

The Arizona Supreme Court Petition for Review

Art, Science and More

BY THOMAS L. HUDSON

Although most cases do not warrant the attention of the Arizona Supreme Court, if your case does, preparing a well-crafted petition for review will improve the chances of your case being heard. This article discusses the art and science of preparing a petition, with the goal of helping you to decide whether to recommend to your client filing a petition, and how best to “maximize your chances of obtaining review if the decision is made to file.





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Deciding Whether To File

A petition should be filed only after carefully considering the likelihood of its success.

During the past five years, the Supreme Court has considered, on average, 759 petitions per year. It has, on average, granted review in 19.4 cases per year. That means the Court grants review in only approximately 2.6 percent of cases. Other things being equal, you have a 1 in 38 chance. The good news: The Court grants review in approximately 3.9 percent of civil cases (a 1 in 26 chance). The bad news: The Court grants review in approximately 1.5 percent of criminal cases (a 1 in 66.6 chance).¹

Pursuant to Arizona Rule of Civil Appellate Procedure (ARCAP) 23 (Rule 23), the grounds for granting a petition “include, among others, the fact that no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.” ARCAP 23 (*see also* ARIZ.R.CRIM.P. 31.19(c)(3) (setting forth the same criteria for criminal

cases)). Although our Supreme Court has, over time, varied with respect to how strictly it construes these non-exhaustive criteria, the Court currently views its business as much more about “lawmaking” than “error correcting.” In other words, the Court takes the Rule 23 criteria seriously—and so should you.

Accordingly, when considering whether to file a petition, assess whether your case presents arguable grounds for review under Rule 23. Such an assessment should include considering the following:

- Does the case present an issue that is likely to affect the rights of others?
- Does the case present an issue that is recurring in the lower courts in an area where further guidance from the Supreme Court would be helpful?
- Does the Court of Appeals’ decision conflict with another Court of Appeals’ decision or with a decision from the Arizona Supreme Court?

- Is there something about the case that is likely to pique the Court’s interest because, for example, it squarely frames a legal issue that one or more Justices has “hinted” might be appropriate for clarification in prior decisions?
- Is the case a good “vehicle” for review? For example, is the factual record fully developed? Is the issue squarely presented? Was the lawyering well done below?
- Does the case present an issue already pending before the Court in another case?
- Is there some reason why the client might want the Court of Appeals’ opinion depublished absent a grant of review, and can you point to something in the opinion that might interest the Court?

In sum, take a good hard look at whether there is something in your case that the

Court should address that goes beyond the particular dispute between the parties. That is not to say that the Court is never interested in cases involving an egregious legal error that results in an injustice, but focusing on case-specific error that affects only your client will rarely pique the Court’s interest.²

A Little Help From Your Friends

In addition to scrutinizing your case, consider early on during the process whether there are other groups or parties that may be affected by your case and who might be interested in participating as *amicus curiae* during the petition stage. If the case truly presents an issue of statewide importance, there will likely be others affected that would like to see the Court take review.

Although an *amicus* brief that merely parrots the party’s brief offers little value, the Court may find helpful an *amicus* brief that provides a “real world” perspective and explains the broader impact of a deci-

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sion on an industry or group. At the petition stage, an *amicus* brief must be “filed no later than 21 days after the filing of the response to the petition for review.” ARCAP 16(b)(1).

Drafting the Petition

If you decide to file a petition, do not merely cut and paste the arguments made in your Court of Appeals’ briefs. Instead, focus on the factors you identified during your initial evaluation. Ultimately, the petition should be written in a manner that grabs the Court’s attention and has the Justices wanting to grant review.

In pitching your case, however, stay true to the record. Resist the temptation to stretch your case into another, more interesting one. The fact is, your petition will be scrutinized by five very smart Justices, their very bright law clerks who are eager to find flaws in the petition, and a group of very experienced and talented staff attorneys who have seen many, many

petitions. You will not fool the Court into believing your case is something that it is not.

Also, resist the temptation to characterize the Court of Appeals’ decision as an outrage or idiotic (even though your client may prefer that approach). Although including such hyperbole in an early draft may have a cathartic effect, ultimately treat the decision below as incorrectly deciding an interesting and important question.³

With your focus honed, schedule ample time in the drafting process for editing and re-editing to make your petition as short and concise as possible. Toward that end, avoid unnecessary legal citations stating obvious propositions (e.g., summary judgment standard). Some of the best and most effective petitions are short. Reserve the more exhaustive discussion of the issues for the supplemental brief (if review is granted).

