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## COMMENTARIES

### PETITIONS FOR LEAVE TO APPEAL TO THE ILLINOIS SUPREME COURT— IT'S YOUR LAST CHANCE, SO MAKE IT COUNT

*William G. Clark\**

Since my election to the Illinois Supreme Court in 1976, I have been repeatedly asked one question: what percentage of Petitions for Leave to Appeal ("PLAs") does the Illinois Supreme Court grant? The Illinois Supreme Court is only obligated to take certain cases. These cases include direct appeals of cases in which a statute of the United States or of Illinois has been held invalid, or in which the issue to be decided is one of great public interest.<sup>1</sup> Additionally, under Supreme Court Rule 603, the court may take direct appeals from circuit court judgments which impose the death sentence,<sup>2</sup> and Supreme Court Rule 651 allows the court to take direct appeals from post-conviction proceedings in death penalty cases.<sup>3</sup> The Supreme Court has original jurisdiction in mandamus, prohibition, and habeas corpus proceedings under Supreme Court Rule 381.<sup>4</sup> The court may also dispose of a case with a Supervisory Order under Supreme Court Rule 383.<sup>5</sup> Finally, the court is obligated to take attorney discipline cases that are most commonly brought under Supreme Court Rules 753 and 754.<sup>6</sup> All other cases come to the court through the PLA process. The court takes PLA cases at its discretion.

The requirements for PLAs are stated in Supreme Court Rule 315(a).<sup>7</sup> This rule lists certain general criteria that the court considers in its decision to grant leave to appeal. One criterion is the general importance of the issue

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1. ILL. REV. STAT. ch. 110A, § 302 (1985).

2. *Id.* § 603.

3. *Id.* § 651(a).

4. *Id.* § 381(a).

5. *Id.* § 383.

6. *Id.* §§ 753-754.

7. *Id.* § 315(a).

presented. This factor encompasses the potential public effect of the case in question. Another criterion is whether there is a conflict between the lower court decision in the case presented and a previous decision of the Supreme Court or another appellate division. At other times the Supreme Court is confronted with issues in which the appellate divisions have differed on the law in a certain area. Because the law must be uniform, the Supreme Court often takes cases to settle conflicts between appellate courts. Also included in the general criteria is the need for the court to use its supervisory authority.

The petitioner's legal argument requesting review by the Supreme Court is extremely important. Lawyers often give too much attention to a detailed argument of the facts of the case without affording sufficient attention to the legal question presented. The most important factor to be considered is the disputed legal argument, not the factual scenario. This is not to say that counsel should omit the pertinent facts. Rather, counsel should include enough facts to enable the court to get the "flavor" of the case.

The legal argument should be stated at the beginning, rather than the conclusion, of a petition for leave to appeal. As every lawyer hopefully learned in law school, the way in which an argument is presented is half the battle. All seven justices' eyes are blurred each year by thousands of pages of PLAs that ramble on about unimportant facts and state the legal argument only in conclusion.

The court likes things that "catch its eye." Accordingly, the legal argument must be clear and succinct. The court looks most favorably upon petitions that set forth the issues and then clearly argue the relevant theory. Although the committee comments following Rule 315 state that the court usually expects ten to fifteen pages to suffice for a PLA,<sup>8</sup> there is a simpler rule of thumb: "the shorter the better." It is rarely necessary to use more than twenty to twenty-five pages. In order to have a petition allowed, a lawyer must be familiar with both the court's rules and the court's approach in considering a petition.

In 1984, 1,531 PLAs were filed with the court. Only 164, or eleven percent, were allowed. Time constraints limit the number of appeals. For example, the court hears about two hundred oral arguments a year. Therefore, the court must be selective in allowing PLAs. Obviously, when a lawyer files a PLA, it is helpful to understand the selection process the court uses to determine which PLAs will be allowed.

Each of the seven justices receive PLAs between terms. During this time each justice reads and votes on each petition. At the next term, each justice turns his votes into the Marshal's Office. The Marshal tallies the votes and submits a summary sheet to each justice. The PLA summary sheet contains the PLA number, each judge's vote, and its disposition, either allowed, denied, or some other action such as "hold for *ABC Co. v. XYZ Inc.*"

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8. *Id.* § 315 committee notes.

