Discretion's Day—How To Prepare an Attractive Petition for Discretionary Review at the North Carolina Supreme Court

By D. Martin Warf and Lorin J. Lapidus

North Carolina was one of few states where a dissenting judge at an intermediate appellate court could file an opinion triggering an appeal as of right to the state's highest court. But on October, 3 2023, the 2023 North Carolina State Budget (HB 259) became law and ended that statutory avenue of automatic appellate review to the North Carolina Supreme Court. Thus, N.C.G.S. § 7A-30(2) is no more.

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But calculating when coverage from when the old statute ends and the new section 7A-30 begins involved some uncertainty until the Supreme Court's opinion in *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 386 N.C. 359 (2024). Before *Bottoms Towing*, the bar was aware that the relevant session law decreed that this legislative change "is effective when it becomes law and applies to appellate cases filed with the Court of Appeals on or after that date." HB 259, Section 16.21.(e). But now, the Supreme Court has threaded the needle for the bench and bar alike by explaining that so long as an "appeal was filed and docketed

at the Court of Appeals before the effective date of that act [3 October 2023]," parties may still rely on under the prior G.S. § 7A-30(2) to obtain an appeal as of right to the Supreme Court based on a dissenting opinion in the court of appeals. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 386 N.C. at 361, fn 1. While there are just a few remaining opportunities to take advantage of the old law, it may still be prudent to couple a petition for discretionary review (PDR) with a notice of appeal based on a dissenting opinion, particularly for those cases where the filing of the record on appeal occurred on or before 3 October 2023, *but the docketing* of the appeal occurred after that date.

Substantively, North Carolina now sits in line with the majority of other states, and the United States Supreme Court, which retains a largely discretionary docket. To that end, the future of Supreme Court practice in this state is unmistakable—practitioners must work harder to convince the North Carolina Supreme Court that a case is worthy of further appellate review. That task is challenging but not insurmountable. The pertinent statutory provisions which authorize the Supreme Court to allow discretionary review mark the following important guideposts:

> ...when in the opinion of the Supreme Court:
> (1) The subject matter of the appeal has significant public interest, or
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C.G.S. § 7A-31(c) (2023). Preparing a PDR may seem daunting, and now even more so, since petition practice is now the principal gateway to trigger Supreme Court intervention. Thus, the following seven considerations are designed to guide practitioners preparing PDRs in North Carolina in order to maximize the chances for a favorable outcome:

1. Recognize the Institutional Function of the Supreme Court and Craft a Petition with That Understanding in Mind

The North Carolina Supreme Court is not an error-correcting body. That is the court of appeals' job. Thus, the denial of discretionary review does not necessarily mean that the decision of the court of appeals was legally correct. Rather, this state's Court of last resort serves as the guardian of North Carolina jurisprudence. To that end "[i]t is the institutional role of th[e] [Supreme] Court to provide guidance and clarification when the law is unclear or applied inconsistently." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). The core purposes of Supreme Court review are therefore to ensure the uniformity and protect the integrity of this state's jurisprudence. The Supreme Court is necessarily looking beyond the direct interests of the parties and whether their was reversible error below. The significance of the legal issue involved or its public importance coupled with its effect on the overall landscape of North Carolina law are of paramount concern. For example, if there are direct conflicts of published authority between panels of the court of appeals on important legal issues, that conflict could satisfy the requisite statutory criteria as a uniform rule may be needed. A court of appeals opinion that directly conflicts with a particular ruling of the Supreme Court might also qualify. *See Lumbee River Electric Membership Corp. v. Fayetteville*, 309 N.C. 726, 742, 309 S.E.2d 209, 219 (1983) (discretionary review appropriate when court of appeals misunderstood and misapplied North Carolina Supreme Court precedent). PDR-worthy issues thus present as broad legal problems that shake the system at its core.

2. Distill the Issues from the Court of Appeals to Highlight the Particular Dilemma with the Intermediate Appellate Court's Decision

Following the court of appeals' review, it is likely that many issues were presented to that court. But once the dust settles from the proceedings below, practitioners should carefully study the arguments made to that court and narrow the issues to those suitable to petition the Supreme Court for additional review. It may become evident that just one issue raised before the court of appeals meshes well with the statutory factors enumerated in G.S. § 7A-31. That issue should be carefully distilled to its essence so that the specific problem with the court of appeals' opinion becomes apparent. Once the issue is sufficiently narrowed, all energy should be focused on the particular issue that poses a significant harm to the overall legal landscape—in other words, that something needs fixing quite badly.