Lastly, if the case warrants it, have someone with fresh eyes who knows nothing

about the case—but something about how the Arizona Supreme Court works—review the petition. For better or worse, lawyers almost always become convinced that their side of the case should have prevailed at the Court of Appeals. As a consequence, those litigating the case often develop blind spots for certain issues that may stand out to someone unfamiliar with the case who reads only the Court of Appeal’s decision. If possible, take advantage of that fresh perspective.

Substantive Components

Rule 23 provides that, “The petition and cross-petition shall contain” three concise components: (1) the issues to review (and any other issues the Court may need to decide if review is granted), (2) the material facts (with record citations), and (3) “[t]he reasons the petition should be granted.”⁴ Any request for attorneys’ fees must also be made in the petition. Although not required, a good petition

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should also include an introduction and conclusion. Each of these substantive components is discussed below.

Introduction

Include a brief introduction that provides an overview of the case, including the nature of the dispute, the Court of Appeal's holding, and your initial pitch for why the case warrants the Supreme Court's


attention. The introduction should put the balance of the petition in context. A Justice who reads only the introduction should want to grant review.

To best serve its purposes, however, keep the introduction short (ideally one page). Although it is the first part of the petition, consider drafting the introduction after developing the structure of the rest of the petition. Then, revisit the introduction after honing the rest of the petition. Doing so helps crystallize the introduction so that it includes only the most important points and themes.

Issues Presented for Review— The Right “Hook”

In many cases, the statement of issues can effectively determine whether the Court grants review. In fact, this is the only section of the petition that will be included, verbatim, in the memorandum prepared about your case by a staff attorney.⁵ Accordingly, think strategically about the issues and draft them carefully.

Keep the statement of issues concise, easy to understand, and interesting. Use more than one sentence, and avoid long, convoluted sentences. Also, draft each issue in a manner that suggests it has broad application and is important; making an



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issue too fact-specific suggests it is unique and not likely to recur. Finally, use a style that is likely to grab the Court's attention. An uninteresting statement of issues makes it easier to overlook compelling arguments made in the balance of the petition.

Many appellate lawyers follow the “deep issue” method promoted by Bryan Garner.⁶ That method sets forth “the ultimate, concrete question that a court needs to answer to decide a point your way.”⁷ The issue is “deep” in the sense that it “is the final question you pose when you can no longer usefully ask the follow-up question, ‘And what does that *turn* on?’”⁸ It generally follows the form of a syllogism, as in the following example:

Municipalities are prohibited from taxing “interstate” telecommunications services. *See* A.R.S. § 42-6004(A)(2). A telecommunications service is generally considered “interstate” if the underlying transmission begins in one state and ends in another. Did the Court of Appeals err by finding that three separate and distinct interstate transmissions could be combined into a single intrastate transmission “loop” notwithstanding that no such loop exists in the physical world and the statute does not provide for combining

transmissions in such a manner?⁹

In terms of the number of issues, keep it to the minimum (ideally one or two compelling issues). Although in exceptional cases you may need to raise several major issues, a petition with too many issues suggests that none is compelling.

In framing the issues, also think strategically about their scope and how that may

affect the manner in which the case is decided. For example, a narrow issue may fit the Rule 23 criteria better, but it also may require a remand even if the Court rules in your client's favor.¹⁰ In contrast, presenting multiple issues may allow the Court to resolve the case without further proceedings, but that may also decrease the chances of the Court granting review.

Lastly, stick to issues actually decided by the Court of Appeals. Although you may be able to frame a great issue for review, it will not be very effective if the Court of Appeals did not actually resolve it.

Additional Issues Presented (but Not Decided)

Rule 23 further specifies that a “petition shall also list, separately and without argument, those additional issues that were presented to, but not decided by, the Court of Appeals and which may need to be decided if review is granted.” Include in a separate section any issues presented below but not reached by the Court of Appeals, such as alternative theories or issues otherwise not reached due to the way the Court of Appeals decided the case. Failure to do so may result in the Court treating the issue as abandoned.

