MAY IT PLEASE THE COURT

EFFECTIVE ADVOCACY BEFORE THE NEW JERSEY SUPREME COURT

by Peter G. Verniero

Although it will cite some rules, this article will not focus on the procedures for appearing before the New Jersey Supreme Court, such as the deadline for filing a petition for certification and a host of other requirements. Those procedural requirements are set forth in the Rules of Court, which should be reviewed, especially Rule 2:12.

Instead, this article will share a perspective on what makes a presentation effective before the Supreme Court—or not—as the case may be. New Jersey has many able trial lawyers who represent their clients effectively before juries or trial judges in civil or criminal cases. But an argument or approach that might fit splendidly at the trial level (like a bellowing closing argument or cutting cross-examination of a witness) might not succeed or have any relevance at all before the seven members of the state Supreme Court.

With that framework in mind, the purpose of this article is to answer commonly asked questions about Supreme Court advocacy, and to offer observations on avoiding pitfalls that occasionally cause even seasoned practitioners to stumble.

While this article may not break new ground, the points emphasized—as obvious as some might be—cannot be repeated enough. Indeed, doing a few simple things well is often the key to an effective and winning appellate argument.

Petitions for Certification

An appeal before the Supreme Court usually begins with a notice of, and petition for, certification. (These are separate documents.) Although there are other avenues to the Court—such as a dissent in the Appellate Division, which enables a client to seek an appeal as of right—the likeliest path to the high court is through the petitioning process.

A petition for certification is styled somewhat differently than a brief, but the elements of an effective petition are essentially the same as those of an effective brief.[1] Appellate briefs generally begin with a preliminary statement, which under the applicable Rules of Court must be no more than

three pages, with no footnotes.[2]

The analogue to the preliminary statement in a petition for certification is the "short statement of the matter involved."[3] This statement provides an excellent opportunity to offer the Court a roadmap of the practitioner's argument in plain, straightforward language. It allows the attorney to express what the case is really about, what relief is being sought and why the Court should hear the matter. Undoubtedly, the attorney will want to explain those topics in greater detail elsewhere in the petition, but they are worth noting in summary fashion in the short statement.

The main objective of a petition for certification is to persuade the Court to review the case. Although the petition rightly should touch on the merits of the dispute, the immediate challenge is to convince the Court that, irrespective of how it might resolve the matter, the case should at least be heard.

Rule 2:12-4, aptly titled "Grounds for Certification," should be cited at least once in the petition. It's worth quoting in full here:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

The prefatory phrase, "Certification will be granted only if...," conveys a sense of limitation regarding what constitutes grounds for certification. That sense is buttressed by the rule's last sentence: "Certification will not be allowed on final judgments of the Appellate Division except for special reasons." In that context, the "special reasons" criterion signals that certification will not be granted lightly.[4] Thus, the rule is bracketed by language suggesting that most petitioners face long odds in having their petitions granted.

Indeed, the statistics bear this out. In 1948, the first year the modern Supreme Court went into business, the Court received 15 petitions of certification. By contrast, in the 2016-17 term of the Court, the justices received 1,211 petitions, of which they granted 87—about a seven percent acceptance rate.

Those numbers are typical. They are mentioned not to discourage practitioners or their clients from seeking the Court's intervention when a case truly requires it, but to emphasize the reality of the task. The statistics highlight the importance of grabbing the Court's attention by a clear, straightforward introductory statement in the petition, one that underscores why the matter is of such significance that it should be selected for review by the justices—instead of the matters contained in the 93 percent of the other petitions they will receive and deny.

In this author's experience, among the strongest candidates for review are cases involving some confusion among lower courts regarding a significant point of law, cases in which there is a serious systemic issue that warrants the Court's supervision or cases in which a manifest injustice should be corrected. If the lower court decision is reported or published—meaning it can be cited as precedent in other cases—the petition's candidacy before the Supreme Court is enhanced. Conversely, a petition involving an unreported decision on a point of law that is not particularly unique or far reaching likely will be denied.

