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## The state Supreme Court review process from start to finish

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You lost in the state appellate court. Most likely it was an appeal from a court or jury trial. You have but one option left - a petition for review to the California Supreme Court. You are anxious because Supreme Court review is discretionary, and the Court accepts only a fraction of the petitions it

receives. You want to maximize your chances of getting your petition granted, because a denial means your case is effectively over.

I am a former state Supreme Court staff attorney, and I have read and reviewed thousands of petitions. I will lay out the nuts and bolts of the petition for review, tell you what happens after it arrives in the Court, and give you some basic tips for good petition writing. I hope to give you insight into how to differentiate your petition from the thousands of petitions the Court receives annually.

With the exception of death penalty cases, review of cases by the Supreme Court is a matter of discretion. California Rule of Court 8.500(b)(1) states the primary ground for Supreme Court review: "When necessary to secure uniformity of decisions or to settle an important question of law." What does that phrase mean for you as the petition writer? Here is the two-part short answer: The Court is keen to accept a case where there is a published, and to a lesser extent, unpublished conflict in the state appellate court; and/or the case presents an issue of "statewide importance."

Rule 8.504 governs the content of your petition. For example, the petition must contain a nonargumentative statement of the issues; state why the case is significant under Rule 8.500(b); and state whether a petition for rehearing was filed in the appellate court and, if so, how the court ruled.

The petition must not exceed 8,400 words; if it does, you must make an application to the chief justice for a longer petition. The tables required by Rule 8.204(a)(1) and 8.204(b)(10) do not count against word length, and you may attach an exhibit you consider "unusually significant" and/or a relevant statute "not readily accessible," but such attachments cannot exceed 10 pages.

Finally, under Rule 8.500(c), the Supreme Court normally will only consider an issue timely raised in the appellate court; and will only accept the appellate court's statement of facts unless the petitioner has called attention to any alleged misstatement of an issue or fact in a rehearing petition.

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### **In getting your case heard, first impressions count.**

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When a petition for review is received, it is scheduled for conference, and the central staff prepares a conference memorandum: civil petitions are sent to the director of the civil central staff, and are assigned to one of its 15 attorneys; criminal petitions are sent to the director of the criminal central staff and are assigned to one of its 20 attorneys.

The central staff's conference memorandum is designed to assist the Court in determining whether a case is appropriate for review. The memorandum summarizes the case's facts, procedural history, parties' arguments, and merits, and most importantly, the author of the memorandum makes a recommendation to the justices as to whether the case is sufficiently important for Court review.

This last function is vital because the central staff author's recommendation dictates the level of scrutiny the petition will receive at the justices' weekly Wednesday conference. Specifically, the conference memorandum's author assigns the case to either the "A" list or "B" list. While the Court may review up to 250 cases per week, only 20-30 cases will be on the "A" list. Cases assigned to the "B" list concern routine matters, or the application of settled law, and rarely, if ever, are accepted for review. The Court processes over 6,000 petitions for review annually, and authors approximately 110-120 opinions per year. Only one "B" list case was accepted for review in my three years on the Court.

An "A" list conference memorandum will generally have one of the following designations: "grant"; "grant and hold"; "grant and transfer"; "deny"; "submitted"; "denial submitted"; and "deny and depublish." The designation "submitted" indicates the central staff attorney believes the petition warrants special consideration. "Denial submitted" indicates the central staff attorney believes the petition should be denied, but still warrants special consideration. Regarding depublishing, the recent Court trend is to utilize the depublishing option only in unusual circumstances.

Conference memoranda are distributed one week prior to the conference, and the chief of staff of each chamber divides the memoranda among staff attorneys. Each associate justice has five staff attorneys; the chief justice has seven. Staff attorneys are typically seasoned appellate attorneys who have been with their particular justice for several years. Only the justices attend the weekly conference. Four justices must agree in order for a case to be accepted for review. However, where three justices vote for a case to be accepted, often a fourth justice will join the three to ensure the case is accepted.

After a case is accepted, the chief justice assigns it to one of the justices who voted to grant review. That justice then prepares within the Court a "calendar memorandum," which is essentially a draft opinion. The calendar memorandum is distributed to the other justices who prepare a "preliminary response," indicating whether they concur, concur with reservations, are doubtful, or dissent. Preliminary responses typically suggest changes to the calendar memorandum, and the response may be as simple as a one-word "concur," or be as long as the calendar memorandum itself. The responding justice will also indicate whether he or she is intending to author a separate opinion.

Once all the preliminary responses are received, the authoring justice decides whether to incorporate any of the suggested changes into a revised calendar memorandum. If the revised calendar receives a majority of concurrences, it is scheduled for oral argument. If not, and the author is unwilling to accommodate the majority, the chief justice resets the matter or reassigns it to a dissenting justice. If the case is reassigned, once the new justice prepares a calendar memorandum and obtains a majority, the case is set for oral argument. The Court hears oral argument during the first week of each month from September through June. Each side has 30 minutes to present its case. In death penalty cases, oral argument may be extended to 45 minutes.

After oral argument, the case is discussed at the Court's private conference, and if a majority of the justices still agree with the recommendation of the justice who authored the calendar memorandum, that justice drafts a proposed majority opinion. In the rare event the majority view is now contrary to that of the calendar memorandum, the authoring justice must make changes reflecting the views of the new majority or the case is reassigned. This too happened only once in my three years on the Court.

In getting your case heard, first impressions count. Remember, given the gatekeeping function the central staff attorneys perform, you are writing to one attorney who will review your petition and assign it an "A" or "B" grade. That attorney brings his or her personality, skills, strengths, and weaknesses to your petition. You will never know that attorney's identity, but know this - you must differentiate your petition from the dozens of others he or she reviews weekly, which is best accomplished by presenting a compelling "Question Presented," and a compelling statement explaining why your matter is worthy of review. Once you have grabbed the staff attorney's attention, a concise statement of facts along with a well organized and reasoned legal discussion finishes the job. The best petitions for review rarely approach the 8,400 word limit. You must get on the "A" list to get any traction.

There is no magic formula that can assure your case will be accepted for review. Most cases do not blaze a new law trail, result in appellate court conflict, or present issues of statewide importance. But if your case has a chance, you now know how your matter will be treated, the hoops it will go through, and you have some basic tips for maximizing your chances of success. Good luck.