

Spokane County Bar Association

Supreme Court and Appellate Practice CLE

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Supreme Court Procedure

By Justice Richard B. Sanders

I. I Hear You Knockin', But You Can't Come In

Of 1,255 total filings in 1994, only about 150 were ultimately decided on the merits by the Washington State Supreme Court. Therefore, the odds against the Supreme Court hearing your case are approximately ten to one, considerably worse than the odds a party may actually prevail if review is accepted (see attached).

There are four different sources of cases for Supreme Court review:

- (1) Direct review from the trial court;
- (2) Discretionary review from the Court of Appeals;
- (3) Certified review from federal courts; and
- (4) Original actions commenced in the Supreme Court
(mandamus against state officials, etc.).

By far the most likely source are petitions for discretionary review from the Court of Appeals. Historically, approximately sixty percent of the filings are criminal matters although in 1994 the bulk of petitions for review actually accepted were civil.

In theory discretionary review is most likely for cases involving important and unsettled issues of law, particularly where the Court of Appeals has arguably misstated the legal rule in a published opinion. RAP 13.4. The Supreme Court gives no deference to the Court of Appeals! Don't be afraid to take exception—that is what the Supreme Court is there for.

Therefore, to avoid stumbling at the threshold of the Temple of Justice, the astute lawyer is well advised to cast his petition in the form of important

LEGAL issues which are either (1) undecided or (2) decided wrongly by the Court of Appeals. Conversely, arguments based upon the insufficiency or inadequacy of the evidence will almost surely result in the denial of the petition. Recall the Supreme Court is, at least in theory, not an error-correcting court. The rule of law is the important thing. Many may file, but few are chosen.

II. Procedure to Consider a Petition for Review

The Supreme Court routinely receives and considers between fifty and sixty petitions for review each month. These petitions are normally set for a department hearing to be conducted three or four months later.

Supposedly the clerk assigns each new petition alternately to Department I and then Department II. Justices Madsen, Guy, Talmadge, and Dolliver sit on Department I, whereas Justices Alexander, Johnson, Smith, and Sanders sit on Department II. Chief Justice Durham sits on both departments. Petitions for review are granted or denied in the department ONLY by unanimous vote. If the vote is not unanimous, the matter is usually set over to the following month's en banc conference for consideration by the entire court.

Upon receipt of the petition and response, if any, a staff attorney from the commissioner's office is assigned responsibility to prepare a screening memo normally between one and six single spaced pages. The screening memo is intended to summarize the facts and issues presented and analyze whether the petition should be granted according to the criteria set forth in RAP 13.4. The memo makes a recommendation. Matters in the briefs which the staff attorney believes are extraneous are not set forth in the screening memo.

Over ninety percent of the screening memo recommendations are "deny" with the remainder being either "no recommendation" or, in the case of three or four cases per month, "grant." These recommendations are considered; however the description and analysis are more important.

Approximately two weeks before a departmental hearing the screening recommendations are distributed to each judge in the department and organized in three ring binders. Also distributed are all petitions for review, responses to the petition for review and, in many cases, appellate briefs.

These petitions are then divided between the four sitting justices on each department, each justice taking his or her turn to prepare a brief oral report to the other department justices on the merits of the assigned petitions with a

recommendation. The Chief Justice also takes a couple. These oral recitations usually take between one and five minutes after which each justice on the department is given an opportunity to make further comment in conjunction with an up or down vote.

Ninety-five percent of all petitions are unanimously granted or denied by the department. Even if the initial vote taken by the department members is not unanimous, a unanimous vote to review is often achieved if one or more justices feels strongly that that is the appropriate outcome.

In the course of considering twenty-five or thirty petitions for review, the department may deadlock on one or two. These cases are continued to the en banc conference for consideration by all nine justices. The reporting department justice reports to the en banc conference on the petition. The principal department justice in opposition reports on the opposing point of view.

This procedure may provide a subtle incentive to reach unanimous agreement at the department level, i.e., to avoid the en banc.

