



# Obtaining California Supreme Court review

*The Cal Supreme Court does not often grant review, but if petition you must, here are the ground rules*

BY DANIEL U. SMITH  
AND VALERIE T. MCGINTY

The most difficult appellate challenge in California is obtaining Supreme Court review of your case.

First, the Supreme Court accepts only five percent or less of all cases submitted for review.

Second, a successful petition for review addresses issues radically different from the issues that lawyers routinely address in the trial and appellate courts. Hence, for an advocate to be effective in drafting a petition for review, the advocate must **shift focus in the manner required by the Rules of Court.**

This article explains the factors that promote a grant of review and explains some of the technical requirements for a Petition for Review.

## The chance of getting review is small

To repeat, the California Supreme Court grants review in very few cases — five percent or less.

Moreover, that percentage is even less for the vast majority of appellate decisions that are unpublished. Only 15 to 30 percent of the “grants” involve unpublished opinions, yet about 88 percent of Court of Appeal opinions are unpublished. Hence, the 12 percent of opinions that are published comprise at least 70 percent of Supreme Court cases, showing the great difficulty of getting review of an unpublished decision.

This disparity between the greater frequency of “grants” of published opinions can create a conflict between the petitioner and the petitioner’s

institutional allies who might write letters in support of review. Petitioner, who has already been harmed by the California Rules of Court opinion, may want the Court of Appeal to publish to aid getting review. But the petitioner’s institutional allies will disfavor publication because, if review is denied, they do not want a published adverse decision to harm similarly situated plaintiffs.

## Show that case law is not uniform

The most common difficulty for lawyers drafting a petition for review is **shifting their focus from error and prejudice — which are the focus in the trial and appellate courts — to the issues defined in California Rules of Court, rule 8.500(b)(1): Is review “necessary to secure uniformity of decision or to settle an important question of law?”** (Cal. Rules of Court, rule 8.500(b)(1). Under this rule, the Supreme Court sits as a “court of precedent,” granting review to issue rulings that the Supreme Court perceives are needed by parties, lawyers, and judges in areas the Supreme Court deems important.

The Supreme Court does not grant review to correct errors, no matter how **egregious or how prejudicial.** In fact, to the extent the appellate opinion manifests clear error, to the same extent review should be denied because error can exist only if the law is clear. And where the law is clear, there is no need for Supreme Court review. Hence, the petition for review should not focus on error. Instead, **the advocate must adopt the Supreme Court’s perspective and make the case that review is necessary to improve the civil justice system by**

**resolving conflicting case law and important questions of law.**

## Showing that case law is not uniform

The petition can **show the need to “secure uniformity” by citing conflicting published decisions and unpublished decisions.** Citing **unpublished decisions** to show the issue is unsettled does not violate California Rules of Court, rule 8.1115(a) because the petitioner is **not relying on the unpublished decision as precedent that should be followed.**

## Showing the issue is important

The petition can show that the question of law is “important” in several ways:

- **Cite the number of California Supreme Court and appellate decisions in the area to argue that, unless the Supreme Court resolves the issue presented now, the issue will recur to plague California trial and appellate courts, requiring Supreme Court review eventually.**
- **Cite the number of similar transactions that occur annually in California, giving rise to the same issue in the future.**
- **Cite the number of appellate decisions in other jurisdictions addressing the issue.**
- **Cite the discussion of the issue in treatises, law reviews, and the Restatement.**
- **Cite reports on the issue by think tanks and advocacy groups.**

Such factors led the Supreme Court in *Marvin v. Marvin* (1976) 18 Cal.3d 660, 134 CR 815, to grant review because of a “substantial increase in the number of couples living together without



DECEMBER 2012

marrying,” making it important to provide guidance for “determining property rights” by courts that had so far “arrived at conflicting positions.” (*Id.* at 665.)

Address other factors that can increase the likelihood of review. For example, review is more likely if your case is a good “vehicle” for deciding the issue because the factual record is fully developed and because no procedural obstacles, such as waiver, will prevent the Supreme Court from reaching the issue presented. Review is virtually assured if the issue presented is already pending before the Supreme Court. In such a case, the Court will order a “grant and hold,” pending the Court’s decision of the lead case. (Cal. Rules of Court, rule 8.512(d)(2).)

