

Petitioning the Utah Supreme Court for a Writ of Certiorari

by Beth E. Kennedy

The raw statistics indicate that the chances are relatively slim that the Utah Supreme Court will grant a petition for a writ of certiorari. Since 2008, the Utah Supreme Court has granted only 19% of the petitions that have been filed. Figure 1 shows the percentages by year.

describes some of those differences and offers practical tips for drafting and responding to petitions.

Reasons Why the Utah Supreme Court Will Grant a Petition

To understand how to draft a petition for a writ of certiorari, it is

FIGURE 1	2008	2009	2010	2011	2012	2013 to date
Petitions Filed	122	116	102	108	113	114
Petitions Granted	27	22	27	11	18	21
% Granted	22%	19%	26%	10%	16%	18%

And even if a petitioner persuades the Utah Supreme Court to grant the petition, there is no guarantee that the petitioner ultimately will persuade the Utah Supreme Court to reverse the Utah Court of Appeals' opinion. The Utah Supreme Court has not issued opinions in all of the cases for which it granted certiorari review since 2008. But of those cases it has decided, it granted relief to the petitioners on the merits only 43% of the time. Figure 2 shows the percentages by year.

important to understand its purpose. On the most fundamental level, a petition provides the Utah Supreme Court an opportunity to review an opinion issued by the Utah Court of Appeals. But this review is “not a matter of right,” and the Utah Supreme Court will not grant a petition simply because the Utah Court of Appeals erred. Utah R. App. P. 46(a). Instead, a petitioner must convince the Utah Supreme Court that there are “special and important reasons” that require the Utah Supreme Court to exercise its discretion to review the Utah Court of Appeals' opinion. *Id.*

While these numbers seem daunting, they are not prohibitive. A petitioner who keeps in mind the purpose and function of a petition can increase the chances that the Utah Supreme Court will grant the petition and review the Utah Court of Appeals' opinion.

Rule 46(a) lists four of these reasons. They suggest that the supreme

To prepare an effective petition, it is important to understand the ways in which drafting a petition for a writ of certiorari differs from drafting an appellate brief. Although the audience is an appellate court for both a petition and a brief, the court has a different objective in reviewing each document. This article

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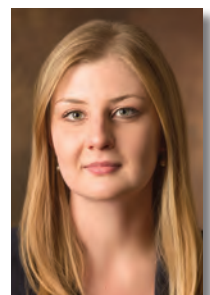


FIGURE 2

	2008	2009	2010	2011	2012	2013 to date
% Relief Granted	63%	57%	46%	18%	33%	None yet decided

court's primary focus in deciding whether to grant a petition is whether the appeal presents an opportunity to clarify Utah law. The four listed reasons are "neither controlling nor wholly measuring the Supreme Court's discretion," but they "indicate the character of the reasons that will be considered." *Id.*

The first listed reason the Utah Supreme Court will grant a petition is that the Utah Court of Appeals' opinion conflicts with a prior Utah Court of Appeals' opinion. *Id.* R. 46(a)(1). When such a conflict arises, the law becomes uncertain because it is unclear which opinion controls. A federal court of appeals can resolve such a conflict with an en banc opinion, eliminating the need for the United States Supreme Court to resolve the conflict. But our state system has no en banc mechanism, and a future panel of the Utah Court of Appeals cannot satisfactorily resolve the conflict because it is bound by horizontal stare decisis. So in Utah, only the Utah Supreme Court can resolve the conflict.

The second listed reason the Utah Supreme Court will grant a petition is if the Utah Court of Appeals' opinion conflicts with an opinion of the Utah Supreme Court. For a district court, a conflict between an opinion of the Utah Supreme Court and a subsequent opinion of the Utah Court of Appeals is no more comforting than a conflict between two opinions by the Utah Court of Appeals. While the Utah Supreme Court's view of the law governs, the question of whether the Utah Supreme Court's opinion is narrow and therefore distinguishable from the Utah Court of Appeals' opinion can be answered definitively only by the Utah Supreme Court. When the Utah Supreme Court considers a petition where such a conflict exists – or arguably exists – the Utah Supreme Court is not concerned primarily with correcting an error, but with resolving the uncertainty created by the Utah Court of Appeals' opinion.

The remaining two listed reasons the Utah Supreme Court will grant a petition also highlight the Utah Supreme Court's purpose of clarifying the law. They arise when the Utah Court of Appeals

has "so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of the Supreme Court's power of supervision," or when the Utah Court of Appeals has decided an important issue of law "which has not been, but should be, settled by the Supreme Court." *Id.* R. 46(a)(3)–(4). In the former circumstance, it is important for the Utah Supreme Court to exercise its supervisory authority to ensure the orderly and predictable course of judicial proceedings. In the latter circumstance, while district courts will be bound by the Utah Court of Appeals' opinion, litigants may not consider the important issue settled until the Utah Supreme Court has spoken. The uncertainty will remain until the Utah Supreme Court decides the issue, even if it ultimately agrees with the Utah Court of Appeals.