The system allows the single justice in the department to maximize his or her influence for cases which are randomly assigned to that department; although any justice on one department has a minimum influence on the disposition of cases assigned to the other department.

Although justices assigned to one department may attend the conference for the other department, this is rarely done. A justice assigned to one department will not ordinarily receive screening memorandums pertaining to cases assigned to the other department, unless he or she specifically requests them. However, if a justice becomes aware of a specific case assigned to the other department which he or she believes warrants a particular action, that justice is perfectly free to express a preference in any manner he or she sees fit. However, as a practical matter, this is rare—if for no other reason than the first priority must be preparation for one's own departmental hearing.

Comment: One has an infinitely better chance of getting a petition for review granted if at least one justice in the department to which the petition has been assigned assumes an advocacy role in support of review because normally practically all petitions are denied.

III. Miscellaneous Matters

Department conferences are held once a month. Besides considering petitions for review, the department also considers cases which are filed directly in the Supreme Court on its "transfer-retain" calendar. Although there may be twenty-five to thirty petitions for review, typically there are a half dozen or less cases which are filed directly. For these cases the court must decide whether to retain jurisdiction or transfer to the Court of Appeals. Perhaps because attorneys have sensed the importance of issues when appealing directly to the Supreme Court, a higher percentage of these cases are retained than petitions for review are granted. One consideration is whether or not the case will "end up here anyway," in which case it is thought probably better to retain review initially.

There are also a number of other miscellaneous matters considered involving the expenditure of public funds for indigents, motions to extend time, etc.

IV. En Banc Conference

Once a month all nine justices meet in an en banc conference. Matters which are not resolved at the department conference are passed to the en banc conference such as petitions for review which have not been either granted or denied unanimously by the department. The court also considers a variety of administrative matters at the en banc conference which usually lasts two to three hours. The junior justice (me) takes notes. The Chief Justice usually sets the agenda for the en banc conference although she will put items on the agenda as requested by other members of the court.

Circulation assignments are usually the first item to be considered at en banc, e.g., are judges getting their opinions out promptly, etc. Committees also report to the en banc conference, such as the Rules Committee, which may propose a rule be published for comment or that a rule be suspended or repealed.

Cases potentially subject to disposition by summary per curiam opinion are considered at en banc, which is a practice the Supreme Court is attempting to encourage. A per curiam opinion is unanimous and is quickly decided without oral argument under circumstances where (1) Supreme Court review is appropriate but (2) the answer is obvious. Typically the commissioner's office drafts a per curiam opinion pursuant to en banc direction under the control of the assignment judge.

Substantive death penalty case motions are also decided at en banc after a report from the assignment judge. Death penalty cases have a life of their own

and are subject to special expedited procedures and special rotation so each justice must take his or her turn so to be preassigned the same number of death penalty cases as any other justice.

Additionally, the en banc conference takes up other miscellaneous matters which are appropriately presented to the entire court, such as recall petitions, attorney discipline, motions to modify commissioner rulings, motions for discretionary review, etc.

V. Determining Cases on the Merits/Oral Argument

Cases selected for review are randomly assigned to particular justices for the preparation of a prehearing memorandum. See assignment procedure attached.

The preparation of this prehearing memorandum is primarily the responsibility of one of the two law clerks of the assignment judge who prepare the memorandum subject to the assignment judge's approval for distribution to the court approximately two weeks prior to oral argument. This prehearing memorandum summarizes the facts, the issues, provides an independent legal analysis, and recommends how the case should be decided. Normally, however not necessarily, the assignment judge concurs with this recommendation; but (rarely) he or she may change his or her mind after oral argument.

Who the assignment judge is is a closely guarded secret of the court. To make attorney guesswork more difficult, law clerks in addition to the assignment justice's law clerks typically attend the oral argument.

After oral argument in a morning or afternoon, all justices retire to the conference room for deliberation. The assignment justice makes a ten to twenty minute presentation regarding the nature and recommended outcome of the case at which point the Chief Justice invites an opposing view. Normally the assignment judge writes the majority opinion or, if he is in the minority, writes the dissenting opinion. Traditionally, the first justice to speak up in opposition is assigned the responsibility to write the opposing point of view.