In addition to the factors cited above, advocates should be mindful of the following considerations that affect the likelihood of a grant of review.

### Draft a concise statement of the issues

The petition for review must start by stating the issues presented for review in a manner that is “concise” and “nonargumentative,” referring to the “facts of the case but without unnecessary detail.” (Cal. Rules of Court, rule 8.504(b)(1).) A “concise” statement of the issue presented helps convince the Court that your case raises an “important issue of law.” State the issue in three lines or less. As examples, consider the following issues presented on behalf of plaintiffs in California Supreme Court cases.

- “Was a truck driver negligent when, on his lunch break, he parked his truck in an emergency area next to a freeway, creating the obstacle that killed plaintiff’s decedent?” (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764.)

- “Does a homeowner policy covering ‘accident’ create a duty to defend the insured from a claim of battery when the insured’s belief in his right to self-defense was unreasonable?” (*Delgado v. Inter-*

*insurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302.)

- “Where a toxic product causes separate economic and physical injuries, is the statute of limitation for each injury triggered separately based on the separate manifestation of each injury?” (*Grisham v. Philip Morris, U.S.A., Inc.* (2007) 40 Cal.4th 623.)

- “When a golfer recklessly tees off without first looking to see if the fairway is clear of nearby golfers, is he immunized from liability by the doctrine of primary assumption of the risk?” (*Shin v. Ahn* (2007) 42 Cal.4th 482.)

- “Does a male supervisor’s consensual sexual relations with some female employees create a hostile environment for other female employees?” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446.)

- “Does the Jones Act allow California courts to assert jurisdiction over a claim of asbestos injuries arising from maritime exposure outside California?” (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503.)

- “Does Labor Code section 6304.5 make OSHA standards admissible to prove a contractor’s duty to the employees of other contractors?” (*Elsner v. Uveges* (2004) 34 Cal.4th 915.)

- “Is a personal injury award of emotional distress damages extinguished by the plaintiff’s death pending appeal?” (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288.)

- “May an award of noneconomic damages to a medical malpractice plaintiff be reduced to lifetime periodic payments?” (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629.)

If possible, present just one or two issues. It is unlikely that a case will contain more than two review-worthy issues. An advocate who presents numerous issues reveals a misunderstanding of the limited criteria for granting review, thereby impairing the advocate’s credibility.

### Scope of review

The Supreme Court may review only “part of a decision,” leaving undisturbed the court of appeal’s rulings on remaining issues or remanding to the court of appeal to decide unresolved issues. (Cal. Const., art. VI, § 12(c); Cal. Rules of Court, rule 8.56 (a)(1) (“Supreme Court may specify the issues to be briefed and argued”.) After granting review, the Supreme Court may notify the parties to address an issue not raised in the petition or answer, but the Court is not bound to decide every issue the parties raise or the court specifies. (Cal. Rules of Court, rule 8.516(b).) The Supreme Court does not defer to the court of appeal’s analysis or decision. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

### Avoid waiver

The Supreme Court does not ordinarily “consider an issue that the petition failed to timely raise in the court of appeal.” (Cal. Rules of Court, rule 8.5000(c)(1).) Hence, advocates must preserve review-worthy issues by raising them first in the court of appeal.

Yet the Court has discretion to consider a new issue that the Court deems important or integral to the issues presented. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654-655, (considering antitrust issues related to rent control ordinance because of the “extreme importance of the issues presented.”); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662 (whether prejudgment interest is awardable on punitive damages is “integrally related to the principal issues on review”); cf., *People v. Birks* (1998) 19 Cal.4th 108, 116 (petitioner was excused for failing to argue in the court of appeal that Supreme Court precedent should be overruled.)

Also, as a “policy matter,” the Supreme Court accepts the court of appeal’s statement of the issues and facts and will not “normally” consider any issue or fact omitted or misstated by the court of appeal unless the petitioner



challenged that omission in a petition for rehearing. (Cal. Rules of Court, rule 8.500(c)(2).) Hence, if your client loses in the court of appeal, you should petition for rehearing to challenge the appellate court's omission of any "issue or fact."

