AFTER THE PETITION FOR REVIEW:
What to Expect in the California Supreme Court

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You've filed your petition for review in the California Supreme Court, and now you're waiting—and hoping. When will the court decide whether to grant review? If it does, what happens next, and how long before the case is argued and decided? This article answers these questions and more.

The Court's Procedures for Evaluating Petitions

The California Rules of Court and the Supreme Court's Internal Operating Practices and Procedures (IOPP) describe how the court resolves petitions for review. The court's calendar coordinator places each new petition on the calendar for one of the court's Wednesday conferences—typically, on the sixth Wednesday after the petition is filed. Under Rule 8.512(b), the court has sixty days after the last petition in a case is filed to order review or give itself up to thirty more days to decide. Practitioners can register online to receive immediate email notification. If the court does not rule within the allotted time, the petition is deemed denied.

Depending on the nature of the petition, it is assigned to one of the court's central staffs (that is, civil, criminal, or capital) or to a justice for preparation of a conference memorandum, who assigns the case to the court's A or B list. Cases on the A list involve recommendations for affirmative court action, dissents in the court of appeal, or "questions that deserve special attention." IOPP § IV.D. All others are B cases. The conference memorandum also includes one of seven recommendations:

(1) Grant;

(2) Grant and Hold (where an already pending case presents similar issues);

(3) Grant and Transfer (where the matter should be resolved by the court of appeal, for example, a summarily denied writ petition should be considered on the merits);

(4) Deny;

(5) Submitted (where the case warrants special discussion);

(6) Denial Submitted (where the memorandum author favors denial but believes the court should discuss the case); or

(7) Deny and Depublish.
IOPP § IV.

The justices get at least eight days to review the petition and conference memorandum before the Wednesday conference (IOPP § IV.E), at which the justices discuss and vote on the week's A cases. Any justice may request

deferral of an A case to a subsequent conference for further evaluation. IOPP § IV.G. The B cases are denied summarily, unless a justice requests more careful consideration of such a case. IOPP § IV.H.

Once a case is accepted, Rule 8.516 and IOPP § IV.K give the court broad leeway to specify which issues it will review. The parties must limit their briefs and arguments to those issues and any others fairly included in them. Cal. R. Ct. 8.516(a)(1). However, the court may decide any issue fairly included in the petition or answer or any other issue presented by the case that the parties have a reasonable opportunity to brief and argue. Cal. R. Ct. 8.516 (b)(1), (2); IOPP § VI.B. The court also may decline to decide any issue presented by the parties or specified by the court. Cal. R. Ct. 8.516(b)(3).

Briefing

If the court orders review of your petition, your opening brief will be due thirty days from that order. Cal. R. Ct. 8.520(a)(1). The answer is due thirty days after the opening brief is filed, and the optional reply is due twenty days later. Cal. R. Ct. 8.520(a)(2), (3). The parties cannot extend this time by stipulation, but the chief justice may grant reasonable extensions under Rule 8.60.

Alternatively, a party may submit its court of appeal brief and attach to the cover a notice of intent to rely on that brief in the Supreme Court. Cal. R. Ct. 8.520(a)(1), (4). This occurs rarely, for several reasons. First, issues addressed in the court of appeal briefs that were not accepted for review may not be included in the Supreme Court brief. Second, the Supreme Court reviews the court of appeal's decision, not the trial court's (Cal. Const. Art. VI, § 12(b)), so Supreme Court briefs should focus on perceived court of appeal errors. Additionally, the parties' arguments to the court of appeal and its opinion may reveal strengths and weaknesses in the parties' analyses that were not apparent earlier. Supreme Court briefs should reflect this analytical evolution.

More basically, the tenor of Supreme Court briefs should be different from court of appeal briefs because the Supreme Court's judicial role is fundamentally different. The court of appeal reviews trial court decisions and corrects legal errors. By contrast, the Supreme Court ensures a consistent body of case law for lower courts to follow and resolves legal questions of statewide importance. Accordingly, policy arguments have far greater significance in the Supreme Court. (Of course, the Supreme Court has the same obligation as the lower courts to follow the dictates of California's constitution and legislature, so petitioners can only ask the court to interpret constitutional or statutory law—not to change it.)

Supreme Court merits briefs include the same elements as court of appeal briefs, except that "The body of the petitioner's brief on the merits must begin by quoting either: (A) Any order specifying the issues to be briefed; or, if none, (B) The statement of issues in the petition for review and, if any, in the answer." Cal. R. Ct. 8.520(b). Beyond this, practitioners must comply with relevant provisions of rule 8.204. *Id.* The maximum length of opening and answer briefs is 14,000 words (like all merits briefs in the court of appeal), but the reply is limited to 8,400 words.

Cal. R. Ct. 8.520(c). The caption is the court of appeal caption (Cal. R. Ct. 8.204(b)(10)), with the Supreme Court case number added. The cover colors, per Rule 8.40(b)(1), are white for the opening brief, blue for the answer, and white for the reply.