Although some lawyers worry that listing additional issues may discourage the Court from granting review, the opposite is more likely true. If the Court would rather not reach an issue in the first instance, it can remand to the Court of Appeals.¹¹ On the other hand, if it thinks an issue not decided is worthy of the Court's attention, it may take the case to reach the undecided issue.

Material Facts and Procedure

Include in a separate section the material facts and procedural background pertinent to the petition. By the time a petition for review is filed, a case often has a long history, but most of it no longer matters. Focus on the facts essential to putting the issues in context, and those necessary to help the Court understand the significance of the case. Also include any important procedural history such as the lower court rulings concerning the issues presented for review.

While drafting the facts, also keep in mind the standard of review. If, for example, the case arises from a jury verdict, the Court will view the facts in the light most favorable to upholding that verdict. If you cannot convince the Court to take the case without stating the facts in a manner contrary to the standard of review, reconsider whether to file a petition.

Reasons To Grant the Petition

Devote a separate section of your petition to the "Reasons to Grant Review." This section is the meat of the petition, and it is where you should make your case and advance your best arguments.

Although stylistically similar to other appellate briefs, the central focus is different. An appellate brief focuses on trial court error (or the lack thereof). The petition must convince the Court that the case presents important legal questions warranting "institutional" review (not merely that error occurred). So again, Rule 23 (or ARIZ.R.CRIM.P. 31.19) should be your guide. For example, if there truly are conflicting lower court decisions, make that a central focus. If the

issue is arising with some frequency—or presents an issue in common with another pending petition—note that. If there is a dissent, explain why the majority erred, and why having the Supreme Court resolve the issue is important. In other words, explain why the issue is one of statewide importance and affects other parties.

You also should demonstrate (expressly or implicitly) that the Court should decide the issue now (rather than allowing the issue to percolate further in the lower courts), and that your case presents a good "vehicle" for review (because of a well-developed factual record, etc.). Although part of the pitch is often also that the Court of Appeals erred (on an issue of statewide importance), a petition focusing merely on appellate court error will at best secure depublication of a published opinion (although depublication may be an independent goal).

Requests for Attorney's Fees and Costs

Persuant to ARCAP 21(c), "If a petition or cross-petition for review is filed, a request for allowance of attorneys' fees *shall* be made in the petition or cross-petition for review or response thereto" (emphasis added). Accordingly, include a separate request for attorneys' fees in the petition for review, or include the request in the conclusion. Also include the relevant statutory authority and/or contractual provisions pursuant to which you plan to claim fees. (Failure to do so may preclude the recovery of any fees.)¹² Lastly, include a request for costs.

Conclusion

Close with a short conclusion. If the petition is short, a simple sentence may do. Alternatively, consider recapping the issue or issues presented and the necessity for granting review. As noted above, you also



In memory of our friend and colleague.

Paul S. Ruderman

August 29, 1957 – August 2, 2012

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may include in this section a request for attorneys' fees and costs (citing the underlying authority).

Additional Petition Components

In addition to the above substantive components, the petition should include several non-substantive components.

Caption

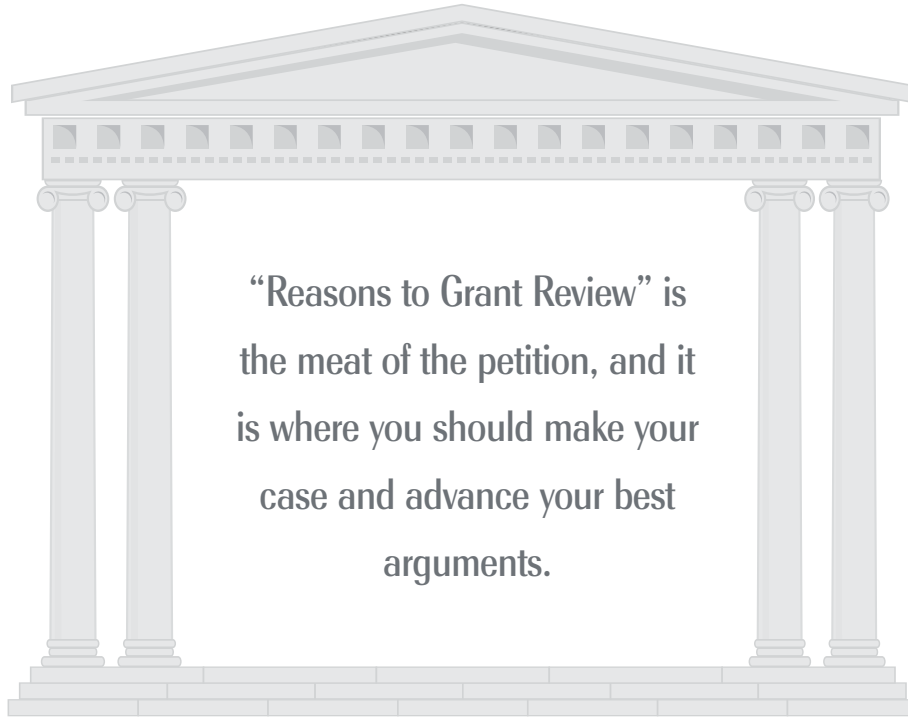
Pursuant to ARCAP 6(c), the Petition "shall contain a caption setting forth the name of the court, the title of the case, the case number and a brief descriptive title." *See also* ARIZ.R.CRIM.P. 31.12. On the caption page, include the attorneys' bar numbers, law firm, address, telephone numbers, and email addresses. The caption page becomes the cover page.

