PRESENTED AT

26th Annual Conference on State and Federal Appeals
University of Texas School of Law
June 9-10, 2016
Austin, Texas

REHEARING STRATEGY IN THE COURT OF APPEALS: PAVING THE WAY FOR SUPREME COURT REVIEW

DOUGLAS W. ALEXANDER

ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP
515 Congress Ave., Suite 2350
Austin, Texas 78701
(Telephone) (512) 482-9301
(Facsimile) (512) 482-9303
dalexander@adjtlaw.com

REHEARING STRATEGY IN THE COURT OF APPEALS: PAVING THE WAY FOR SUPREME COURT REVIEW

The appellate rules tell us that filing a motion for rehearing in the court of appeals "is not a prerequisite to filing a petition for review in the Supreme Court . . . nor is it required to preserve error." TEX. R. APP. P. 49.9. While it is helpful to know that the rules do not *require* us appellate lawyers to file a rehearing motion before pursuing review from the Texas Supreme Court, it would be more helpful still to know when, if ever, we *should* file a rehearing motion before seeking review from that Court.

That is what this paper is about and what makes it different from most other CLE papers on this topic. Most papers (i) describe the rules governing motions for rehearing; (ii) detail the grim odds against getting a rehearing motion granted; and (iii) provide "dos and don'ts" on writing an effective rehearing motion. Make no mistake, it is critically important to understand all of these points. But this paper begins with the assumption that the advanced audience reading this paper already has an understanding of these rehearing basics.

This paper focuses instead on a single strategy question: **Assuming that the court of appeals will deny any motion for rehearing that I file, when, if ever, should I file such a motion before seeking review from the Texas Supreme Court?**

- As framed, this question assumes that appellate counsel has already advised the client that seeking review from the Texas Supreme Court would be an appropriate use of the client's money (which is by no means a given in every case).

- As framed, the answer to this question does not turn on the odds of the court of appeals granting or denying the rehearing motion—it assumes that the motion will be denied (which, at least statistically, is the safest assumption in most cases).

These predicate assumptions give rise to an alternative way of framing the strategy question: **If I assume the court of appeals will deny any rehearing motion I file, and understanding that the appellate rules do not require me to file a rehearing motion as a prerequisite to filing a petition for review in the Texas Supreme Court, why would I ever advise my client to spend money on an effort doomed for failure?**

This client-centric framing of the strategy question poignantly describes the practical conundrum faced by appellate counsel in many, if not most, cases destined for Supreme Court review. I am often retained in cases *after* the court of appeals has issued a decision adverse to my new client, but *before* the deadline has run for filing a motion for rehearing. If I advise the client that pursuing Supreme Court review would be an appropriate course of action, trial counsel and the court invariably want to know my thoughts on whether we should first file a motion for rehearing before seeking review.

In most cases, I reach the conclusion that the court of appeals will almost certainly deny rehearing. When that is this case, I advise trial counsel and the client that I employ a rebuttable presumption *against* filing a motion for rehearing. But there are key factors I have identified over the years that can rebut that presumption. I identify five such factors in Section II, below. But first, in Section I, I discuss a purported danger of seeking rehearing—that the court of appeals will replace its flawed decision with a bulletproof one.

I. Purported Danger of Seeking Rehearing—Turning a Flawed Opinion into a Bulletproof Opinion.

The court of appeals can deny a rehearing motion by simply issuing an order declaring, "Denied." But when appellate counsel files a rehearing motion firmly based on one or more of the five factors discussed in Section II, that

telegraphs to the author of the opinion (i) the movant is intent on seeking review from the Supreme Court, and (ii) the movant has one or more solid grounds for doing so.

In such a case, it is not unusual for the panel that issued the flawed opinion to withdraw it and issue a new one that (i) does not change the result, but (ii) tries to plug the holes pointed out by the rehearing motion. I have experienced this phenomenon on numerous occasions. So I analyze every potential rehearing effort based on the predicate assumption that the court of appeals *will not* change the result, but *will* try to make it more difficult for me to challenge the decision in the Supreme Court.

Which begs yet another question: **If the likely result of a rehearing effort is to make the court of appeals opinion less susceptible to challenge in the Supreme Court, why give the court of appeals a road map to "fix" the opinion's shortcomings?**

The short answer is that *if* a rehearing motion will enhance the odds of a grant by the Supreme Court, counsel should not be dissuaded from filing that motion based on the mere *risk* of the court of appeals substituting a bulletproof opinion for a flawed one. Truth be told, I have yet to experience a case in which the original court of appeals opinion was susceptible to attack, but the reissued opinion rendered it bulletproof. Quite the contrary; because the original opinion does not disappear, even though "withdrawn," I deem it fair game to attack that opinion as part of my overall critique of the court of appeals' analysis. Thus, in virtually every case, I have viewed a newly issued opinion denying rehearing as a gift because it gives me two opinions to shoot at in the Supreme Court instead of just one.

II. Five Factors Compelling Rehearing Before Supreme Court Review.

Even if you are confident that the court of appeals will deny your rehearing motion, the existence of one or more of the following five factors should compel you to seek rehearing in order to pave the way for Supreme Court review.

A. The panel ignored or mischaracterized a cornerstone fact.

It is not enough to justify filing a motion for rehearing that the court of appeals misstated *some* fact or even a *material* fact. After all, the point of a motion for rehearing is not to make the author of the opinion sound careless or stupid. But if the opinion completely ignored or mischaracterized a fact that is critical to an intellectually honest resolution of an important legal issue, that omission or mischaracterization should be cleanly pointed out in a motion for rehearing.

The key reason for doing so is to preclude one or more justices on the Supreme Court from concluding that you sandbagged the court of appeals. From the Supreme Court's vantage point, if a particular fact omitted from or distorted in the court of appeals opinion is so critically important, then, out of simple fairness, the court of appeals should have been given the opportunity to fix the problem while it still had the chance; it is not the Supreme Court's job to fix the problem on discretionary review. A petition for review is much stronger when you can make a double-barreled argument: (1) the court of appeals ignored or distorted a cornerstone fact; and (2) we gave the court the opportunity to fix the problem by filing a motion for rehearing that clearly pointed the omission/distortion, but the court still refused to do so.

B. The panel misunderstood or mischaracterized a key legal argument.

For the same reason you should not sandbag the court of appeals when it omitted or mischaracterized a cornerstone fact, you likewise should not sandbag the court when it misunderstood or mischaracterized a key legal argument. A motion for rehearing can often humbly and gently point out such a flaw in the opinion without taking the court of appeals to task for missing the boat. But if the legal argument in question truly is important, and if the rehearing motion makes expressly clear precisely how the court of appeals misunderstood or

Title search: Rehearing Strategy in the Court of Appeals: Paving the Way for Supreme Court Review

First appeared as part of the conference materials for the
26th Annual Conference on State and Federal Appeals session
"Rehearing Strategy"