By Tillman J. Breckenridge

Petitioning for Further Review After Losing a Federal Appeal

The last thing anyone wants to think about in the midst of litigation is losing an appeal. But it is important to be prepared, because when an opinion comes down, a short clock starts ticking, and you will need to decide quickly whether to move up or move on. As an appellate litigator with a healthy chunk of my practice devoted to Supreme Court work, clients often approach me after they have already lost in a court of appeals. They often want to know whether it is worth it to go forward with a petition for rehearing en banc or a petition for certiorari in the Supreme Court. This article will discuss when to file either petition and how to evaluate whether it is worth the cost.

The first rule of evaluating whether to go forward with a petition for rehearing en banc or a petition for certiorari is to start with the assumption that either petition would be a waste of time and money. Unfortunately, it is usually too late to salvage a case once the court of appeals has ruled. The Supreme Court grants certiorari in about one percent of the cases brought before it. Take out the *in forma pauperis* petitions—which leaves the "paid" cases—and the number only goes up to four percent. In most circuits, it is even tougher to get a petition for rehearing en banc granted. That does not mean that giving a serious look at options for moving forward is a bad idea. But you must approach the question with caution in order to invest your company's money wisely.

If your appellate counsel does not appear to be approaching the question with that first rule in mind, consider it a red flag and consider getting a second opinion. There are several reasons why counsel who just lost your appeal might be gung-ho about going forward with a petition. First, and foremost, is the same reason I always advise clients to use different lawyers on appeal than they used at the trial level—when a lawyer has invested so much time, energy, and intellectual capital into a case, it is hard to be objective. And objectivity is essential to any decision on what to put in front of an appellate court. Second, counsel may be embarrassed or concerned that the loss has diminished him or her in your eyes. He or she will want the opportunity for vindication and to finish the litigation as a winner. Third, if you didn't have an experienced appellate lawyer handle your appeal, he or she may not fully understand the odds the case is up against. Finally, there are, unfortunately, a few lawyers out there who would let the extra billing opportunity play some role in his or her advice as to whether to proceed. Of course, most lawyers will be able to give you fair, objective advice regarding whether to file a petition, so it usually will not be necessary to seek out a second opinion. But there are many reasons why a lawyer might not proceed with necessary caution, and in-house counsel should be comfortable with the questions that go into deciding whether to go forward with a petition for rehearing en banc or a petition for a writ of certiorari.

Elements of a Petition for Panel Rehearing/Rehearing En Banc That Has an Appreciable Chance at Success

When filing a petition for rehearing, you will almost always petition for both a panel rehearing and rehearing en banc. Most circuits automatically consider any petition for rehearing en banc as a petition for panel rehearing, and there is generally no harm in asking for both. Panel rehearing is particularly appropriate when the opinion turned on the panel's mistake regarding an undisputed or indisputable fact.

The Federal Rules of Appellate Procedure (FRAP) require a petitioner for a panel rehearing to "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." FRAP 40(a)(2). On its face, that is a very tough standard to meet. And it demands an ability to articulate a critical fact or legal ruling that the panel obviously missed. It is exceedingly rare to see a panel reverse itself based on a legal error. For that reason, any purported mistake of law should include a request for rehearing en banc as well.

En banc rehearings are also very rare. Indeed, the rules include express discouragement against filing a petition. En banc rehearings are "not favored and ordinarily will not be granted." FRAP 35(a). They will only be granted in one of two circumstances. *Id.* Rehearing en banc is appropriate when (1) there is a split within the circuit on a legal issue, or (2) "the proceeding involves a question of exceptional importance." FRAP 35(a). Viewing those two standards in the abstract, it would seem that the latter is the more effective ground on which to base a petition. After all, a court will not often recognize that it has two conflicting cases. The first case was, or should have been, raised in the appeal on which the petition is based. On the other hand, courts of appeals decide questions of exceptional importance all the time. Almost all appeals are exceptionally important to the parties. Otherwise, they would not spend the time or money.