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Identifying and Framing the Questions

The first step in drafting a petition is to identify the questions of law to ask the Utah Supreme Court to review. As explained above, each question should invite the Utah Supreme Court to clarify confusion or a conflict in the law, not merely to correct an error in the Utah Court of Appeals' opinion. An error that does not create uncertainty in the law for future cases – because it is tied to the facts of your case, for example – is unlikely to entice the Utah Supreme Court.

The questions should be simple and objective. They “should be short and concise and should not be argumentative or repetitious.” Utah R. App. P. 49(a)(4). And just like choosing issues to include in an appellate brief, it is important to narrow the questions presented to one or two questions – three at most. Presenting more than three questions detracts from the importance of any one question.

Narrowing the issues makes it more likely that the Utah Supreme Court will grant the petition, but it comes with risk. If the petition is granted, the questions you can address in the opening brief will be limited to those questions the Utah Supreme Court agreed to review in granting the petition and those “fairly included within.” *Id.*; *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995). This means that drafting the petition can require a substantial amount of research to ensure that the few questions presented in the petition are the ones that will provide the best chance to prevail on the merits.

“Making a misrepresentation, whether on the law or the facts, invites the respondent to imply that any uncertainty in the law is a product of your misreading of the law or misrepresentation of the facts.”

Persuading the Court

Once the questions have been identified and framed, the next step is to explain why the Utah Supreme Court should grant the petition. Because there will not be an opportunity to present oral argument, the contents of the petition are especially important. *See* Utah R. App. P. 51(a).

The primary focus of the petition is to explain how the Utah Supreme Court can settle an important issue of Utah law – in other words, how each question fits within one of the four

considerations listed in rule 46(a). *Id.* R. 49(a)(9). The petition should explain the uncertainty that results from the Utah Court of Appeals' opinion and how that uncertainty will impact future cases. After describing the uncertainty, the petition must convince the Utah Supreme Court that the facts and posture of your case will provide an adequate vehicle for resolving the uncertainty.

Remember that the point of the petition is to convince the Utah Supreme Court to review the merits of your case, so at this stage the primary focus should not be how you will prevail on the merits. Even if you convince the Utah Supreme Court that there is an uncertainty in the law, the Utah Supreme Court might grant the petition and resolve the uncertainty in a way that affirms the Utah Court of Appeals' opinion. What is certain, however, is that you cannot change the result absent the Utah Supreme Court's

granting the petition. If your petition is granted, you will have the opportunity to convince the Utah Supreme Court on the ultimate merits in the briefing.

Finally, the petition must be accurate. Making a misrepresentation, whether on the law or the facts, invites the respondent to imply that any

uncertainty in the law is a product of your misreading of the law or misrepresentation of the facts. The rule explains, “The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.” *Id.* R. 49(e).

Responding to the Petition

The same principles explain how to respond to a petition. A response should persuade the Utah Supreme Court that the issues presented in the petition are not worth the Utah Supreme Court's time and attention. Simply put, the respondent must undo the petitioner's work.

The response should show that the law does not need clarification because the Utah Court of Appeals' opinion is

consistent with existing law. In essence, the response should trivialize the questions presented, attempting to remove any temptation the Utah Supreme Court might have to weigh in on the issues. And if there is uncertainty that requires resolution, the response should focus on why this case does not present an adequate vehicle for resolving that uncertainty. The case may not provide an adequate vehicle because, for example, it is fact-specific, the issue presented was not preserved in the trial court, or the petition advances a position contrary to the position the petitioner advanced in the Utah Court of Appeals. The response should focus on any reason this case may not allow the Utah Supreme Court to address the merits of the question presented.

Other Filings

Although the petitioner may file a reply, the Utah Supreme Court will not wait to receive it. As soon as the respondent files its opposition, the clerk will distribute the petition and opposition for consideration. Utah R. App. P. 50(d). This means that a petitioner who wishes to file a reply should do so quickly –

otherwise, some justices may already have made up their mind by the time your reply is distributed.

The respondent must also decide whether to file a cross-petition. Determining whether to file a cross-petition can be difficult. On the one hand, if the Utah Supreme Court grants the petition and the respondent did not file a cross-petition, the respondent's issues will not be before the court. On the other hand, filing a cross-petition might persuade the Utah Supreme Court that the case warrants review, increasing the chances that the petition will be granted. Having just obtained a partial victory in the Utah Court of Appeals, increasing the risk that the petition will be granted by filing a cross-petition may not be worth it.

Finally, the petitioner should consider whether an amicus brief will be helpful. If the Utah Court of Appeals' opinion will have important consequences on a particular group or industry, a brief from a representative of that group or industry might help to persuade the Utah Supreme Court that it should address the questions presented. *Id.* R. 50(f).

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