Finally, a party may file a supplemental brief "limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." Cal. R. Ct. 8.520(d)(1). Supplemental briefs must be filed at least ten days before oral argument and are limited to 2,800 words. Cal. R. Ct. 8.520(d)(2).

Amicus Support

In the recent Proposition 8 cases, the Supreme Court accepted sixty-three amicus curiae (friend of the court) briefs. *Strauss v. Horton*, 46 Cal. 4th 364 (2009). Most cases don't need or receive that kind of attention but do benefit from amicus support. Because the Supreme Court develops the law rather than merely resolves individual disputes, the parties aren't the only ones affected by a Supreme Court decision—in employment cases, for example, employers' and employees' rights throughout the state are expanded or curtailed—so interested persons often submit amicus briefs. Such briefs may analyze particular issues exhaustively, explain how industries or regulatory schemes work so the court can better gauge the effects of its rulings, or discuss issues not addressed by the parties. Occasionally, the court's ultimate decision rests on an amicus contribution. Thus, an informative, persuasive amicus brief can be extremely valuable.

Applications to file amicus briefs are due thirty days after the reply is or could have been filed, unless the chief justice permits a later application. Cal. R. Ct. 8.520(f)(2). Late submissions are not always allowed, so practitioners should avoid the risk by filing timely under the rule. The proposed brief must accompany the application "and may be combined with it." Cal. R. Ct. 8.520(f)(5). The application must explain the amicus's interest and how the brief will assist the court. Cal. R. Ct. 8.520(f)(3). The application and brief covers must identify the party being supported, if any. Cal. R. Ct. 8.520(f)(6). If the amicus brief is accepted, "any party may file an answer within 20 days" after the amicus brief is filed. Cal. R. Ct. 8.520(f)(7).

Rule 8.520(f) (like a similar U.S. Supreme Court requirement) mandates disclosure of parties' support for California Supreme Court amicus briefs. Until a few years ago, a party could finance or even ghostwrite amicus briefs to the court without revealing those contributions. Now, the amicus application must identify "(A) Any party or any counsel for a party in the pending appeal who: (i) Authored the proposed amicus brief in whole or in part; or (ii) Made a monetary contribution intended to fund the preparation or submission of the brief; and (B) Every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending ap-

peal." Thus, if the parties exceed mere coordination with amici and their counsel, the parties must disclose that they participated in drafting or funding amicus briefs—and thereby risk undermining the amicus briefs' credibility.

Oral Argument and Decision

Each case is assigned to a justice who prepares a calendar memorandum on the facts, the legal issues and a proposed resolution. IOPP § VI.A. In most civil and criminal cases, the assigned justice voted for review and may have authored the conference memorandum or be assigned to another case involving similar issues. IOPP § VI.C. Other cases are assigned "in such a manner as to equalize each justice's allotment of cases" or by rotation. *Id.*

After the calendar memorandum circulates, each justice must respond by stating whether the justice concurs, concurs with reservations, is doubtful or does not concur, and whether the justice intends to write a concurring or dissenting memorandum. If a majority concurs with the original calendar memorandum, the case is scheduled for preargument conference. If not, the case is reassigned or discussed in conference. IOPP § VI.D.2.

Any concurring or dissenting memoranda must circulate within a specified time. Each justice then indicates concurrence with the original calendar memorandum or any concurrence or dissent. The case is reassigned or scheduled for conference discussion if the original calendar memorandum loses its tentative majority. IOPP § VI.D.3. Once a tentative majority has been or is likely to be established in support of a circulated memorandum, the case is scheduled for preargument conference. If the tentative majority holds at that conference, the court schedules the argument. IOPP § VI.D.4. There is no time limit on this conference process, which in some cases may take two years or more.

The parties generally receive at least twenty days' notice of the oral argument date. Cal. R. Ct. 8.524(c). Argument is limited to thirty minutes per side, and absent court permission only one counsel per side may argue. A party must file any application to divide argument time at least ten days in advance; each segment must be at least ten minutes. No amicus curiae may argue unless a party allocates a portion of its time (with prior court permission). Cal. R. Ct. 8.524(e), (f), (g).

After argument, the justices meet and the chief justice assigns the case for opinion. IOPP § VIII.A. If the tentative majority has held, the calendar memorandum author typically drafts the opinion. If the majority has shifted, a justice in the majority gets the assignment. IOPP § VIII.B. The proposed majority opinion is circulated, followed by any proposed concurrences or dissents. IOPP § IX. In an effort to avoid dissents and minor concurring opinions, the justices must communicate any concerns and suggestions about the majority opinion in time for its author to consider and possibly incorporate them before releasing the opinion. IOPP §§ VIII.C, IX. Absent unusual circumstances, the opinion is filed within ninety days after argument. IOPP §§ VII, X.

Conclusion

The California Supreme Court's processes for reviewing petitions are well established and designed to promote thoughtful consideration of all significant issues despite the court's crowded docket. While you wait on pins and needles, the justices and their staffs are working diligently to draft memoranda, resolve divergent views, and craft cogent opinions.

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