The strongest petition for rehearing en banc exposes a conflict between holdings within the circuit. That makes sense when

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you consider the role of an appellate court. Appellate courts are courts of "review." They exist primarily to ensure that the trial courts got the law right. Naturally, their jobs are easier, and their dockets are less burdensome, when trial courts are getting the law right more often. And their jobs are tougher when the court has given trial courts a mixed message on what the law is. When there is an intra-circuit split, the court's docket will soon be burdened with more appeals on the same issue because litigants will be less likely to settle before an appeal when they both can cite purportedly binding precedent in their favor. Taking it one step further, intra-circuit splits increase litigation altogether because parties are more likely to engage in behavior that results in a lawsuit when the law is not clear, and they are less likely to settle at the trial level as well.

Identifying an intra-circuit split allows the petitioner to appeal to the judges' base senses of judicial efficiency and fairness of the process and can offer a compelling justification for taking on more work in the near term. Thus, the first question that should be asked when considering filing a petition for rehearing en banc is whether there is an intra-circuit conflict. If the answer is "no," then a petition for rehearing en banc will almost certainly be a waste of time and money. If the answer is "yes," it remains far from a conclusion that you have a strong petition for rehearing en banc, but you probably have one that's at least worthy of weighing against the cost of losing (or winning) the petition.

One common mistake of counsel is to believe, and argue, that en banc rehearing is needed because the panel's decision conflicts with the decisions of other circuits or state courts of last resort (which is generally, and under-inclusively, referred to as a "circuit split"). While this may be a persuasive fact to mention in the petition to establish that there are judges who support your position, and it may be helpful to establish the importance of an issue, it is *not* a ground for a petition for rehearing. FRAP 35 does not include a circuit split among the reasons for granting a petition for rehearing, and judges will generally disregard a petition that overemphasizes other circuits' decisions. Again, the role of the court of appeals is important here. Appellate judges know that, while they should generally avoid creating circuit splits, it is not the court of appeals' job to correct circuit splits. That role is reserved for the Supreme Court.

If there is an intra-circuit conflict, the next question to ask is how simple the conflict is to grasp. A petition for rehearing en banc starts with a short statement, usually only a few sentences, stating the reason that rehearing is necessary. FRAP 35(b)(1). Your counsel must be able to grab a judge's attention with just that statement. After that, counsel has less than 15 pages to fully explain the facts of the case, the intra-circuit conflict, and the issue's importance. Thus, your counsel must write the petition in a way that the panel's error, or the conflict at least, smacks the judge in the face. That often is not a challenge if there is a conflict on an intuitive issue that appellate judges see all the time—such as the proper standard of review or a pleading standard. But when it is a complex issue, like a narrow area of securities law that requires understanding several different financial products, your counsel must be especially gifted at breaking a complex issue down into simple terms and drawing a black-and-white contrast with no shades of gray. The more complex the issue is, the less likely you are to win a petition for rehearing en banc, and you should consider that when weighing the cost of filing the petition against the cost of giving up or going straight to a petition for certiorari.

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Finally, you should consider the importance of the case to the court and the public. Even in cases involving an intra-circuit conflict, you must impress upon the court the importance of the issue that was incorrectly decided. Granting a petition for rehearing is completely discretionary for the court; thus, it is not enough to simply establish that your legal issue meets one of FRAP 35's two criteria for granting the petition. It must be carefully explained to the court why the panel's error will not only damage your company, but thousands of other similarly situated companies. Or it must be explained how the intra-circuit conflict will lead to strained dockets and confused trial judges, or how the panel's decision will have a deleterious effect on the public. Circuit judges will rarely be concerned if the purported error that creates an intra-circuit conflict really only affects your company, will not be a recurring problem, and will not have any secondary effects on the public.

Despite its equal footing in FRAP 35, the "exceptional importance" basis for granting a petition for rehearing en banc is somewhat illusory when it is not paired with an intra-circuit conflict. Courts rarely grant a petition for rehearing en banc on that ground alone. Indeed, the petition for rehearing en banc in *Ricci v. DeStefano* caused a now-famous—thanks to Justice Sotomayor's confirmation hearing—public debate among the Second Circuit judges on the role of en banc rehearings and whether to grant them in cases of "exceptional importance." The case involved a local government's decision not to certify test results because the test left too many minority firemen ineligible to become officers, and the government was concerned that it would be sued for discrimination. The denial of the petition for rehearing en banc generated three concurrences and two dissents. *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008). Judge Cabranes, in the main dissent, stated that the case raised "important questions of first impression… regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices." *Id.* at 93 (Cabranes dissent). But that was not enough to elicit the votes needed for rehearing.

