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Litigation Practice Tip - March 2024

Convincing a Court to Hear Your Case When it Doesn't Have to

Part II: Petitions for Review

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Let's start with a worst case—or at least bad case—scenario: the Court of Appeal has just ruled against your clients in that Really Big Case. **Should you file a Petition for Review in the California Supreme Court?** This Tip will help you answer that question; suggest ways to convince the Court to take your case; and explore strategies for when the shoe is on the other foot: i.e., when you have won in the Court of Appeal and your opponent has filed a Petition.[1]

If you have lost in the Court of Appeal, an obvious first step is to read the opinion carefully to reassure yourself that your position was correct and the court got it wrong. But that's only one part of the analysis.

The Supreme Court only grants between three to five percent of all Petitions for Review in civil cases, depending on how you count.[2] That does *not* mean the Supreme Court believes that the Court of Appeal is right more than 95% of the time. Rather, it reflects that the Court's role is *not* to correct the Court of Appeals alleged errors, ""which are important only to the decision of the particular case in which they are made . . . ." *People v. Davis*, 147 Cal. 346, 347 (1905). Instead, as stated in California Rule of Court 8.500(b)(1), the Supreme Court may order review when "necessary to secure uniformity of decision or to settle an important question of law."

In the right case, securing "uniformity of decision" provides the best chance of success for petitioners . If different Court of Appeal panels have reached opposite holdings on similar facts, the Supreme Court may well decide to hear the case, though even then there is no guarantee.

Historically, legal services attorneys have been more successful in convincing the Supreme Court that a petition presents "an important question of law" under rule 8.500(b(1). Here, the general 5% success rate on petitions is a little misleading. Justices have often recognized that issues surrounding preservation of health care, survival benefits, shelter, or access to the courts tend to be more important than run-of-the-mill money disputes.

So how do you decide whether the issue in your case is review-worthy? One way is to start a sentence "Unless this Court grants review . . ." or "If the Court of Appeal opinion is allowed to stand . . ." and then figure out how to finish it.

If the best you can come up with is that harm will befall your client, that will not be good enough for the Supreme Court. It's not that the justices lack empathy, but resolving a dispute affecting only the parties to a case is not part of the Court's job description. Here

are some ideas on how you might finish the sentence or the rest of the Petition to emphasize the importance of the issue:

- Though the fate of your client alone will be insufficient, let the Court know if there are many other similarly situated persons who will similarly be harmed. This might be particularly true if the Court of Appeal has interpreted a statute or regulation in a statewide program such as Medi-Cal, which serves millions of Californians.
- Point to any confusion the Court of Appeal opinion might likely cause in the trial courts or to large groups of persons or entities affected by the decision.
- Describe possible broad effects not immediately obvious from the face of the opinion. For example, if the opinion ruled on the validity of a local ordinance, point out how many other identical ordinances there are throughout the State. In one of our cases, the Court of Appeal had ruled that certain language in a favorable statute was unconstitutional. Our successful Petition for Review noted (based on a Westlaw search) that more than 1,000 statutes had identical language.

And, of course, the Petition for Review should address the merits of the issues. The Supreme Court does not expect an in-depth discussion of the merits, which can be seen by Rule 8.504(d), limiting the length of a Petition to 8,400 words (roughly a 30-page brief), compared to Rule 8.520(c), which permits later opening briefs on the merits up to 14,000 words (about a 50-page brief). But the Petition at least needs to cast doubt on the Court of Appeal opinion.

Amicus letters in support of review

Rule 8.500(g) permits amicus curiae letters in support of a Petition for Review. These can be a very useful way to let the Court know that the issue raised in the Petition is important not just to you and your client, but to others as well. You can start with other legal services programs whose clients also might have a stake in the issue presented. The Legal Aid Association of California is a great place to begin, as LAAC often writes amicus letters and can truthfully state that it represents more than 100 legal services programs.

But this is an area where you should also think outside the box and contact other groups that might be affected. For example, the California Medical Association has written amicus letters in cases where the government has denied or delayed health care coverage. If there is an issue that might have arisen in other states, one of the national support centers such as the National Housing Law Project might inform the Court of the national significance of the case. And perhaps your issue crosses ideological lines, in which case a letter from a usual adversary, sometimes called a “strange bedfellow,” would be most useful. For example, a conservative taxpayer organization might support your client’s taxpayer standing argument.

There is no formal deadline for an amicus letter. But a goal should be to ensure that it is read in time to make a possible difference. Ideally, the letter should assist the research attorney responsible for the Conference Memo recommending to the justices whether review should be granted. The attorney might start working on that memo as early as when the Answer to Petition for Review is due, which is 20 days after the Petition is filed, or perhaps ten days later, when the Reply to the Answer is due. Cal. R. Ct., R. 8.500(e). In any event, the sooner the better.

Strategies for dealing with your opponent’s Petition for Review

Now let’s discuss the happier scenario in which you have prevailed in the Court of Appeal and the opposing party has filed a Petition for Review. The first question is whether you should do anything at all. As was the case with whether to file a preliminary opposition to an appellate writ,[3] there is little consensus among appellate attorneys on whether to file an Answer. Some attorneys eschew Answers on the ground that they may draw too much attention to the Petition. But others (with whom I agree) believe that it’s always a good idea to promptly disabuse the justices and research attorneys of any favorable opinion they might have of the Petition.

Answers should provide reasons for the Supreme Court to decline hearing the case, not

lengthy refutations of each of the petitioner's arguments on the merits. Some have compared a good Answer to a "stifled yawn," as in telling the justices "nothing to see here, folks; move along."

Some ways of achieving that goal are to argue, when applicable:

- There are no directly conflicting appellate opinions on the issue presented;
- The facts of the case are unique and unlikely to recur in other cases;
- The case doesn't really present the issues the petitioner claims it does;
- For any number of reasons, the case is not a good "vehicle" (remember that buzzword) for litigating the issue presented.

Most importantly, so as not to sabotage the goal of a "stifled yawn," the Answer should be short.

No amicus letters in opposition to review

While Rule 8.500(g) permits amicus letters in opposition to a Petition for Review, they are not a good idea. Such a letter would send the decidedly mixed message that "the following attorneys from the following programs have taken time out from their busy schedules to write hundreds of words explaining just how unimportant the issues are in this case."

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[1] This Tip does not cover getting the U.S. Supreme Court to hear (or not to hear) a case or securing a transfer of a matter from a Superior Court, Appellate Division to the Court of Appeal, though there are similar strategic considerations.
[2] The Supreme Court grants approximately 3% of petitions outright and decides those cases on the merits. The Court issues a "grant and hold" order in another 2% of petitions, planning to remand the matter after the Court decides an overlapping issue in another case.
[3] *See* **January Tip**: *Convincing a Court to Hear Your Case When it Doesn't Have to Part I: Appellate Writs*.

As always, if you have questions about this Tip or any other litigation topic, please reach out.
