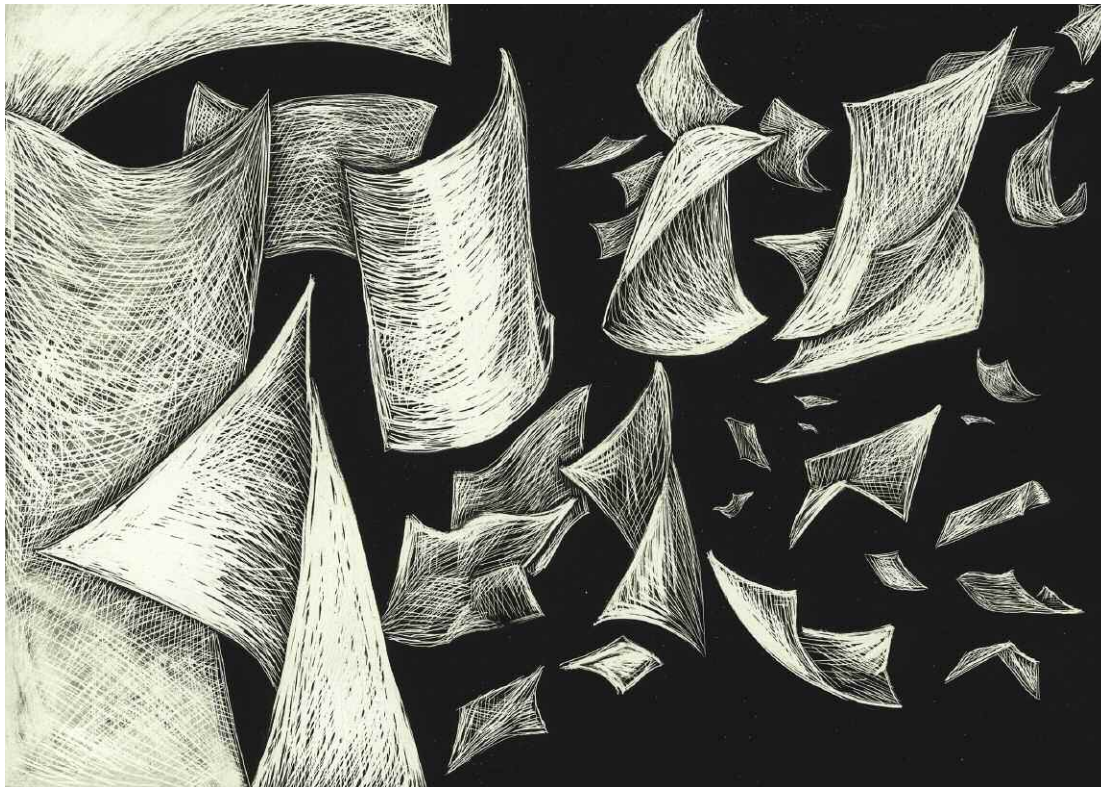


Petitioning for Further Review after Losing a Federal Appeal

by Tillman J. Breckenridge



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. It is usually too late to salvage a case once the court of appeals has ruled. The Supreme Court grants *certiorari* in about 1 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 4 percent. In most circuits, it is just as tough 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 pursue your client’s interests wisely.

Elements of a Petition for Rehearing 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 automati-

cally 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 rehearsals are also very rare. Indeed, the rules include express discouragement against filing a petition. *En banc* hearings are "not favored and ordinarily will not be granted." FRAP 35(a). They will only be granted under one of two circumstances. 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. But 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. Identifying an intra-circuit split allows the petitioner to appeal to the judges' base senses of judicial efficiency and fairness of the process. Thus, the first question you have to ask yourself when considering filing a petition for rehearing *en banc* is whether there is an intra-circuit conflict.

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. 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 (as noted in FRAP 35), it is *not* by itself a ground for a petition for rehearing. Judges will generally disregard a petition that overemphasizes other circuits' decisions. While appellate courts should generally avoid creating circuit splits, it is not the

court of appeals' job to correct circuit splits. That is the role of the Supreme Court.

If there is an intra-circuit conflict, the next question you must ask yourself and counsel is how simple the conflict is to grasp. A petition for rehearing *en banc* starts with a short statement, usually only a paragraph or two, stating the reason that rehearing is necessary. FRAP 35(b)(1). You must be able to grab a judge's attention with just that statement. After that, counsel has less than fifteen pages to fully explain the facts of the case, the intra-circuit conflict, and the issue's importance. Thus, you 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, you must be especially careful to break the complex issue down into simple terms.

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. You must explain to the court why the panel's error will not only damage your client, but thousands of other similarly-situated parties, lead to strained dockets and confused trial judges, or 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 client, will not be a recurring problem, and will not have any secondary effects on the public.

Despite its apparent 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. 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 *certiorari* 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 *certiorari* 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 *certiorari* petition is usually not advisable.

There are, of course, exceptions to the need for a circuit split. Occasionally, a circuit split is impossible or so highly unlikely that requiring a circuit split would make the lower court’s decision effectively unreviewable. Also, there are some cases that simply strike the Court as being important enough to warrant immediate review.

One final consideration to determine the strength of your potential *certiorari* petition is whether it will attract amicus support. 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.

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. 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. The first issue is likelihood of success when the case is reheard *en banc* or on the merits of the case in the Supreme Court. You must take an objective 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 risk and 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. If you represent a national organization, you have to consider how much damage will occur if you lose an issue in the Supreme Court and suddenly a legal rule that had hurt your client in just one part of the country now hurts everywhere else.

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 of a record and set of arguments you have developed as well. You must make sure that you have 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.

Finally, you should consider the elements that may make a petition unworthy even if you win on the merits. For instance, a public figure or company must consider the potential loss of goodwill associated with having its name attached to an unpopular Supreme Court decision. Additionally, a petitioner must weigh the time it takes to work through the whole process.

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 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 client a lot of headaches.



Tillman J. Breckenridge is a partner at Bailey & Glasser where he concentrates his practice on appellate litigation at all levels, serving the needs of all the firm’s clients. He has represented individuals, companies, organizations, and foreign, state, and local governments before the United States Supreme Court and the US Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, District of Columbia, and Federal Circuits as well as many state appellate courts. Additionally, he is an adjunct professor of law at the William & Mary School of Law, where he directs the Appellate and Supreme Court Clinic.