Tables

Although the rules do not require any tables, the better practice is to include both a table of contents and a table of authorities. It makes the petition easier to use, and some law clerks, staff attorneys, and Justices may read the table of contents first. Accordingly, part of the drafting process should include reviewing and editing the table of contents so that it independently tells the story of your case in an outline format.

Signature Block

As with other court filings, include a signature block after the conclusion that includes the date, law firm, attorneys and bar numbers.



only of such documents.” If the appendix is short (15 pages or fewer), it may be attached to the petition. Otherwise, a separate appendix is required.

Think carefully about what to include in the appendix. If there are documents that demonstrate that the issue raised is recurring or otherwise presents an issue of statewide importance, include them. Also, if a raised issue turns on

the interpretation of a statute, regulation, rule or Restatement provision, include these items in the appendix.

More Nuts and Bolts

When To File

The petition must be filed “[w]ithin thirty days after the filing of a decision or within 15 days after the clerk has mailed notice of the determination of a motion for reconsideration.” ARCAP 23(a). These dates do not run from the date of receipt, but rather the filing date of the decision, or the date the clerk mails the notice on a motion for consideration.

Extensions

It is common for parties to request an extension to file the petition (or response). With the AZTurboCourt system, requests for extension are filed directly with the Supreme Court. A stipulation for a 30-day extension will generally be accepted. Absent some truly unique and extraordinary circumstances, a relatively short motion for extension (not exceeding 30 days) will also be granted regardless of any opposition (so do not bother to oppose such a request).

Copy of Court of Appeals’ Decision

Per Rule 23, attach a copy of the relevant Court of Appeals’ decision and any order on a motion for reconsideration to the petition.

Certificates

With the AzTurboCourt system, you must now file the certificates separately from the petition. These should include (1) a certificate of service, *see* ARCAP 4(c) and 4(d), and (2) a certificate of compliance. The certificate should also provide: “Pursuant to ARCAP 23(c), the undersigned certifies that the accompanying Petition for Review uses 14-point proportionally spaced Times New Roman typeface, is double spaced, and contains _____ words.” For the word count, you may use the word count feature of your word processor. Just make sure to select the “include footnotes” option to ensure an accurate count.¹³

Appendix

Rule 23(c) provides that, “If there are documents in the record on appeal that are necessary for a determination of the issues raised by the petition or cross-petition, the petitioner and cross-petitioner shall file, simultaneously with a copy of the petition and cross-petition, an appendix consisting

Form and Format

Rule 23 requires a font size of 14 points or more for proportionately spaced typeface. (14 point Times New Roman is standard.) Rule 23 also requires that the petition be double-spaced.

The petition also must comply with the form set forth in ARCAP 6(c). Although Rule 6(c) allows for a little flexibility, follow these guidelines:

- 8½ × 11 inch white paper with black type;
- 14-point Times New Roman proportionately spaced font, double-spaced on single side of paper;
- Single-space and indent headings, quotations and first line of footnotes;
- Italics, underline, or bold for emphasis;
- Italics for case names and signals (e.g., *see*);
- Bold title case for headings;
- 1-inch margins all around;

- Page numbers centered in the bottom margin.