This waiver rule does not apply on review of a grant of summary judgment or summary adjudication because review is de novo. (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 452.)

### When to file

The petition for review must be filed within 10 days of the appellate decision becoming final. (Cal. Rules of Court, rule 8.500(3)(1).) Unless rehearing is granted or the appellate decision is modified, a full opinion on the merits becomes final on the 30th day after filing that decision, requiring the petition for review to be filed 40 days after the filing of the appellate decision. **Denials of writ petitions or a petition for writ of supersedeas become final immediately upon filing, requiring the petition for review to be filed within 10 days of the appellate decision. Except for original proceedings in the Court of Appeal, a petition is deemed filed when posted by priority or express mail or delivery by a common carrier promising overnight delivery.** (Cal. Rules of Court, rule 8.25(b)(3), (4).)

### Attachments

The petition must attach the court of appeal opinion and the order on the petition for rehearing. In addition, it may be useful to attach "unusually significant" exhibits or trial court orders, relevant out-of-state statutes, or regulations or rules that are not readily accessible and which together do not exceed 10 pages. (Cal. Rules of Court, rules 8.1115(c); 8.504(e)(2) and 8.504(e)(2)©.)

### Keep the petition short

Effective petitions for review are often just 10 to 15 pages long. To achieve

such brevity, eliminate everything that does not show that courts are in conflict and that the issue is important. Save detailed analysis of the merits until after the petition is granted.

### Grant and transfer

It may be appropriate to request that the Court grant review to transfer the case back to the court of appeal with directions. For example, if the court of appeal summarily denied a petition for writ of mandate, the petitioner may ask the Supreme Court to grant review and transfer the matter back to the court of appeal for further proceedings. (Cal. Rules of Court, rule 8.500(b)(4), 8.528(d).)

In rare cases, where the court of appeal has committed obvious error, the Supreme Court may "grant and transfer" with instructions to the court of appeal to apply established law. But such instructions are not always followed. (E.g., *Lane v. Hughes Aircraft*, No. S059064 (Mar. 19, 1997 docket entry: "Petition for review granted; transferred to CA 2/7 with directions to vacate its decision & reconsider in light of *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 932-933 and *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710-711.") The court of appeal refused to take the hint, requiring the Supreme Court to grant review and address the merits. (*Lane v. Hughes Aircraft* (2000) 22 Cal.4th 405, cert. den., 121 S.Ct. 307 (2000).)

Similarly, in *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, the Court of Appeal twice dismissed the appeal by order. Both times, the Supreme Court granted review and retransferred with instructions telling the court of appeal it was wrong. (See *id.* at p. 8.) When the Court of Appeal ultimately filed an opinion on the merits, the Supreme Court granted review and reversed.

In sum, an effective petition for review is unlike any other brief that

counsel file. In the trial court, in the appellate court, and even in the Supreme Court after review is granted, briefs on the merits argue error and prejudice on issues the court is required to resolve. By contrast, a petition for review asks the Supreme Court to exercise discretion to review the issues presented — either because appellate decisions are in conflict, or because the issue of law is important, or both. Petitions that single-mindedly focus on these two factors will be more likely to obtain that elusive appellate victory — a grant of review.



Smith

*Daniel U. Smith is senior partner at Smith & McGinty in San Francisco. Smith is a Certified Appellate Specialist and has appeared in the California Supreme Court 18 times. He served on the Judicial Council Civil Jury*

*Instructions Committee that developed the CACI instructions published in 2003. He is a member of CAOC's Amicus Curiae Committee. For more information, visit [www.plaintiffappeals.com](http://www.plaintiffappeals.com).*



McGinty

*Valerie T. McGinty is a partner at Smith & McGinty, representing plaintiffs on appeal. Before handling appeals, Ms. McGinty practiced employment litigation at Lawless & Lawless. Ms. McGinty helped represent*

*California Employment Lawyers Association (CELA) as amicus in the California Supreme Court. She received her B.A. from Stanford University and her J.D. from UC Hastings College of the Law.*

