Taming the Odds:

Increasing the Chances of Getting Relief from the Supreme Court

By Kent L. Richland

Litigators abhor a long shot. Few things dampen a lawyer*s enthusiasm for investing substantial resources in a particular litigation strategy more than the knowledge that the likelihood of success is small. Yet, sometimes—particularly when the long shot is the *only* shot—there is little choice.

Obtaining relief in the California Supreme Court is decidedly a "long odds" proposition; in recent years, the chances of getting review granted by the Court have run somewhere between one in ten and one in twenty. But once the intermediate appellate process has been exhausted, the California Supreme Court is frequently the only option left to the litigant convinced that injustice has prevailed. As a result, litigators often must wrestle with the choice of trying to buck the odds or giving up altogether.

The purpose of this article is to make that choice a little less problematic by identifying various methods by which the odds of obtaining relief from the California Supreme Court can be improved. These methods are no doubt well known to appellate specialists, but are either unknown to or unappreciated by the larger population of litigators whose practice is largely confined to the trial courts. These tricks of the appellate trade may never reverse the odds, but properly utilized they can significantly level the playing field.

Effective employment of these approaches requires some understanding of what the Supreme Court is *today*—its current institutional role, the forces, pressures and constraints which shape that role, how the justices perceive their tasks, and the Court*s present priorities. The lawyer who can most accurately "psyche out" the Court will be in the best position to know what issues to raise, the best procedural posture in which to approach the Court, and the best calculated means of presenting the issues to obtain relief. Before discussion of specific strategies can be truly meaningful, therefore, it is essential to give some consideration to some of the more important attributes of the present Court.

—Three Key Variables—

There are three essential attributes the California Supreme Court currently exhibits which, by their interplay within the rules governing the Court's jurisdiction, play a significant role in determining

those cases in which the Court grants relief. They are: (1) the Court's primary institutional role as a promulgator of policy rather than a corrector of error; (2) the inherently limited resources of a seven-member court which must administer the legal system of the largest state in the union; and (3) the desire (notwithstanding the forgoing) to correct error and nip nascent error in the bud.

For the practitioner seeking relief, the most important fact about the California Supreme Court is that its principal function is to set policy by deciding important issues of law and securing uniformity of decision where the courts of appeal are in conflict. *See Cal. Rules of Ct., Rule 29 (a).* What this means is that, in most circumstances, the Court will not grant relief in a matter simply because there was error committed in the trial court or court of appeal, or because the result was "unjust." As a practical matter, a prerequisite to Supreme Court review is that the issue presented must affect the legal system as a whole or a substantial segment of California*s citizenry. The fact that a case involves a large amount of money, is highly complex, or involves celebrated parties may make it important to the lawyers; however, none of these factors will make the case important to the Supreme Court unless the issues are significant.

Almost as significant is that the Court has extremely limited resources to accomplish its functions. There are seven justices on the Court who share enormous responsibilities. They must vote on more than one hundred petitions for relief filed each week; they must review, as an original appellate matter, each case in which the penalty of death has been imposed (the backlog of which now approaches two hundred); they must attend oral argument (which usually consumes about a week each month, ten months of the year) and they must, of course, consider and decide the cases before the Court and author majority, concurring and dissenting opinions in those cases. These taxing duties no doubt affect the Court*s consideration of how "important" an issue must be in order to justify a grant of review. Cases of limited impact have little chance of being "smuggled" onto the Court*s agenda. It is no wonder that the Court has so freely relied upon depublication—nullification of the precedential value of a court of appeal opinion without the necessity of a full-blown grant of review—as a means of shaping California law.

The justices* natural inclination in a particular case to see that error is corrected, or that potential error is avoided, seems, at first blush, to be at odds with, or at least of a lesser order than the other two variables. Because of the limited resources, this factor usually comes into play only when it can be accomplished without materially interfering with the Court's more significant institutional role. Nevertheless, that the Court will attempt to correct error *where it can be done without a substantial expenditure of its resources* provides, in some circumstances, a potential avenue of relief of which all litigators should be aware.

Of course, many other subjective factors affect whether or not the Court will act in a particular matter, not the least of which is the ideological orientation of the Court with respect to the issue presented. It is unlikely, for example, that the present Court would grant review of an issue in order to enlarge significantly the rights of tort plaintiffs. Because the Court occasionally reaches a result seemingly inconsistent with the conventional wisdom, such generalizations are subject to continuous re-

evaluation. *See, e.g., Mary M v. City of Los Angeles,* 54 Cal. 3d. 202, 221(1991) (where police officer misuses official authority for purposes of rape, public entity which employs him is vicariously liable).

After the case has been subjected to analysis and both lawyer and client are satisfied that a favorable ruling from the Supreme Court is a substantial possibility, there are some techniques for "packaging" the petition that can substantially enhance the chances of obtaining the attention of the Court.

—Ways to Tame the Odds—

"Coattailing" The Issues

One of the surest ways of obtaining Supreme Court review is to align the case with a case containing a similar issue already pending before the Court. A petition for review on an issue already before the Court will frequently result in a "grant and hold" order, *i.e.*, a grant of review pending the Court*s determination of the issue in question. *Cal. Rules of Ct., Rule 29.2 (c).* The Court will also frequently "grant and hold" where the issue presented is closely related to a pending issue or where its proper resolution may depend upon the manner in which the Court resolves the pending case. Of course, to take advantage of this avenue the attorney must be aware that the issue is pending in the Supreme Court. Normally the issue must also first be raised in the Court of Appeal.