Length

Although Rule 23 provides three options for length (depending on the typeface and whether it is handwritten), attorneys should opt for the 3,500 word limit that requires using a 14-point proportionately spaced typeface. The rule also precludes “an average of more than 280 words per page, including footnotes and quotations.”

Filing and Service


File the Petition electronically with the Supreme Court. Absent an agreement between the parties concerning electronic service, paper copies must still be served on all parties, *see* ARCAP 23(e), although that will change as new features in

AZTurboCourt are implemented. For now, the certificate of service must name each party represented by each attorney served and show service on each person or entity required to be served.

Cover and Binding

The rules neither require a separate cover nor spiral binding, and the better practice is to keep it simple. E-filing makes anything more complicated obsolete. For any paper copies, simply staple the petition in the corner, using the caption page as your cover sheet.

Conclusion

As noted at the outset, most cases do not warrant the Supreme Court’s attention. But if you believe your case does, take the time to develop your petition so as to maximize your chances of review. 

endnotes

1. The Court also considers a large number of cases and motions that proceed other than through the petition for review process.
2. If you need to preserve an issue for review by the United States Supreme Court, such review (certiorari) lies only from “final judgments or decrees rendered by the *highest court of a State*.” *See* 28 U.S.C. § 1257(a) (emphasis added). Therefore, if a party plans to seek review in the U.S. Supreme Court, a petition for Arizona Supreme Court review must be filed.
3. In a well-known article giving practitioners tips on how to lose an appeal, Judge Kozinski sarcastically explained, “You can always create a diversion by attacking the district judge. You might start out by suggesting that he must be on the take because he ruled against you. OR that he is senile or drunk with power, or just drunk.” Hon. Alex Kozinski, *The Wrong Stuff: How You Too ... Can Lose Your Appeal*, 1992 BYU L. REV. 325.
4. The full text provides that the petition shall contain: “1. The issues which were decided by the Court of Appeals and that the petitioner wishes to present to the Supreme Court for review. The petition shall also list, separately and without argument, those additional issues that were presented to, but not decided by, the Court of Appeals and which may need to be decided if review is granted. 2. The facts material to a consideration of the issues presented to the Supreme Court for review with appropriate references to the record on appeal. No evidentiary matter shall be included unless material to a proper consideration of the issues presented, in which instance a reference shall be made to the record or page of the certified transcript where such evidence appears. 3. The reasons the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.” *See also* ARIZ.R.CRIM.P. 31.19(c).
5. The Arizona Supreme Court staff attorneys prepare a memorandum that summarizes the petition and response, and make a recommendation concerning whether review should be granted.
6. BRYAN A. GARNER, *THE WINNING BRIEF* 49 (1999).
7. *Id.*
8. BRYAN A. GARNER, *ADVANCED LEGAL WRITING & EDITING* 3-4 (1998).
9. Although the deep issue method has gained ground, some scholars and appellate lawyers continue to defend the single sentence “whether” form of framing the issue. *See, e.g.*, <http://sophisticml-tonianserbonianblog.wordpress.com/2008/03/28/deep-issue-dilemma/>.
10. *See, e.g., State v. Hansen*, 160 P.3d 166 (Ariz. 2007) (finding issue of whether a statute falls within the Legislature’s authority to enact procedural rules related to victims’ rights under the Victim’s Bill of Rights one of statewide importance, and remanding to the Court of Appeals for further proceedings after resolving the narrow issue).
11. *See, e.g., City of Peoria v. Brink’s Home Sec., Inc.*, 247 P.3d 1002, 1005 (Ariz. 2011) (remanding with respect to issue raised but not considered below for “the court of appeals to consider ... in the first instance.”).
12. *See Ezell v. Quon*, 224 P.3d 645, 652 & n. 3 (Ariz. Ct. App. 2010) (holding that requests for attorneys’ fees that do not specify the substantive basis for an award of fees will not be granted and collecting cases holding the same). Pending rule petition R-10-0033 proposes to make this requirement explicit in ARCAP 21(c)(1).
13. *See DeSilva v. DiLeonardi*, 185 F.3d 815 (7th Cir. 1999) (order to show cause noting problems with Microsoft Word’s word-count feature).