

## Choose Me! Maximizing Your Chances for Discretionary Review

By Virginia Hinrichs McMichael

A packed room greeted the panelists at the 2018 AJEI Conference in Atlanta for a breakout session focused on tips for increasing the likelihood of obtaining discretionary review. The informative discussion was punctuated by the sounds of a jazz band warming up in an adjacent conference room, the discordant notes adding levity to the otherwise businesslike session.

### The Panelists

The Honorable William Pryor, Circuit Judge of the U.S. Court of Appeals for the Eleventh Circuit, moderated a panel of judges and attorneys including The Honorable Steven David, Senior Member of the Indiana Supreme Court; Elizabeth Ryan, Staff Attorney with the Tennessee Supreme Court; and Mike Scodro, Esquire, a partner in the Supreme Court and Appellate Practice group of Mayer Brown LLP in Chicago.

### Procedures for Evaluating Petitions for Discretionary Review

Judge Pryor opened the discussion by noting that the percentage of discretionary appeals varies widely from one court to another. The Eleventh Circuit principally hears cases based on

mandatory review, with discretionary appeals, including petitions for rehearing en banc or for reconsideration of a panel opinion, comprising less than one percent of the docket.

Justice David described the Indiana Supreme Court as “small but wiry,” noting that each of the five justices considers every petition for discretionary review, after which they vote electronically. One vote in favor of review suffices to bring the matter to a conference of the justices. At the conference, each justice expresses his or her view, beginning with the most junior justice and ending with the most senior. The process from the filing of an application to a decision of whether to grant review is completed in no more than one month.

Justice David tantalized the attendees by revealing “the world’s most valuable checklist” for obtaining discretionary review. Although his checklist was not distributed, Justice David agreed to share it with readers of *Appellate Issues*, and it appears in the box on page 4.

Elizabeth Ryan stated that in the Tennessee Supreme Court, staff attorneys are the gatekeepers charged with reviewing all applications for discretionary review. Staff attorneys draft

memos for the justices and confer among themselves before presenting a memo to the justices. The justices convene twice a month to consider discretionary appeals. Two of the five must agree before an appeal will be granted.

The Tennessee Supreme Court staff attorneys categorize their memoranda on the merits of granting review as follows: “C” cases are those for which review is unwarranted; “B” cases are those requiring further consideration and research; and “A” cases are those recommended for appellate review. Capital cases and cases involving termination of parental rights are always “A” cases.

Ryan stated that an appellate attorney’s goal should be to avoid “the ash heap of a C memo.” The keys to avoiding such a fate are to know your audience, eschew “fluff,” and identify a real legal issue requiring resolution.

### **Front-Loading the Petition for Review**

Mike Scodro, a seasoned appellate practitioner with experience as a Supreme Court clerk, opined that the key to a successful petition for discretionary appeal is to front-load the petition so the reader’s first impression is that the issue warrants appellate review. The first fifteen minutes a clerk spends reviewing an application are critical. A successful petition will promptly address three key questions: (1) Is there a split? (2) Is it important? and (3) Was the underlying decision wrong? The weight given to the third question – was it wrong? – will vary from one

court to another so it is important to know your audience.

Justice David concurred with Scodro on the importance of getting in the key points upfront, noting: “Trial court judges have short attention spans because they are overwhelmed. Appellate court judges have short attention spans because they can.”

The panelists agreed that appellate practitioners generally understand the importance of getting the reader’s attention from the beginning. Trial lawyers who are accustomed to focusing on the facts, however, may get bogged down in the facts and procedural history and lose the reader.

### **Amicus Briefs in Support of Discretionary Review**

There was no consensus regarding whether amicus briefs in support of discretionary review affect the outcome. Justice David opined that five judges would give you five different opinions regarding the efficacy of amicus briefs.