If there is no opposing point of view immediately expressed, each of the justices seated around the conference table is polled (in a counterclockwise direction from the assignment justice), states his or her views, and tentatively votes on the case. Once again the rule holds true that the first justice to express an opposition point of view is given the writing assignment. Justices are seated at the conference table by order of seniority in the same order that they are

seated at the bench with the Chief Justice at the head of the table, Department I on the left, Department II on the right.

This is probably the first and last time all members of the court will personally meet to consider the merits of a particular case. The discussion will typically take half an hour.

Usually within two months the justice assigned the responsibility to write the majority opinion will circulate his opinion. Sometimes justices will change their vote. This may result in the justice who had previously been assigned the dissent being reassigned to write for the new majority and vice versa.

The circulation process is not complete until each justice has signed a majority, a dissent, or a concurring opinion. Simply dissenting without writing or signing an opinion is not permitted. In unusual circumstances of delay the majority opinion may be published before the concurring or the dissenting opinion, so the parties will know how the case turned out.

As previously noted, a calendaring system is maintained so that it can be readily determined how many days have elapsed from the time a justice received a writing assignment until he or she has completed that writing assignment. The clock starts running on the date of the oral argument for the majority opinion whereas the clock starts running for the dissenting opinion on the date the initial majority opinion is first circulated. Of course, any justice can change his or her mind before the final publication date.

VI. Some Comments About the Process

The practice of assigning a particular judge to take particular responsibility for a particular case prior to oral argument is not universally shared amongst appellate courts. While a particular judge becomes very familiar with a case prior to oral argument under the Washington system, other justices who are not so assigned lack a similar incentive and maybe relatively confident that they will not be required to write an opinion on that case unless they disagree with the assignment judge. The system does insure, however, that at least one member of the court has given the case an in-depth review beyond the scope of the briefs presented by the parties. This practice makes briefs more important and oral argument less important, or so it seems to me.

Another interesting feature of the Washington system is that the screening memo manner of selecting cases for review, and deciding them on the merits, emphasizes a focus on basic legal principles. Therefore, the appellate lawyer

might be well advised to brief and argue his case accordingly, i.e., de-emphasize emotional arguments, rather structure his argument around what he should characterize as fundamental, enduring, and rational legal principles as illustrated by specific decisions. It might be best to avoid undue emphasis on the specific decisions absent identification and analysis of the important principles with which these decisions may or may not be consistent.

The appellate advocate might be better off to urge a particular decision be overruled for rational reasons than distinguished for irrational ones. If a "bad" case is not overruled, it controls—or so it seems to me.

In other words, do not allow individual trees to obscure your view of the forest. The Supreme Court sees itself as the final custodian of fundamental legal principles which only fortuitously find application to your particular case. Focus on the big picture—will the rule you propose for your case do justice to the basic legal principle which should be promoted?

In all your dealings with the Supreme Court, keep to the point, and be concise. The shorter your brief, the fewer your issues, the better the chance the judges will focus on what you think is important, because you have given them no choice. Easier said than done; however, do not feel guilty that your brief is shorter than the legal maximum—it may be that much more effective as a result.

During oral argument, remember that nine judges will decide your case, not just the Chief Justice who is seated right in the middle. Don't be afraid to look at the far ends of the bench. The chances are just as great that one of them is the assignment judge as any other justice. As a matter of fact, the Chief has fewer assignments.

Do not be afraid to use a chart or graph to support your oral argument, however, if you think a near-sighted judge (like me) may not be able to read it, consider passing out a handout with the same information.

Plan your oral presentation five or ten minutes less than your time allotted so that you will make sure to cover the important points while being able to answer questions that may be directed to you. By the same token, recall that ninety percent of the horsepower of your case must be in your brief because that is the basis upon which the assignment judge writes his prehearing memorandum, that is what the court studies, and that is usually the basis upon which the case is decided. A clear, concise, and focused brief is the best tool you have on appeal.