



Tips for Effective Petitions for *Certiorari*

by Jason C. Astle

The Colorado Supreme Court receives approximately 1,000 petitions for *certiorari* (cert petitions) every year. Although the Court's justices vote on every one of them, very few will be granted.¹ To help the justices handle the volume, law clerks review cert petitions and prepare objective memoranda that outline the issues presented in the case and the arguments advanced by the parties. The memoranda amount to a first look at the merits of the petition and are an important step in the petitioner's quest for *certiorari* review.

By providing "best practice" tips, this article is intended to assist both attorneys and *pro se* litigants wanting to file a cert petition with the Colorado Supreme Court, as well as those who are writing in opposition to a cert petition. Written from the perspective of a law clerk who reads petitions and writes memoranda for a Colorado Supreme Court justice, this article provides suggestions intended to help petitioners better argue their cases.

Filing Basics

Before analyzing the cert petition itself, a brief overview of the mechanics of filing one is necessary. *Certiorari* is a writ, granted at the Court's discretion, issued to review a lower court's decision. The rules governing appeals and writs can be found in the Colorado Appellate Rules, adopted by the Colorado Supreme Court, and in the Colorado Revised Statutes.² Generally, after a lower court enters a final judgment, a party may file a petition with the clerk of the Supreme Court, paying requisite filing fees.³ Petitions must be "succinct and shall not exceed twelve pages . . . [and] shall comply with C.A.R. 32."⁴

Except for *amicus curiae* briefs, there are only three cert petition-related filings with the Court: (1) the petition; (2) the opposition (filed by respondents), which also may include a cross-petition; and (3) the reply (filed by the petitioner).⁵ Denial of a cert petition typically ends the appeal process, unless the petitioner chooses to pursue a cert petition in the U.S. Supreme Court.

Framing the Issues

Before a petitioner can file a cert petition, he or she must create it. The most effective petitions are those that clearly identify the important issues needing resolution by the Colorado Supreme Court. The issues presented in the cert petition are, in many ways, the most important part of the petition. They frame the facts and the arguments and tell the Court in one sentence what will be decided if the petition is granted. Issues presented therefore should be narrowed to the most important

claims. If every conceivable issue is listed or repeated by putting the same issue in different terms, the petition may hide, or detract from, the most important or strongest issues presented.

Issues should be framed narrowly. This may be difficult, especially for attorneys or clients heavily invested in their litigation; however, there usually are some issues that should be dropped. Short or narrowly drawn issues tend to focus both the arguments and reader attention; long-winded or heavily slanted issues do not.

Clearly drawn issues also help the reader make connections between issues that should be reviewed together (such as a legal question and the error analysis that may accompany any determination of the law—especially if the error analysis can be resolved through review of a third but separate legal or factual issue). The issues presented always should be written as short statements beginning with the word "whether." For example:

Whether, in a matter of first impression, the district court's broad application of Colorado's Disrupting Lawful Assembly statute (C.R.S. § 18-9-108) violated Petitioner's fundamental rights, guaranteed by the U.S. and Colorado Constitutions, to free political expression at an election-related event.⁶

Use the Facts

Asking the Colorado Supreme Court to consider taking a case is different from arguing the merits of a case. Good cert petitions focus on the purpose of requesting *certiorari*: to clarify unsettled law, cure an appeals court split, address constitutional questions, or address matters of general legal importance. The Court wants to know whether this is the right case to address the issues raised by the facts of the case.

The best way to help answer this question is for the petitioner to provide (1) a clear statement of relevant facts, and (2) pro-

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cedural history. Both of these are required in all petitions.⁷ A series of disjointed factual assertions (as might be found in a complaint) are far less helpful to petition readers than a careful explanation of pertinent information, written to emphasize particularly important points about timing, relationships, or context.

By the same token, being concise means omitting unimportant facts (such as detailed dates, when timing is not an issue) that may distract the reader. A law clerk's main objective is to present a memorandum that connects the facts of case to the issues presented in the petition.

