Seek “Top Court” Review?

* This posting is an excerpt from the forthcoming 5th Edition of Myron Moskovitz’s book, *Winning an Appeal*.

The Problem

Most jurisdictions have two levels of appellate courts: an intermediate appellate court, and what I call the “Top Court.” In New York, the Top Court is called the Court of Appeals. In most other states, it is called the State Supreme Court. And, of course, the “Toppest Court of All” is the U.S. Supreme Court.

If you lost in the intermediate appellate court, you can then ask the Top Court to hear your case via a petition—called a “petition for certiorari,” “petition for review,” or something similar. If the Top Court grants your petition, all they’ve done is agree to *hear* the case. You haven’t *won* yet—you still have to convince the Court to rule for you on the merits. In many jurisdictions, the Top Court denies over 90% of these petitions, sometimes, almost 99%. And, of course, many grants will end up as losses on the merits for the petitioner.

What’s going on here? What competent lawyer in his right mind would spend his client’s money preparing and filing *a complaint in a trial court* with less than a 10% chance of winning? Or prepare and file *an appeal* to the intermediate appellate court with such a low expected payoff?

So why do so many attorneys do exactly that in the Top Court? Mostly because they don’t understand how the Deciders on the Top Court see their job.

The lawyer thinks, “I file a complaint because I’m right on the facts and the law. And I file an appeal when I think the trial court got it wrong. Top Court? Same thing. The intermediate appellate court was wrong, and once I show this to the Top Court, they’ll grant my petition, hear it on the merits, and give me my victory.” Unfortunately, for many attorneys, it doesn’t work that way. The Top Court has a very different perspective:

> Trial judges make mistakes, so we have an elaborate, expensive group of

> intermediate appellate courts – staffed by hard-working, intelligent judges and law clerks to review trial court records and correct those mistakes. Occasionally those courts make mistakes too, but it's not the Top Court's job to correct them. *We are not a Court of Error Correction.* We have only five [or seven, or nine] judges, so we have time to handle no more than about 100 cases a year. We use those 100 cases *to clarify the law*. The law needs clarifying when different intermediate appellate courts have announced conflicting rules of law, or when some unresolved question of law affects a large segment of society or some industry or institution. If your case doesn't involve such a question, we won't hear your case – *even if we agree that you got screwed by the intermediate appellate court!* Our legal system isn't perfect. Live with it.

This is a hard message to hear, and the majority of lawyers who file petitions in the Top Court never hear it, don't really understand it, or refuse to believe it. Their petitions focus on the intermediate court's mistakes. They might have read the Top Court's warning to focus on conflicts among intermediate appellate courts" and "important questions of law", but they don't get what it means. So they spend their client's money to join the 90% who get the unexplained "Petition denied" notice.

In most cases, unfortunately, you can't give the Top Court exactly what it's looking for – you simply don't have the ammo. If you don't have the ammo, it's pretty hard to fake it and fool the Top Court. They're too smart for that, and they see too many petitions trying to do the same thing. If that's your situation, it's time to consider folding your cards and saving your client some bucks.

Show "A Conflict"

The Top Court first looks for a *direct, express* conflict in statements of *law* appearing in *reported* opinions of intermediate appellate courts.

One reported opinion says, "The rule of law on this issue in this jurisdiction shall be X." But your reported opinion says, "We refuse to follow that decision. The rule of law on that issue shall be Y, not X." When this happens (it's rare), the Top Court is very likely to say: "Our main job is to resolve these conflicts, so everyone follows a single rule of law. Petition granted."

That accounts for a large portion of the tiny number of petitions granted.

Attorneys try to squeeze their petitions into this category when it really doesn't fit. They attempt to show a "conflict" by arguing that the opinion in their case is *inconsistent* with another opinion. The two reported cases purport to use the same rule of law, but *apply* them differently. This rarely works. Most of your competing petitions are arguing the same thing, so why should the Top Court pick yours?

If the intermediate appellate court opinion in your case is *unpublished*, you have almost no chance of showing a conflict that matters to the Top Court. If no one but the parties see it, who cares? It has no effect on "the law," so the Top Court is unlikely to grant review.

Show "An Important Issue of Law"

Every lawyer thinks his issue is important. It might be important to him, and it might be important to his client. It might even be important to academics. But that's not what the Top Court means by "important."

