreme Court Practice*,<sup>10</sup> the bible of the field, which is due out shortly in a new edition; and
- (2) The Supreme Court Clerk's office, which has some of the most generous and patient officials in the government.

The best advice for anyone briefing a case at the cert stage—perhaps the only advice you really need to remember—is to consult these two guides whenever you have a question.

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10. See generally R. STERN & E. GRESSMAN, *supra* note 5.