This would be done when *ABC Co. v. XYZ Inc.* is already under advisement and has issues similar to those in the case under consideration. The court may then be able to dispose of the second case with a supervisory order. The court may also allow and consolidate a petition with a similar case that has not yet been argued. The court may simply dispose of a case by supervisory order. However, this method is only proper if the court believes that the issues have been resolved by another case, and further briefing would be an inefficient use of the judiciary.

Only four votes are needed to allow or deny a PLA. As lawyers are most likely aware, the votes regarding the PLAs are not matters of public record, and the justices very rarely dissent from a decision to grant or deny a PLA. Therefore, counsel would be unwise to assume that a petition received seven votes, whether it was granted or denied. In fact, that would be an exception. Petitions are often allowed or denied on votes as close as four to three. In most close votes, the judges will re-read the petition and vote again. There is little or no discussion on the merits of each particular case. When the voting process is completed, the Reporter of Decisions conveys the results to the Clerk of the Court for announcement.

Although the bar would surely like to know, it is difficult to predict the type of petition that will most likely be allowed. Each justice has a different legal background. For example, one judge may have had a criminal practice prior to sitting on the Supreme Court. Consequently, a petition involving a criminal matter may attract more of that judge's attention than that of a judge with a civil litigation background. Of course, when lawyers file PLAs, they are attempting to get the court's attention in the hope that court will grant the petition. A few examples on how *not* to get the court's attention are useful. In *People v. Lucas*,<sup>9</sup> the petitioner stated in his petition for rehearing:

Congratulations!

Mazel Tov!

Felicitaciones!

It took the Patriots of Lexington seven long hard years, and countless barrels of blood to establish the precept that the government may not search a home without a search warrant. It took the Supreme Court of the United States 180 years to apply that principle to the states. And on almost the *very day* the Supreme Court decided that the police may not enter a home without a warrant even to arrest *with probable cause*, this Court has devised a method to circumvent the Fourth Amendment entirely!

How stupid we now feel!

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9. 88 Ill. App. 3d 942, 410 N.E.2d 1046 (1st Dist. 1980).

All these years we had thought that in order to search a home the police needed search warrants with attendant probable cause.<sup>10</sup>

The attorney went on to declare that the appellate court's reasoning was "an utter absurdity" and that "such bootstrap, topsy-turvy 'logic' is fit only for an Alice-in-Wonderland world." As authority for these allegations, the attorney placed heavy reliance on Lewis Carroll's book, *Through the Looking Glass*.

The appellate court properly noted:

[I]t is the duty of a lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbents of the judicial office, but because proper maintenance of that office is of supreme importance. Canon 7 of the Illinois Code of Professional Responsibility states that, in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to the tribunal.

We strongly support energetic and zealous representation of one's client. However, a client's position can be presented in a persuasive, dignified manner. Emotional attacks by counsel lose all that objectivity accomplishes.<sup>11</sup>

Recently, an appellate court justice, in his dissent from the majority opinion in *Prewain v. Caterpillar Tractor Co.*,<sup>12</sup> stated as follows:

In Roman days, it was common and accepted practice to divine life's mysteries and to foretell future events from an examination of the entrails of birds. Young noblemen were schooled in the art of translating entrails. No less a personage than Caesar Augustus, himself, was a practitioner of this art of augury. Nowadays, however, this art has passed into disuse. There are no practitioners trained to read chicken livers and other organs of bird viscera. Modernity, however, has brought us a substitute tool for divining mysteries and future trends. It is called the Illinois Supreme Court. While opinions as to its efficacy are not uniform, some say it is as reliable as bird entrails. Some say it is better. In any event, it is available to us and should not be ignored.<sup>13</sup>

Needless to say, this passage caught the Supreme Court's eye. However, the goal is not only to get our attention, but to do so without insulting the court.

It is also helpful to examine the wide variety of cases the court *does* accept. In the September 1985 Term, the court allowed forty-five PLAs, of

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10. *Id.* at 950-51, 410 N.E.2d at 1046. Although the appellate court refused to reprint excerpts of the petition, I do so here to illustrate my point.

11. *Id.* at 951, 410 N.E.2d at 1046 (citations omitted). However, for the record, rehearing was allowed in this case. The judgment was vacated, and the cause was remanded with directions. *Id.* at 951, 410 N.E.2d at 1047.

12. 123 Ill. App. 3d 687, 463 N.E.2d 161 (3d Dist. 1984), *aff'd*, 108 Ill. 2d 141, 483 N.E.2d 204 (1985).

