Implications of Supreme Court practice for Massachusetts

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Our nation's capital recently played host to the Appellate Judges Education Institute summit, a conference for federal and state appellate judges, practitioners and appellate court staff attorneys.

Befitting the hometown of the U.S. Supreme Court, the conference showcased a discussion about how the court selects cases for review, a preview of matters pending before the court, and wisdom from distinguished Supreme Court and other advocates about how they prepare and deliver oral arguments.

As an attendee, I was struck by the implications that these conversations have for Massachusetts appellate practice.

1. Discretionary review by the court of last resort. The extraordinary infrequency with which the court accepts cases for certiorari review — approximately 1 percent — is comparable to the rate at which our Supreme Judicial Court allows applications for further appellate review — approximately 5 percent.

Although our Appeals Court is not divided into separate districts, and thus we have no circuit splits, some of the factors that the Supreme Court considers in selecting cases resonate in Massachusetts.

Thomas C. Goldstein, founder of SCOTUSblog and a frequent Supreme Court litigator, outlined five questions central to the court's decision whether to grant a petition for cert.

First, does the case present a pure question of federal law, one that transcends the facts of the particular case? According to Goldstein, raising one or two such questions in a petition is reasonable, while raising more than three can produce skepticism.

The same need to identify issues having broad legal impact, and to limit the number of questions presented, is relevant in drafting an application for further review in the SJC.

Second, why does the Supreme Court need to step in? Four out of five cases taken by the court involve circuit splits, but the court sometimes takes cases for other reasons, such as to address the meaning of a federal statute that is either not well understood or has been struck down by a lower court as unconstitutional. And if a lower court has defied a Supreme Court decision, the court may take the case at least for summary, if only rarely for plenary, review.

The SJC shares the same concerns as the Supreme Court over matters of statutory construction, constitutional interpretation, and the meaning and application of its own prior decisions. And sometimes inconsistencies in Massachusetts appellate decisions, or divides within panels of the Appeals Court, can approximate circuit splits.

Third, why must the Supreme Court step in now? If, for example, the problem raised by the petitioner can be corrected by the action of an administrative body, the court may conclude there is no need for review. Similar matters of timing and remedy are germane to whether the SJC decides to take a case on further review.

Fourth, is the case the right vehicle to resolve the legal issue? The record, procedural posture and arguments made below must squarely present the issue for review by the court. The same concerns have long been critical to review in the SJC.

Fifth, was the lower court wrong on the merits? A petitioner needs to convince at least four of the nine justices of an error below to obtain cert. In the SJC, three votes are needed for further review. In both courts, the party seeking review generally must make a persuasive case that the rule that he

advocates would actually make a difference to the outcome of the case.

Those five considerations are not exhaustive, and not all five are always essential for obtaining review, but they are useful to bear in mind when crafting requests for review in either court of last resort.

2. Supreme Court's docket. Former Solicitors General Paul D. Clement and Drew S. Days III presented a preview of the Supreme Court's current term. Among the cases they discussed were criminal cases whose impacts will be felt in Massachusetts.

For instance, in the realm of ineffective assistance of counsel, *Missouri v. Frye* and *Lafler v. Cooper* present related questions concerning whether a criminal defendant who rejects a plea offer because of ineffective assistance of counsel can obtain relief if the defendant receives a longer sentence than the prosecution had offered under the plea.

Some years ago, the SJC recognized that issue but left it open in *Commonwealth v. Mahar*, 442 Mass. 11 (2004).

In *Perry v. New Hampshire*, the issue is whether the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, or only when those circumstances are orchestrated by the police.

In light of our evolving understanding of the ways in which eyewitness identification can be flawed, and the dire consequences of those mistakes, however the Supreme Court resolves the case will be meaningful for the evolution of Massachusetts jurisprudence.

Williams v. Illinois offers the latest chapter in post-*Crawford* confrontation clause jurisprudence. It raises the question whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, in which the defendant has no opportunity to confront those analysts, violates the confrontation clause.

Given that the SJC has weighed in on the topic in several recent decisions, it will be interesting to see how the Supreme Court analyzes it.

3. Oral argument. In a lively discussion, veteran advocates shared their diverse strategies for making the most of oral argument, proving that there are many ways to prepare for the big day. The time needed to get ready for oral argument varied among the panelists from two weeks to two months.

For instance, Mike Hatchell, a leading appellate practitioner from Texas, said that he reads every case cited in the briefs — in the order in which they appear — as well as the entire record.

Clement takes a more focused approach, reviewing only select cases from the briefs, and only those parts of the record identified as crucial to the parties' arguments.

As for "taking the show on the road" — practicing the argument before moot courts— most of the panelists said they generally do two to four.

Roy T. Englert Jr., an experienced Supreme Court advocate, told of once rehearsing an argument before two different mock panels: one composed of associates who had assisted him with the appeal, and another made up of trial attorneys. He found both helpful, but if given a choice he would have used only the former panel because he felt that it better appreciated the case from an appellate perspective.

Taking a different tack, Hatchell said that he usually foregoes moot courts because he finds that they make his argument feel too scripted. He added that mock panels tend to be far more harsh or lenient than the real court, and therefore give him a false sense of how the actual argument will go.

On the day of the real argument, the materials that the panelists found most useful to have at the lectern varied greatly.

On one end of the spectrum was Englert, who brings a written copy of his entire argument, in case he gets a cold bench. On the other end was Clement, who brings nothing.

In the middle was Jeffrey S. Sutton, a former Ohio state solicitor and currently a judge on the 6th Circuit. Sutton recounted that, when in practice, he would take to the lectern a single manila folder with notes written on all sides and the first sentence of his argument, in case he froze. He said that an advocate who comes to the lectern with nothing can appear to be showing off, but he also acknowledged that some judges may see the strategy in a positive light — as telling the court: "I have no agenda to press; I'm simply here to answer your questions."

In any event, the entire panel agreed that having some notes can provide helpful psychological support.

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