The justices are keenly aware that for the vast number of cases, the petition for certification represents the last chance at an appeal. As a result, they spend a considerable amount of time reviewing and voting on petitions. Every petition is discussed at one of the Court's conferences and put to a vote. Those tallies are available at the clerk's office so that practitioners can know precisely who on the Court voted to grant or deny a petition.

Three affirmative votes are required to grant the petition, whereas at least four justices must vote to decide the merits of the case as a ruling majority (this assumes no justices are recused and that all seven members ultimately will decide the question). That reality makes for some interesting math: A minority of justices can commit the Court to hear an appeal, but a majority of justices is needed to decide its outcome.

The math changes in the event the Court denies a petition, and a litigant asks the Court to reconsider that denial. Under that circumstance, a successful motion for reconsideration, like any other motion, requires an affirmative vote of four justices (one more than what was necessary to grant the original petition). Thus, if a petition for certification could not garner the necessary *three* votes to be granted, it will be difficult for the motion for reconsideration to garner *four* votes. This is one area in which, practically speaking, there are few second chances.

As noted, a dissent in the Appellate Division earns the client an appeal as of right to the Supreme Court (the practitioner still must perfect that right by formally filing an appeal with the Court). But be sure to understand that the issue before the Court in that circumstance is limited *solely* to the issue on which there was a dissent in the Appellate Division.

Put differently, do not fall into the trap of believing that, because the Court will be reviewing an issue on which there was a dissent below, the justices will be considering all other issues as well. To have those other issues heard,

the practitioner must petition the Court to do so. In such a case, a notice of appeal and a petition for certification must be filed, limiting the scope of each to the issues they respectively cover.

Procedural History

The procedural history should provide a short synopsis of how the parties reached the present judicial juncture. Avoid references to irrelevant proceedings. Unless the dispute itself involves a procedural issue, there generally is no need to recite every pleading and motion in the procedural history. Sometimes, for ease of reading and economy, it makes sense to combine the procedural history with the statement of facts.[5]

Statement of Facts

Write the statement of facts with care. Include every fact that will later be mentioned in the argument. As a corollary rule, avoid unnecessary facts. Always include facts that support the argument, but avoid being argumentative in the statement of facts. It is usually easier for the reader to digest facts presented in chronological order—the sequence in which they actually occurred.

Legal Argument

When making legal arguments, always remember that the audience is a set of jurists who will have the last word on questions of state law. In other words, do not be afraid, when justified, to urge the Supreme Court to overrule a lower court decision or modify or reverse one of its own decisions.

Address contrary law; the other side surely will, so practitioners should take the opportunity to explain things in their own way. Address contrary facts for the same reason. Avoid hyperbole, clever language and exaggerated pronouncements; they detract from a petition's credibility—and credibility with any court is supremely important.

Whenever possible, write in the active voice. This author prefers short, crisp sentences to overly complicated ones. Avoid adverbs and adjectives; those are usually junk words that merely editorialize and add little or no value to a petition. Similarly, avoid complex sentence structures. And, there is no reason for personal attacks on adversaries or lower court judges.

When appropriate, explain the public policy behind the law. It is critical to keep in mind that a case decided by the Supreme Court will have, in many instances, public policy ramifications beyond the four corners of the individual case. Be prepared to address those ramifications in the petition and, later, at oral argument, should the petition be granted.

Tone, Proofreading and Brevity

A petition's tone should be professional at all times. There is no need (or place) for humor or sarcasm. The tone should resemble that of a judicial opinion, albeit written from the client's perspective. And, of course, proofread the petition to avoid typos and misspellings. They distract the reader.

As already suggested, shorter sentences and paragraphs are easier to digest than longer ones. The author does not recall having ever seen a sentence longer than 50 words that could not be broken into two, or maybe three, smaller sentences. The same is true for paragraphs: Try to make them no more than a few lines of type.

