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Seeking (or resisting) Supreme Court review?

A few tips for convincing the California Supreme Court to either grant or deny a petition for review.

By Robert J. Stumpf Jr., Karin Vogel, and Guylyn Cummins

So, you plan to seek — or prevent your litigation opponent from obtaining — review in the California Supreme Court? Here's a few things to keep in mind:

SEEKING REVIEW

1. Know the odds

With rare exceptions, the California Supreme Court is not required to hear a case. Most times it grants review only in its discretion, and not often. In 2013-2014, for example, the court granted review in only about 5 percent of civil cases. Even this figure overstates the odds because it includes cases in the "grant and hold" category that will not result in written opinions. These numbers hit a record low in 2008-2009, where the court granted only 3 percent of civil petitions. If your case is unpublished, the odds are worse. Generally, only about 20 percent of the civil cases the court decides to hear arise from unpublished opinions.

2. File the petition on time

You must act quickly if you intend to seek review. You must file your petition for review within 10 days of the court of appeal decision becoming final — ordinarily, 30 days after the appellate court clerk files it. (Beware: An order summarily denying a writ petition becomes final immediately.) This 10-day period cannot be extended, although the chief justice may excuse a default for a limited time. You must count your days carefully. Two things in particular. First, the filing window is not extended by Code of Civil Procedure Section 1013 for things like service by mail. Second, the 30-day period for when the reviewing court's opinion becomes final is not extended if it falls on a holiday. If that day is Saturday, count 10 days from Saturday. But if the 10-day period for filing falls on a Saturday, you have until Monday to file.

3. Focus on WHY

Because the odds of getting review are so long, Job #1 is to convince the court that your issue is worthy of its attention.

That means telling the court (after presenting your issue) why your case meets a recognized reason for review. Do the courts of appeal disagree? Do you raise an important legal issue that needs to be settled? Is the issue fairly presented by the facts and procedure of your case? Does your case present a good vehicle for review, e.g., issues squarely presented, on a fully developed record, with competent counsel on both sides? If you can answer "yes" to all of these questions, your petition stands a fighting chance; if all you can argue is the court of appeal's opinion was "wrong," you have little chance. The California Supreme Court is not a court of error.

4. Remember merits matter

Convincing the court your issue is important matters. It also matters, however, that the court of appeal reached the wrong conclusion. And the more wrong, the better — if the court of appeal got it right and there's no conflicting authority, the Supreme Court might not see a need to grant review even for an "important" issue. It's even better if the opinion includes a dissent — a sure sign something may be amiss. (A dissent automatically puts a case on the court's "A list" at its Wednesday conferences; cases on the "B list" have almost no chance.) Although your petition need not address the merits in detail, an effective petition must make at least a preliminary showing the court of appeal got it wrong. No need to overdo it, though. If review is granted, you'll have the opportunity to make a full showing on the merits in briefs.

5. Consider a rehearing or publication

A petition for rehearing, which must be filed no later than 15 days after the court of appeal issues its opinion, is not an opportunity to reargue your case or take a second bite at the apple. And petitions for rehearing are almost never granted. If you intend to seek review in the California Supreme Court, however, and the court of appeal's opinion contains a material omission or misstatement of fact, you should request a rehearing. Otherwise, as a policy matter the Supreme Court will normally accept the opinion's statement of the issues and

facts. Cal. R. Ct. 8.500(c)(2). A petition for rehearing is also appropriate if the court of appeal bases its opinion on an issue the parties did not raise or address. CCP Section 437c(m)(2). If the opinion is unpublished, seeking publication could increase your chances of obtaining Supreme Court review. (Published opinions are automatically on the "A list.") "Any person" may request publication by delivering a letter to the court of appeal within 20 days after it files its opinion. Cal. R. Ct. 8.1120(a).

6. Solicit amicus support

It helps if other parties or organizations tell the court your case is important to them, too. Amicus letters can show that your legal issue has widespread application. The letters need not be lengthy or contain detailed legal analysis. They typically are not expensive to prepare. But they can be helpful to draw attention to your case and convince the court that your case is significant.

7. Check the Internet

Another way to convince the California Supreme Court your case is important is to show that other people are talking about it. Newspaper articles highlighting the court of appeal's opinion are helpful. Sometimes, so are websites and blog posts. Recently, we obtained review by quoting a group's website trumpeting the outcome in a "landmark case of first impression" that "opened the doors for a flood of new litigation, likely in the form of class action filings." What better proof that your petition raises an important issue?

OPPOSING REVIEW

1. File an answer

Although it is optional, you should almost always file an answer to the petition for review. It should highlight why there are no grounds for review, i.e., no important unresolved questions or law or split of authority among the courts of appeal. You must file and serve your answer within 20 days after the petition is filed, although the chief justice may grant additional time.

2. Downplay significance and emphasize correctness

Whereas a petition is all about showing the importance of an issue, an answer seeks to make just the opposite showing.

Your goal is to convince the court there is no reason for it to get involved. For one thing, the court of appeal's opinion is straightforward and correct. For another, no one besides the parties really cares about the issue. In most cases, an answer should be short and "uninteresting." Less is usually more. If you can, convince the court the case is not an appropriate vehicle for review because, for example, it involves facts not likely to recur, a record that is sketchy, an unusual procedural posture, or complicating facts that cloud the main issue. In other words, maybe next time.

3. Consider "other issues"

Not everyone knows that a party opposing review can request the Supreme Court, if review is granted, to consider other issues as well. This requires a statement of the additional issues in a "concise, non-argumentative statement" framed "in terms of the facts of the case but without unnecessary detail." Cal. Rule of Ct. 8.504(c). Thus, if you won your case on one key issue but lost on another that also could have secured your win, you might consider asking the court to review the "other" issue, too. Unless you do, you could lose the whole ballgame if the court reverses the judgment and only addresses your opponent's issue.



ROBERT STUMPF JR.
Sheppard Mullin



KARIN VOGEL
Sheppard Mullin



GUYLYN CUMMINS
Sheppard Mullin

Robert J. Stumpf Jr., Karin Vogel and Guylyn Cummins are members of Sheppard Mullin's Certified Appellate Specialist Team and have handled more than 300 appeals and writs, including more than 85 published appellate opinions. Bob Stumpf is a former chair of the Appellate Law Advisory Commission, which administers the appellate specialist certification program for the State Bar of California.