The main concurrence focused on the lack of an intra-circuit conflict and the fact that both the district court and the panel decided consistently with circuit precedent. *Id.* at 90 (Parker concurrence). Judge Katzmann suggested in his concurrence

that he did not agree with the panel, but he voted against rehearing to be "consistent with [the] Circuit's longstanding tradition of deference to panel adjudication." *Id.* (Katzmann concurrence). Judge Calabresi conceded that the question was at least "interesting," but agreed with both the main concurrence and Judge Katzmann's concurrence urging restraint. *Id.* at 88. Chief Judge Jacobs appeared incredulous in dissent at the notion that petitions for rehearing should be denied as a matter of "tradition." *Id.* at 92 (Jacobs dissent). But Chief Judge Jacobs was in the minority by one vote, and "tradition" caused the court to exercise its discretion not to grant rehearing in a case involving legal issues that would affect all businesses and governments on an issue—race—that is subject to "strict scrutiny." In a case involving "novel questions that are indisputably of 'exceptional importance,'" that ground could not garner enough votes by itself to obtain a rehearing en banc. *Id.* at 101. On the other hand, it is difficult to imagine a judge voting against rehearing en banc because of "tradition" in a case that conflicted with circuit precedent.

The hurdle is incredibly high to obtain rehearing based on the issue being of "exceptional importance." Unless there is a dissent or special concurrence from the original panel stating that existing precedent should be overturned, filing a petition for rehearing en banc based solely on the "exceptional importance" ground is almost never an effective use of your company's funds.

Elements of a Petition for a Writ of Certiorari That Has an Appreciable Chance at Success

Like a petition for rehearing, an ideal cert petition establishes that there are conflicting opinions on the same legal issue and that the issue is of exceptional importance. Supreme Court Rule 10 sets out the "character of the reasons the Court considers" in exercising its discretion to grant a cert petition. The three criteria it gives are (1) a circuit court has decided an important case that conflicts with another circuit or a state court of last resort, or it has done something so outside its powers that it requires application of the Supreme Court's supervisory role; (2) "a state court of last resort has decided an important federal question in a way that conflicts with… another state court of last resort or" a circuit court; and (3) a state court or a circuit court has decided an important federal question that has not been addressed by the Supreme Court or in a way that conflicts with Supreme Court precedent. Those are pretty ambiguous standards, but the rule of thumb is that if you do not have a conflict among the courts, then filing a cert petition is usually not advisable.

There are, of course, exceptions to the need for a circuit split. There are occasional cases in which a circuit split is impossible or so highly unlikely that requiring a circuit split would make the lower court's decision effectively unreviewable. The Court also tends to take cases in which an act of Congress has been declared unconstitutional immediately. Finally, there are some cases that simply strike the Court as being important enough to warrant immediate review. When a case falls into the first category, that will be obvious. And the second category generally belongs to cases in which the government will be the petitioner. The third category, though, is amorphous. But as corporate counsel, you will need to evaluate how important your case is to the country. Almost always, the answer will be "not important enough," but the fact that these cases are rather rare should not cause you to dismiss the possibility of review without giving it your full consideration.

The Supreme Court is more likely to grant a cert petition based on the importance of an issue than a circuit court is to grant rehearing. *Ricci* provides the perfect example. There, rehearing was denied over acrimonious dissent even though it appears that a majority of the judges thought the panel's opinion was wrong and that the issue was highly important. Shortly thereafter, the Supreme Court took the case without a clear circuit split. Similarly, the Court took *Quon v. City of Ontario*, No. 08-1332 (also known as "the sexting case"), this term with no clear circuit split presumably because it addressed the intersection of privacy law, employment law, and emerging technologies. Under the right circumstances, a cert petition may be worth it even without a circuit split.

One final consideration to determine the strength of your potential cert petition is whether it will attract amicus support. Even if a circuit split exists, the Court is highly unlikely to take the case if the petitioner cannot present a reasonable argument as to how the split will have a negative effect on the country, the people, or its businesses. A petition amicus emphasizes a case's importance. If an industry organization or a group of states file a brief saying the question presented is important to an entire segment of the country or the economy, your petition is more likely to get noticed. If you feel that your issue will warrant amicus support, then you should consider that a plus for filing a petition for a writ of certiorari.