Effective fact statements are focused on the petition's purpose: to explain why the issue is worthy of review. Repeating fact statements focused on which side of the issue should prevail simply misses the point and makes it more difficult to determine whether the issue should be reviewed at all. For time-strapped attorneys, it may be tempting to cut and paste the court of appeals or district court brief into a cert petition, without substantially revising the argument or text. This is both obvious and unnecessary, because the earlier briefs may be read by a law clerk, along with the lower court's record.

All About Analysis

Legal analysis is the art of connecting facts with legal principles to create a reason for choosing one outcome over another. Therefore, it is good practice to start the analysis by spelling out the facts and giving the reader context. It also is necessary to state why the facts are important to resolving the issues. That way, when readers reach the legal analysis, much of the hard

work of understanding the issue is done, because they already know what they are looking for.

Petitioners should raise issues that matter and explicitly state why they matter, rather than assuming that the importance or relevance is obvious. Moreover, petitions should provide meaningful connections, not just a list of details followed by a list of rules. Petitions that describe these connections are more helpful to law clerks charged with reorganizing and reconstructing the petition's arguments into a concise memoranda format for the justices.

Petitioners also should discuss the lower court's decision or other conflicting decisions in a way that speaks directly to why the Supreme Court should review or even reverse the lower court's reasoning. The last paragraph of a clerk's memorandum usually sums up the merits of the issue; good petitions make it an easy paragraph to write.

Reasonable Over Right

Arguments that build on small logical steps are more effective than arguments built on inferential leaps made all at once with dramatic flair, indignation, or other linguistic fireworks. A cert petition is not a litigation brief. Unlike trial courts, which must decide all issues before them, the Supreme Court need not decide every issue.

Reliance on the righteousness of a position is particularly ineffective when writing for seven justices, each of whom has different experiences and approaches to answering judicial questions. The goal is to convince three justices to agree that the issue should be heard, a task made more difficult when the petitioner takes an absolute position with no reasonable alternative outcomes. Good petitions explore alternatives as if they are reasonable but—from the petitioner's point of view—are not supported by the law, logic, or notions of a fair and just outcome.

Proofread for Substance

Petitions capable of turning a nonexpert into an expert enable the law clerk to better understand and summarize the issues being addressed. Finding a proofreader unfamiliar with the applicable area of law can be useful in evaluating whether the petition is clearly written and analytical. This is especially true if there are terms of art or common practices unique to a particularly technical area of law, but whose meaning or importance are not apparent on their face. If the petitioner is an expert, he or she can gain credibility with the reader through a clear and cogent explanation that is easy to follow, rather than trying to impress the reader with complicated arguments or language.

Petitioners also can gain credibility by making sure the petition is logically organized, contains correct legal citation format, and is free of grammar and spelling errors. Avoid mistakes by having an editor who is not connected or familiar with the case proofread the cert petition before it is submitted.⁸ A disinterested proofreader can do more than just nitpick for typos; he or she can provide a perspective similar to that of a law clerk.

Respect

Both parties in a case want and deserve respect. The opinions of the court of appeals or the trial court also deserve respect. One way to annoy an impartial reader such as a clerk or judge is to insult other parties with *ad hominem* attacks or complain about all the "bad" things that happened during the proceedings. The Court would like to have confidence that, if it grants

the petition: (1) the petitioners are capable of arguing the case; (2) there is a suitable record on which to decide the case; and (3) it is the appropriate time to intervene.

Civility not only demonstrates the petitioner's credibility, but also the credibility of the arguments. Complaints can distract the reader from the important points by focusing on a problem the Court can do nothing to resolve (such as changing another party's past behavior). Petitioners should rely on reason and explanation, not insinuation or characterization, to challenge an argument or an opinion.

Using Quotes

A cert petition is most persuasive when it is made up of short, logically connected sentences contained in single-issue paragraphs that build up to a conclusion. Therefore, petitioners should try to limit the use of long block quotes in a petition. Forcing the reader to wade through long, single-spaced text increases the chances that he or she will miss the point or disagree with the best way to resolve the issue.