There are a number of means of becoming familiar with currently pending issues, but one of the most accessible is a loose-leaf service published every few weeks called the California Supreme Court Service, which contains comprehensive, indexed lists of all currently pending issues. Knowledge of currently pending issues will permit the alert litigator to raise them at the earliest possible moment in the lawsuit in order to ensure they are properly preserved for Supreme Court review.

The chief drawback of the "grant and hold" option is that it does not result in review of the case by the Supreme Court; instead, it entails a remand to the Court of Appeal in light of the Court's new precedent—a Court of Appeal which has already indicated its hostility to the position being advocated. Should the Court of Appeal reach the same result a second time even in the face of the new precedent, it is very unlikely the Supreme Court will grant relief since, by definition, it has recently decided the central issue.

The California Supreme Court Service also reports on petitions for review filed in cases which resulted in published opinions. This information can be useful since the Court may not realize the significance of an issue until several petitions for review raising the same issue are filed. Thus, if the Court has denied a petition on the issue in question, counsel should note that the problem presented is a recurring one which will not disappear until review is undertaken. The lawyer who is fully aware of the Supreme Court*s current and historical agenda of issues can make use of that knowledge in a number of different ways to increase the chances of obtaining review.

*Hitting the 'Justice Factor**

Although the Supreme Court carefully reserves its opinion-writing resources for cases of the most widespread impact, the Court will take steps to correct or mitigate error if it can do so with a limited expenditure of its resources. For this reason, where a court of appeal has summarily denied a petition for extraordinary writ, it is not unusual for the Supreme Court to grant review and remand the matter with an order that the court of appeal place the matter on its calendar for hearing. The Court will exercise this option where it is convinced error may have occurred, even if the issue is not one of broad import.

The Court*s utilization of its authority in this manner is based on economics. When review is sought in any case, the Court and its staff must work the case up to see if it presents issues warranting review. If in the course of that work-up the Court concludes that error may have occurred, it costs virtually nothing to order the matter to be heard by the court of appeal—and it may save the legal system the necessity of a costly retrial at a later time. This option is available, however, only where there has been a summary denial of a writ petition. When the court of appeal has issued a full-blown opinion on a matter, review and summary remand is not authorized.

Of course, as with the "grant and hold" remand, the appellate tribunal which will hear the matter may already be somewhat disinclined to grant relief, since it denied the petition in the first instance. However, writ relief is so discretionary that an initial denial does not necessarily signify that the court of appeal disagreed with the petitioner*s position on the merits, so full-scale review following remand by the Supreme Court may increase the odds of disposition favorable to the petitioner.

Published Opinions

The likelihood of review being granted is greater in cases which have resulted in published opinions or where there is a dissenting opinion by one of the members of the court of appeal panel. It is an open secret that the Supreme Court pays particular attention to cases in which the opinion below was published or contains a dissenting opinion. Published opinions are by definition significant, and the presence of a dissent strongly suggests that the issue is of more than passing moment.

A corollary to this rule is that, where the court of appeal has issued an unpublished opinion, the prevailing party may (to its detriment) actually increase the chances of review being granted by requesting that the court of appeal publish the opinion. *See Cal. Rules of Ct., Rule 978 (a).* Institutional clients who frequently desire the publication of opinions in which they have prevailed should be made aware of the potential danger that publication presents. By the same token, the losing party may well wish to adopt a low profile when publication is requested since, if the court of appeal orders publication, the chances of obtaining review may be enhanced.

Make Your Case Important

By now it is no doubt obvious that a petition for review which simply demonstrates that the court of appeal reached the wrong conclusion in its written opinion stands little chance of success in the Supreme Court. Your petition must demonstrate the importance of your case—not in terms of its impact on your client, but in terms of the impact of the issues on the citizens or a segment of the community. A large number of petitions for review mistakenly do nothing more than argue court of appeal error. The petition for review should be framed so as to emphasize the broad importance of the issue presented.

A petition for review normally should concentrate on one—or at most two—issues. It is the rare case which presents more than one or two issues which will have impact beyond the parties to the immediate dispute, and a petition which lists a long series of "important" issues tends to undermine its central premise.

Short, Pithy, and to the Point

Since the Supreme Court is more interested in policy than in correcting error, policy reasons will generally persuade the Court to grant review in a particular case. As a general rule, policy rationales can be stated relatively succinctly. The petition for review that is thick with numerous authorities for the position advanced runs the risk of boring the busy reader as well as deflecting attention from the importance of the issue at hand. The Rules of Court contemplate the filing of full briefs on the merits *after* review is granted, thus permitting the parties to develop their positions fully at that time. *Cal. Rules of Ct., Rule 29.3 (a).*

Amicus Curiae Letters

One of the best ways of persuading the Supreme Court that the issue presented in a petition for review has importance beyond the parties to the lawsuit is to recruit uninvolved third parties to tell the Court that it is so. Fortunately, the Rules of Court make it very easy for any interested group or individual to advise the Court that review is desirable. No special permission from the Court is required, and the interested party may communicate its views to the Court in letter form, with a copy served on each party to the action. While amicus letters from a large number or groups and individuals is surely some demonstration of the importance of the issue presented, one or two persuasive, carefully reasoned amicus letters can have significant impact. Counsel considering seeking review should thus devote some time to persuading potential amici to join the effort.

—Conclusion—

The California Supreme Court is one of the busiest appellate tribunals in the nation. Each week it considers over one hundred matters seeking relief. In such circumstances—where denial of relief is the presumptive norm—anything less than a carefully crafted effort on the part of counsel is statistically guaranteed to fail. However, by taking into account the resources and agenda of the Court and pack-

aging the petition using one or more of the alternatives suggested, the odds of obtaining Supreme Court relief can be substantially tipped in your favor.

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