3. Focus the Main Component of the Petition on Why Its Acceptance is Appropriate Under G.S. § 7A-31

The objective of a PDR is not to argue the merits of a potential appeal to the Supreme Court. Instead, the focus is to convince the necessary complement of justices that the case is worthy of additional study on a higher level under G.S. § 7A-31. Some examples of such instances might include whether a statewide election can be conducted in a certain manner or whether capital punishment accords with constitutional protections. Such issues naturally look at the broad landscape above the interests of the parties at bar. Such issues may constitute an unresolved legal issue of importance on which the Supreme Court has not spoken or on which there has not been a doctrinal statement for some time. Additional matters ripe for Supreme Court intervention involve particularly problematic legal issues that persist in various forms over an extended period of time despite several attempts by the court of appeals to fix the problem. Practitioners should also take time to carefully state the specific issues on which further review is sought with conciseness and clarity. Only after this showing is offered should a PDR briefly preview the highlights of the arguments and authorities that the merits brief may contain if the petition is allowed. This approach will permit the Supreme Court to better evaluate whether its intervention will yield an appropriate return.

4. Use Dissenting Opinions Filed at the Court Of Appeals as a Scaffold

While dissenting opinions at the court of appeals no longer automatically trigger Supreme Court review, they could still provide excellent assistance in clearing a path towards obtaining discretionary review. It is too early to tell how many dissenting opinions we may see at the court of appeals under the new section

7A-30, but those opinions should become a carefully curated part of a compelling PDR. After all, if three court of appeals judges could not agree on one or more important legal topics, the dissenting judge's opinion may provide good indicia that one or more of the section 7A-30 factors are satisfied. For example, if a court of appeals judge specifically articulates the manners in which the majority's opinion at that court conflicts with a particular controlling decision of the Supreme Court, the dissenting opinion could provide valuable gravitas to a PDR. So too could a dissenting judge's opinion facilitate the argument that the case involves important legal principles to North Carolina law when all judges on the panel could not reach unanimity. Ultimately, a well-reasoned dissenting opinion could be the best amicus brief around during the PDR stage.

5. Clearly Articulate Why the Matter upon Which Review Is Sought Is Unique and Weave in Practical Implications That Illustrate How the Court of Appeals' Ruling Is Harmful or Unworkable

According to the 2021-2022 Statistical and Operational Report of North Carolina Appellate Courts, the Supreme Court disposed of 753 petitions during that time period. Many of the petitions could be relatively standard, but nonetheless advocate like Chicken Little that "the sky is falling." A good amount of other petitions (that may even have some merit) may be presented in a way that otherwise makes them relatively uninteresting or uncompelling. Consequently, to prepare a PDR that has a greater chance of making it to the short list, explain the pragmatic implications of why the court of appeals' decision would be harmful to the public or otherwise problematic to North Carolina law. Accordingly, when preparing a PDR, the practitioner may be wise to consider certain questions, such as whether technology, collateral developments here or in other jurisdictions has rendered the prior or existing rule unworkable, and whether the lack of Supreme Court review will continue to cause troubling results. Such unique or distinguishing characteristics may well make the petition stand out from the others.

6. Enlist the Assistance of *Amici Curiae* Support to Highlight the Broader Concerns with the Court Of Appeals' Ruling

The recently amended Appellate Rule 28.1 confirms that *amici* are now welcome guests at the PDR stage. To that end, amicus briefs are prepared by various public or private policy groups or professional organizations whose interests in some important manner converge with the parties petitioning for discretionary review or the legal issues those parties are grappling with. For example, in a medical malpractice case involving the peer review privilege, the North Carolina Medical Board may want to get involved as *amicus* to highlight the importance of protecting the peer review privilege in advancing the care of patients and the practice of medicine in North Carolina. In such an instance, while the Supreme Court is considering whether the PDR has merit, it is given practical indicia—in real time—that the issues involved in the case necessarily involve broad-based public interest or concern.

7. The Stars Must be Properly Aligned

Despite all best efforts, whether a petition is granted may consist of several factors well beyond any practitioner's control. For example, a facially meritorious PDR may have been filed prematurely. The Supreme Court may recognize the potential problem pointed out by the PDR, but may want to let the matter percolate below for a bit longer to see if the issue presents a persistent problem worthy of intervention and whether the court of appeals could patch the problem. The nature of the legal issues involved, the status of existing jurisprudence, and the last time the Supreme Court weighed in on the issue (or a similar issue) can also affect disposition of the petition. The Supreme Court may likewise recognize that while a petition might appear meritorious, a deeper review indicates that public harm or damage to the jurisprudence of the state is not likely to occur at that time the PDR is filed. And since the Supreme Court has only so much bandwidth, a borderline petition may not make the cut during a given term of court based on resources alone. To some extent, then, disposition of the PDR could also depend on having a bit of pixie dust, and every lawyer in this state could always use a bit of pixie dust. ■

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