13. *Prewain*, 123 Ill. App. 3d at 691, 463 N.E.2d at 164 (Heiple, J., dissenting).

which fourteen were criminal appeals and thirty-one were civil appeals. A brief synopsis of a few of those petitions follows. In *People v. Saldivar*, the issue was whether the death of a victim in a voluntary manslaughter case could be considered as an aggravating factor at sentencing.<sup>14</sup> The trial court judge had considered the victim's death when sentencing the defendant,<sup>15</sup> and the appellate court affirmed.<sup>16</sup> The defendant asserted in his PLA that the appellate court's decision conflicted with eight other appellate court decisions. He maintained that the Supreme Court must publish an opinion to provide sentencing guidance to trial courts and reduce a waste of judicial resources. We obviously agreed with the defendant's contention that the conflict needed to be resolved.

Another PLA that we allowed involved indemnity and contribution. The appeal stemmed from a judgment in the Circuit Court of Madison County that awarded third-party plaintiffs complete indemnity from the third-party defendant.<sup>17</sup> The appellate court reversed and remanded, concluding that the third-party action was controlled by the theory of contribution alone and that the trial court had erred in submitting the case to the jury on the theory of indemnity.<sup>18</sup> The petition was allowed because the petitioners successfully maintained that the contract that was entered into by the parties established the necessary relationship to support an implied right to indemnity.

In another case, we allowed a PLA that dealt with a finding of contempt based on the defendant's failure to comply with a trial court order to submit to a blood test in a paternity action.<sup>19</sup> The appellate court affirmed.<sup>20</sup> The defendant contended that he was not required by statute to take a blood test and that the statute did not specify that any penalty or sanction could be imposed for failure to do so. The defendant further argued that his case conflicted with another appellate court case, and that a conflict existed between Supreme Court Rule 215 and the statute governing the use of blood tests in paternity actions.

A PLA concerning access to information regarding abortions was also allowed.<sup>21</sup> The Circuit Court of Cook County issued a writ of mandamus ordering defendants to provide plaintiffs with the names of doctors, hospitals, and clinics receiving welfare payments for abortions.<sup>22</sup> However, the

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14. *People v. Saldivar*, No. 3-84-0397 slip op. (3d Dist. Feb. 14, 1985).

15. *Id.* at 2.

16. *Id.* at 3.

17. *Allison v. Shell Oil Co.*, 133 Ill. App. 3d 607, 608, 479 N.E.2d 333, 334 (5th Dist. 1985), *aff'd*, 113 Ill. 2d 26, 495 N.E.2d 496 (1986).

18. *Id.* at 611, 479 N.E.2d at 337.

19. *People ex rel. Aldworth v. Dutkanych*, 131 Ill. App. 3d 1007, 476 N.E.2d 805 (2d Dist. 1985), *aff'd*, 112 Ill. 2d 508, 493 N.E.2d 1037 (1986).

20. *Id.* at 1008, 476 N.E.2d at 807.

21. *Family Life League v. Illinois Dep't of Public Aid*, 132 Ill. App. 3d 929, 478 N.E.2d 432 (1st Dist. 1985), *aff'd*, 112 Ill. 2d 449, 493 N.E.2d 1054 (1986).

22. *Id.* at 931, 478 N.E.2d at 434.

court denied access to information regarding the amounts paid to each and the number of abortions performed by each.<sup>23</sup> In a divided opinion, the appellate court reversed and found that providing the requested information would infringe upon the right of privacy of women seeking abortions.<sup>24</sup> The appellate majority took note of the rising number of terrorist acts committed against abortion clinics and found that disclosure might lead to harassment, which could make doctors unwilling to perform abortions for welfare recipients.<sup>25</sup> The dissenting judge believed that the record did not support the assumption that disclosure would result in acts of violence or in any way restrain doctors from performing abortions.<sup>26</sup> Plaintiffs argued that Minnesota and Kansas had faced the identical question and that both had ordered disclosure.<sup>27</sup>

Finally, we allowed a PLA in a case that involved a clover crop.<sup>28</sup> The trial court entered a judgment in favor of the defendant.<sup>29</sup> The appellate court reversed and entered judgment for the net profit that the plaintiff would have realized from the crop.<sup>30</sup> The defendant contended that the case was one of first impression in Illinois. The issue was whether the common law doctrine of emblements applies to give a year-to-year farm tenant the right to harvest a clover crop growing on leased property when the crop matures the year *after* the tenancy has been terminated pursuant to statute.<sup>31</sup> Although a case involving one clover crop on its face may appear unimportant, the PLA was allowed because such a case can have a tremendous impact on the whole farming community and future farm tenancies.