Above all, a petition for certification should be brief. In fact, with a limit of 20 pages, it *must* be brief.[6] For some lawyers, this page limitation presents one of the more challenging aspects of writing a petition.

The practitioner can take comfort in knowing what many jurists have expressed, namely, that some of the most persuasive pieces of writing they encounter are short, not long. One way to avoid excessive length is to focus the argument on its core elements. In that respect, consider an observation by former Justice Helen Hoens: "You are far better served to focus your petition on a few points that truly meet the test for certification than to reiterate a long laundry list of issues on which you did not prevail before the Appellate Division."[7]

Oral Argument

In many respects, an effective oral argument will mirror an effective petition for certification. Other than the petition, oral argument is the only opportunity to speak directly to the Court. Make it count. Practice the opening statement. Consider asking a colleague who has not been involved in the case to conduct a moot court to help hone the argument to its most salient parts.

Just as one would in writing a petition, avoid humor and sarcasm at oral argument. Also, check dramatic flair at the door. Again, remember the audience: seven seasoned jurists who are trying their best to resolve a dispute, which, almost by definition, is novel and far-reaching in scope. In this author's mind, the best oral arguments are conversational in tone, meaning there should be no speechifying at the lectern.

And, do not forget to answer a justice's question—even if the answer is that the answer is not known. (Far better to admit lack of knowledge than guess at an answer.) If the practitioner is really stumped by a question that is central to the case, he or she should admit it and then turn to the chief justice and ask whether an answer should be submitted in writing.

The Court will provide an opportunity for a five-minute, uninterrupted opening statement. The statement can be an effective way to offer the Court a roadmap to the argument—much like the opener in a petition or in opposition

to a petition—and to emphasize the strongest points. One need not, however, consume the entire five minutes. If the job can be done in less than five minutes, yield the extra time back to the Court so the justices can begin their questions.

Similarly, if the practitioner is the appellant and has asked for rebuttal, he or she need not use the rebuttal time. Return to the lectern for rebuttal only when something significant truly requires a response. The least effective rebuttal is one that merely repeats an earlier argument. And, of course, if the practitioner wants a rebuttal, remember to ask for it at the outset of the opening statement; it is not automatic.

In closing, the last piece of advice is easier said than done: relax. It is understandable to be nervous when standing in the well of the Supreme Court, even if the practitioner has been there before. But if time has been spent properly preparing an argument, let the documentation, remarks and demeanor underscore the argument. The rest will be up to the Court to decide. ⚖

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Endnotes

1. Rule 2:12-7 (a) expressly provides that a "petition for certification shall be in the form of a brief, conforming to the applicable provisions of R. 2:6." But the rule then goes on to suggest content or section headings that differ from the typical brief, including a "short statement of the matter involved, the question presented, the errors complained of, the reasons why certification should be allowed, and comments with respect to the Appellate Division opinion."
2. Rule 2:6-2.
3. Rule 2:12-7 (a).
4. *See also* Pressler & Verniero, *Current N.J. Court Rules*, comment on R. 2:12-4 (2018).
5. As already noted, within the lexicon of Rule 2:12-7(a), what is typically found in a brief under "Preliminary Statement" can be found in a petition for certification under the heading "Short Statement of the Matter Involved." Similarly, text found under the legal argument heading in a brief can be found in a petition under the headings, "Errors Complained Of," "Comments with Respect to the Appellate Division Opinion" and "Why Certification Should be Allowed." The procedural history and statement of facts in a petition are comparable to those sections in a brief.
6. Rule 2:12-7(a).
7. Helen E. Hoens, Writing Persuasively for the New Jersey Supreme Court, *New Jersey Lawyer*, April 2009 at 12. Former Justice James Coleman also has published an informative guide to both effective brief writing and oral argument. *See* Hon. James H. Coleman Jr., Appellate Advocacy and Decisionmaking in State Appellate Courts in the Twenty-First Century, 28 *Seton Hall L. Rev.* 1081 (2000).