Whether to File a Meritorious Petition

Once you have determined that you have a legal issue that would support a petition with an appreciable chance at success, you have to weigh the chance of success against the cost. Figuring out whether the legal issue and likelihood of the petition's success justify the cost estimate is the easy part. And people sometimes stop there, after determining whether the expense is worth it if the petition fails. But considering the cost of your petition being granted is a critical step to evaluating whether to file at all. You must weigh that not only against the cost of preparing and filing the petition, but also against the cost of preparing and filing all of the subsequent briefs. It makes no sense to spend thousands of dollars on a petition for rehearing en banc if the case is not worth the money you will have to spend to brief and argue after the petition is granted.

You must also evaluate the strength of the case on the merits, the inclinations of the court you are addressing, and how the appeal was prosecuted by your counsel. The first issue is likelihood of success when the case is reheard en banc or on the merits case in the Supreme Court. You and your counsel (perhaps *new* counsel if there are concerns over your current counsel's ability to be objective) must take an unbiased look at the legal issue presented, the facts of the case, and the reasonableness of your position. You must also consider the inclinations of the court. If it is a court that

consistently rules against your side on similar legal issues, then it may not be worth the money to file the petition and subsequent briefs.

Additionally, you have to consider the costs associated with further entrenching bad law if you lose on the merits. Once an issue is taken to an en banc circuit panel or to the Supreme Court and lost, that legal rule is etched in stone so that a party cannot, usually, re-challenge the issue once a case with better facts comes along. If there is a tough employment law issue that you would like to have reversed, it may make more sense to wait until a less sympathetic plaintiff raises the same issue so that you can go to the en banc panel with the new plaintiff. That circumstance is rare, though, because the chance of getting rehearing en banc drops when a party comes up the second time to challenge precedent that has been around for a while.

On the other hand, the chance for Supreme Court review does not drop for subsequent cases. And with the Supreme Court, there is the additional concern of spreading your bad legal ruling throughout the country. Of course, if you work at a regional company, that is less of a concern because you just have to look out for your client. But if you represent a national company, you have to consider how much damage will occur if you lose that issue of employment law (or something else) in the Supreme Court and suddenly a legal rule that previously hurt you in just one part of the country now hurts you everywhere else. The good news is that it is somewhat unlikely that the Supreme Court will grant a petition but then affirm the challenged decision—the Court's reversal rate is about 75 percent—but a bad ruling in the Supreme Court can sometimes be devastating, and a company has to evaluate what it wants in the Supreme Court against what it can live with at the circuit level.

Because losing on the merits can cost far more than simply the money spent on briefing and argument, it is important to consider how good a job trial and appellate counsel have done to this point as well. You should be sure that trial counsel developed an adequate factual record to support the legal conclusion you want the court to reach. And you must make sure that appellate counsel has already raised the issue you want the court to address because a waiver argument can inflict serious damage on a petition, even if the waiver argument is ultimately unsuccessful. If an argument is even potentially waived, that weighs against moving forward. Though this factor is far from conclusive, it is an important consideration because counsel now must spend words in the brief and time in the oral argument fighting for credibility just because the other side raised waiver. That distracts the court from the merits issue it should focus on and it starts the petitioner off in a credibility deficit that must be made up in order to win.

Finally, you should consider the elements that may make a petition unworthy even if you win on the merits. A company must consider the potential loss of goodwill associated with having its name attached to an unpopular Supreme Court decision. For companies that rely heavily on consumer appeal, this is no small concern. Additionally, a petitioner must weigh the time it takes to work through the whole process. There are plenty of cases where an issue will be dead by the time a petitioner files a petition for rehearing, gets a ruling, files a petition for rehearing en banc, gets a ruling on that, files a petition for certiorari, and has the case heard on the merits. Courts can leave rehearing petitions pending for months on end, and it will usually take about a year or more for a Supreme Court case to get from filing a petition to a decision.

There is no magic formula for determining whether a petition for rehearing en banc or a petition for a writ of certiorari is worth filing. There will be cases where, despite failing all of the tests mentioned above, the cost of quitting is too great. And there will be many, many cases that pass all of the above tests and still the petition is not granted. But if you start with the presumption that the petition is not worth filing, and then evaluate the petition's chance of success and weigh that against the costs correctly, you can go forward more confidently or save your company a lot of money and a lot of headaches by not filing at all.