When block quotes are deemed necessary, petitioners should keep in mind that it is not the quoted material itself that is important, but what the quoted material means to the resolution of the issue. Therefore, emphasis should be placed where it has the greatest effect—before and after the quote, not on the quote itself. Block quotes on their own are neither helpful nor persuasive, so context and analysis always should be provided. For a clerk or judge picking up a cert petition for the first time, the meaning of the block quoted material may not be as clear as the petitioner may think.

Accurate Attributions

Petitioners should assume that a clerk will check citations to case law and the record and test them for accuracy. Do not misquote, misconstrue, misread, overstate, take out of context, or otherwise put “spin” on a cited authority or parts of the record—no matter how persuasive it seems. Manipulating information is a surefire way to lose credibility with petition readers.

Instead, petitioners should try to write with the expectation that, after reading the petition, the reader will conduct the same research as the petitioner. Petitioners should lead readers to the same conclusion they have reached, rather than dragging them along or tricking them into agreement. One way to accomplish this is through pinpoint citations to the pages where the important language may be found. The less time it takes a reader to determine whether a point is correct, the faster he or she can move on to the next point.

Criteria for Granting

The Colorado Supreme Court does not correct all errors made by lower courts; it only corrects important errors. Therefore, petitioners should point out why the case is important enough for the highest court in Colorado to decide to spend time on it, as well as how it meets the criteria listed in C.A.R. 21, 49, or 50. Including policy or jurisprudential implications that would result from a ruling favorable to the petitioner can be beneficial, because explaining those implications shows the depth of thought the petitioner has given to the issue.

Also, any unfavorable results that stem from an argument should be directly addressed. It is especially important to address any concerns the Court may have about overturning past precedent or legislative determinations. If negative implications are linked to the petitioner's desired outcome, letting the Court know there is a reasonable way to address the problem could help persuade the Court that granting the petition is worthwhile. If there is a way to solve the problem, tell the Court directly.

Finally, though it may be difficult or the client may insist otherwise, if the issues do not meet the criteria, are not of general importance, or have little chance of success, the petitioner must reconsider whether it is worth the effort and cost to submit a petition. Submitting an unmeritorious petition may needlessly prolong a case.

Follow the Rules

All cert petitions should comply with the appellate rules. Some of the rules have been mentioned in this article, but all are important. Petitioners should ask for the Court's approval before exceeding the word limit, violating formatting rules, or otherwise deviating from what readers expect when they receive a petition, and then do so only when it is absolutely necessary to the argument.

Lawyers with questions about filing a cert petition should begin with reading the appellate rules. Attorneys should contact the Court's clerks directly, rather than having a secretary call. Often, a useful answer to the lawyer's question requires some detailed information about the case. It is likely the explanation will be better understood by the attorney than the assistant.

Conclusion

The Colorado Supreme Court will grant *certiorari* whenever the merits justify review. A good cert petition helps identify those issues deserving the attention of the Court and can be an important part of the process through which petitions are reviewed and decided.

Notes

1. In fiscal year (FY) 2005–06, the Colorado Supreme Court received 868 petitions for *certiorari*, and issued seventy-eight opinions (including opinions on non-*certiorari* appeals), amounting to a grant rate of less than 10 percent. Colorado Judicial Branch Annual Report for FY 2006, available at <http://www.courts.state.co.us/panda/statrep/ar2006/fulldoc-compressed.pdf>.

2. See, e.g., CRS §§ 13-4-108 to -110.

3. Appeals *in forma pauperis* under C.A.R. 12 may be filed without payment.

4. C.A.R. 53.

5. *Id.*

6. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005).

7. See C.A.R. 53.

8. See K.K. DuVivier's “Scrivener” columns in *The Colorado Lawyer* for excellent legal writing advice. See, e.g., DuVivier, “Colorado Citations,” 34 *The Colorado Lawyer* 39 (March 2005), which includes discussion of the Colorado Supreme Court's citation conventions. ■