"Important" means that a significant segment of society or some institutions—the police, school administrators, insurance companies, trial courts, etc.—need guidance on some issue in your case:

- State officials might waste a lot of money putting a measure on the ballot that is challenged as unconstitutional.
- A new statute gives trial courts only vague guidance on when to send a case to arbitration.
- A planned new state highway system cannot go forward because the language of a bond issue is ambiguous.

If the issue in your case seems narrow, find a way to broaden it. Suppose your case involves the legality of the detention of a student by a high school official. Show the court that educators have expressed concern about the paucity of legal guidance on school detentions. If your case contains an issue involving the validity of a certain contractual provision, show the court that the provision is commonly used in form contracts throughout the jurisdiction. If the validity of a local ordinance is at issue,

show that other cities or counties have enacted similar ordinances.

Show importance not with law, but with facts. Tell the story of the need for resolution of this issue, and back it up with citations to news articles, declarations you attach, and whatever else you can lay your hands on. But you've been told that an appellate court does not look beyond the record, and these facts are not in the record. That rule applies to appeals, but not so clearly to original petitions. Go outside the record when you need to.

The most effective way to show importance is with *amicus* letters from *other* parties. An *amicus* letter is not an *amicus* brief. It should be a short letter (no more than a couple of pages) explaining the "real world" effect of the issue, rather than arguing why "the law" requires the issue to be resolved a certain way. (If and when the Top Court grants a hearing on the merits, you can then rustle up *amicus* briefs to argue the law.)

Amicus letters should come from institutions that are directly affected by the issue, and should explain, in as much detail as possible, why the lack of judicial guidance on the issue is hurting each institution. *How* the issue is resolved is less important than the need for some resolution, one way or the other. The more *amicus* letters, and the more prominent institutions writing them, the better.

Pique the Court's Interest

Even if the legal issues in your case are unlikely to be significant to anyone other than your client, there might be something fascinating about them.

Suppose, for example, that some aspect of your case resembles the famous "lifeboat" cases that most lawyers (and judges) read about in law school, where some stranded seamen dine on one of their brethren in order to survive. Such cases rarely occur, but many judges would just love to sink their intellectual teeth into one.

If part of your case involves baseball, movie stars, steamy sex, or another popular subject, emphasize it. The judge who reads your petition might want to tell his friends that she was one of the judges who decided "The Barry Bonds Case" or "The Case of the Horny Lawyer."

Find Out Issues the Court Currently Cares About

If you know which panel of judges will review your petition, try to learn what issues that panel cares about. Look over recent decisions by the court in the area of law involved in your case. You might also discuss your case with practitioners familiar with the recent doings of the Top Court. She might suggest an approach to catch the court's eye.

Drafting the Petition

Keep it short. Some law clerk will be reading a large batch of similar petitions. Most are long. Yours will get more attention if it's short.

Do not spend a lot of words explaining the procedural history of the case and the intermediate appellate court's opinion. All of that information will appear in the opinion, which you should attach. (Court rules often require this, but even if they don't, attach it.) The law clerk will usually read the opinion first, so there is no need to duplicate what the opinion already does.

Keep your criticism of the appellate court's reasoning to a minimum. Most petitions go on and on about how wrong the court was. Big mistake. *Keep your eye on the ball*. At this point, the ball is *not the merits*, but rather persuading the Top Court to *hear* the case. The fact that the intermediate court's reported opinion is wrong is relevant, because it might distort the law. So discuss it, but keep it short.

Instead, focus the petition on the two key factors discussed above: conflict with other courts in the jurisdiction and importance. And put them *up front*. Lead with a two-page (no longer) "introduction" that tells the law clerk: "This is the kind of case you guys have been looking for. Take it!"

Don't Fret If Your Petition Is Denied

If you follow these suggestions and your petition is still denied, don't blame yourself (or me). Following these suggestions will, at most, put you into that small group of petitions that have a chance of being granted. You might do a great job, but your petition may be denied for reasons well beyond your control (such as the court's

workload). So don’t feel bad if this happens—you have plenty of company.

If you are one of the lucky few, you might salvage your client’s case—and the result might be a landmark decision that emblazons your name in legal history.

* *The author grants SCOCAblog a non-exclusive right to publish here this excerpt from Winning An Appeal (5th edition), by Myron Moskovitz.*

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He has taught several thousand lawyers how to write winning briefs and argue their appeals effectively. He is the author of Winning An Appeal (4th ed. Lexis).

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