The appeals that the Supreme Court considers, ranging from blood tests in paternity suits to clover crops, make for an interesting life. As noted above, each judge votes privately on PLAs. Because a judge rarely gives reasons for his decision on a particular petition, it is impossible to list all of the considerations that go into a judge's decision. Unlike so many other aspects of the court, the judges decide PLAs at will. There are no absolute standards.

Although all judges consider the general importance of the question presented, each judge employs certain criteria that affect his or her decision. Many unsuccessful petitioners feel that the court is heartless. To the contrary, we often know in our hearts whether a PLA should be allowed or not. This sort of intuitive decision-making conjures up images of a man who was told

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23. *Id.*

24. *Id.* at 936, 478 N.E.2d at 436.

25. *Id.* at 932-33, 478 N.E.2d at 435.

26. *Id.* at 936, 478 N.E.2d at 438 (McNamara, J., dissenting).

27. *Id.* at 937-38, 478 N.E.2d at 438 (McNamara, J., dissenting).

28. *Leigh v. Lynch*, 133 Ill. App. 3d 659, 479 N.E.2d 346 (5th Dist. 1985), *rev'd*, 112 Ill. 2d 411, 493 N.E.2d 1040 (1986).

29. *Id.* at 662, 479 N.E.2d at 348.

30. *Id.* at 664, 479 N.E.2d at 350.

31. *Id.* at 663, 479 N.E.2d at 349.

by his cardiologist that his heart was not good; it was worn out and had to be replaced by an immediate transplant. "But you're lucky," said the doctor. "We have two hearts available and you can have your choice. The first came from a fine young athlete who was killed in an auto accident. He was a strong young man—captain of his college football team. I know this will be your choice, but because of medical ethics, I must tell you about the other heart. It belonged to an eighty-year-old judge who died of old age." After listening intently, the patient turned to the doctor and told him he would take the judge's heart. The bewildered doctor asked, "When you have a choice between the heart of a fine young athlete and an elderly judge, why in the world would you choose the heart of the judge?" "Because," the man responded, "I want a heart that was never used."

#### CONCLUSION

A few important considerations should be stressed. First, counsel can move the court to reconsider a PLA that has been denied. However, the petition to reconsider will most likely receive the same vote as the original petition. Therefore, it is wise not to file a motion to reconsider unless the court was unaware of some compelling point during the original consideration of counsel's petition; for example, a newly decided case has come to light that concerns the same issue presented in the first PLA, but that counsel could not have cited. No two cases or petitions are alike. A petition will not necessarily be denied because the court denied a petition "just like the one you have." This is especially true for petitions that were denied by a four to three vote. Because the law is ever changing, the factors that this court weighs are ever changing as well.

Counsel should be aware of the odds of success before asking the court to allow a PLA. Every year, the court allows approximately ten percent of all PLAs filed. However, the odds change depending upon the time of year in which the PLA is filed. For example, during the January, March and May terms of 1984, the Court allowed approximately thirteen percent of the petitions that were filed, while in the September and November terms approximately eight percent were allowed. In the January term of 1984, 208 PLAs were reviewed by our court, compared with 536 in the September term.

One final statistic is illustrative. When there is a divided appellate court, the likelihood that the court will allow a PLA in such a case increases dramatically. In 1984, the percentage of PLAs allowed compared with the total number that were reviewed by the court was approximately eleven percent. When the PLA is from a divided appellate court, the percentage rises to thirty-seven percent. In other words, in such cases the chances of having a PLA allowed increase almost four-fold. Moreover, when a PLA is from a divided appellate court that reversed the trial court, the chances of having such a PLA allowed are approximately fifty-eight percent. In this situation there are two judges forming the majority of the appellate court

panel and two judges, the dissenting judge from the appellate panel and the trial judge, holding the opposite opinion. Therefore, PLAs with this procedural history will probably be allowed.

In summary, there are three things to remember when seeking approval of a PLA. First, know the Supreme Court rules concerning PLAs. Second, remember that the court only needs to get the "flavor" of the case, not a lengthy recitation of detailed facts. Third, be clear and concise.