Elizabeth Ryan stated that she finds amicus briefs to be unhelpful in deciding whether to grant discretionary review. Mike Scodro noted that the Illinois Supreme Court expressly prohibits amicus filings in support of petitions for discretionary review. The panelists agreed that for an amicus brief to tip the scales, it must address the central issue for review and say something other than “me too.”

Scodro pointed out that in the United States Su-

preme Court, in cases where there are four or five amici in support of a cert petition, there is a 50% likelihood that the court will grant certiorari. It is difficult, however, to assess whether the increased likelihood of a successful cert petition is the result of the amici filings, or whether cases that are intrinsically meritorious of SCOTUS review generate more interest among amici. Regardless of a causal connection between amici filings and grants of certiorari, Scodro believes that amicus briefs can be helpful in highlighting to the Court the consequences of inconsistencies among the circuits.

### **The Keys to a Successful Petition for Discretionary Review**

The panelists agreed that successful petitions for review have certain common characteristics. Justice David reminded the attendees of the importance of ethics, professionalism, and civility, and the need to avoid being combative or caustic when referring to opposing counsel. Justice David stated that if he is reading a petition that crosses the line of professionalism, he will stop reading.

Elizabeth Ryan emphasized the importance of focusing on the big picture. A petition for review must identify a compelling legal issue and inform the court how that issue fits into the big picture. In some instances, her research reveals that the trial courts are deciding the same issue differently. An effective petition will identify and make those inconsistencies known to the court.

Ryan also stressed the importance of preserving issues for appellate review. She said that some courts have an unwritten list of the issues they want to consider, but if the issue was not preserved, the court will have to pass on the case.

Mike Scodro pointed to the importance of having a clean legal issue that is not fact-specific. The issue should be one that will arise in other cases. Also, be sure to identify whether there are liberty issues at stake or a significant amount in controversy. For example, if the case involves a Fourth Amendment search, statistics about the number of vehicle stops in that jurisdiction will demonstrate the importance and broad application of the issue for review.

Judge Pryor also stressed the importance of focusing on the core issue. Petitions that spend pages regurgitating the standard and then putting forward a laundry list are generally ineffective. Also, be sure to identify any relevant policy issues.

One good tip is to study successful petitions for review filed in your court to learn what arguments were effective in obtaining discretionary review.

### **Petitions for Rehearing En Banc**

Judge Pryor stated that the Eleventh Circuit grants rehearing when it appears likely that the panel made a mistake. It is very rare for the court to grant rehearing en banc and then affirm the panel decision.

Accordingly, an effective petition for rehearing en banc will show the court that the panel erred and that the decision is contrary to the court's other decisions. The petition will also demonstrate how the issue will affect other cases in the circuit.

### **Merits of a Reply to a Petition for Permission to Appeal**

Judge Pryor opined that the court appreciates a reply to a petition when the petition is misleading and opposing counsel seeks to set the record straight.

Elizabeth Ryan stated that the Tennessee Supreme Court also appreciates receiving a reply and will sometimes request one. In some cases, opposing counsel will respond that the issue is important, and the court should grant review.

All in all, this was an informative and entertaining panel with a lot of good advice. Thanks to all four panelists and the Duke Law School team for making it possible.

## **JUSTICE DAVID'S CHECKLIST FOR DISCRETIONARY REVIEW**

Answering "yes" to the following questions will increase your chances for discretionary review. Answering "no" could decrease your chances.

1. Have I thought about how my case extends beyond my client, i.e., does this case have broad impact or is it likely to reoccur?
2. Have I been candid about the facts? (You can be creative with the law; don't try to be creative with the facts. You will lose credibility.)
3. Have I narrowed the issues and focused only on the strong ones? Have I avoided needlessly regurgitating the same issues I raised in the Court of Appeals and avoided burying meritorious issues?
4. Have I avoided unnecessary distractions and cheap shots/snarky comments directed at the other side or (gasp!) the lower court(s)?
5. Is my brief as clear and concise as it can possibly be?

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