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It's *still* not over?

A SHORT GUIDE TO PETITIONS FOR REHEARING, REVIEW, DEPUBLICATION, AND POST-APPEAL PROCEEDINGS IN THE TRIAL COURT

You have filed the complaint, dodged the demurrers, taken and responded to discovery, successfully opposed summary judgment, taken the case to trial and won a verdict, convinced the trial court to deny the post-trial motions, and are now holding the Court of Appeal's newly-filed opinion affirming the judgment. Congratulations! Or maybe it happened a bit differently, and that newly-filed opinion ends with the word, "REVERSED." Yikes! Either way, even though your journey has taken years, it's not quite over. In this article I'll discuss what happens *after* the Court of Appeal files its opinion.

Rehearing

If the party on the losing end of an appellate decision believes that the court has made a substantial error in its analysis, and that error caused it to reach the wrong decision, it can file a rehearing petition. In general, the ground for rehearing is that the court's opinion has misstated or omitted a material fact in the case, has resolved the case based on a mistake of law, or has misstated or failed to address a material issue in the appeal. (See, *In re Jessup's Estate* (1889) 81 Cal. 408, 471.) In short, rehearing is your opportunity to ask the court to correct an important mistake. Bear in mind that the fact that you disagree with the outcome of the court's decision, or even with its reasoning, does not mean that the court made a mistake.

Rule 8.268 of the California Rules of Court ("CRC") gives reviewing courts the authority to order rehearing "of any decision that is not final in that court on filing." An appellate decision in a civil appeal is final 30 days after the decision is filed. (CRC 8.264(b)(1).) But if the decision is originally unpublished, and the court later orders that it be partially or fully published, the finality period runs from the date of the publication

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order. (CRC 8.264(b)(3).) In almost all cases, a rehearing petition must be filed within 15 days after the decision is final. (CRC 2.268(b).)

So, *should* you file a rehearing petition? The short answer is yes, in two situations: (1) the appellate decision is based on an issue that neither side briefed, or (2) you plan to file a petition for review in the California Supreme Court and you believe that the discussion of the facts in the appellate opinion is inaccurate or incomplete. Rehearing is mandatory in cases where the decision was based on an issue that the parties did not brief, if the court failed to give them an opportunity to file supplementary briefs on that issue. (Gov.Code § 68081.) Filing a petition for rehearing is effectively mandatory change if you plan to cite facts not included in the court's opinion in your petition for review or in your brief on the merits if review is granted, because the Supreme Court, as a matter of policy, "normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (CRC 8.500(c)(2).)

Although the appellate court has discretion to consider new arguments and authorities on rehearing, it normally will decline to do so absent a showing of good cause. (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 440, fn. 17 ["we may disregard new authority cited for the first time in a petition for rehearing"]; *Alameda County Mgmt. Employees Ass'n v. Super. Ct.* (2011) 195 Cal.App.4th 325, 338, fn. 10 [noting that "arguments first raised on rehearing are usually forfeited," but finding good cause to consider new issue where statute at issue had not yet been widely construed and failure to correct lower court's mistake of law "might otherwise have led to confusion in later cases interpreting the Act"].)

Filing a rehearing petition is generally a waste of time if your only argument is one that has already been presented to the court and found unpersuasive.

If the other side files a petition, you are not allowed to file a response unless the court directs you to do so. (CRC 8.268(b)(2).) If the court does issue an order requesting an answer, it must be filed within eight days, unless the court specifies some other time. (*Ibid.*)

An order granting rehearing vacates the decision and sets the case at large in the Court of Appeal. (CRC 8.268(d).) In theory, the court might ask for new briefing and hear argument again before issuing a new decision. But in practice, it will simply study the issues presented and then issue a new decision.

Seeking publication or depublication

CRC 8.1105(c) sets forth the standards that appellate courts must consider in deciding whether to publish their opinions. In practice, I am frequently baffled by the courts' decisions about which decisions to publish. (In particular, it is maddening to find unpublished opinions that criticize or reject the reasoning in a published case or cases. Decisions that modify, explain, or provide a reasoned criticism of an existing rule of law or construction of a statute "should be certified for publication" under CRC 8.1105(c)(3) and (4).) Some courts' views about whether their opinions meet the criteria for publication are evidently malleable. It is not uncommon for courts to order publication of an opinion that they prepared without the expectation of publication, in response to a publication request from a party or a third party.

So, let us say that the appeal went your way, the court's opinion borrowed substantial portions of your brief verbatim, and is otherwise a jewel, with one flaw – the court chose not to publish it. Should you ask the court to reconsider its decision not to publish?

If your client is an institutional litigant who is trying to shape the law, certainly. But on the plaintiff's side, that is rarely the case. We normally represent clients who have one case. Even if the opinion would be very favorable to other plaintiffs making similar claims – or to *your clients* in other cases – your duty to your client in the case at hand requires you to ignore the beneficial impact on other cases and clients and consider only whether publication would be beneficial to your client. If you won, it normally will not be.

Since unpublished decisions cannot be cited as precedent, it is difficult to make a persuasive argument that an unpublished opinion warrants review by the Supreme Court. A non-precedential decision cannot "create" a split of authority (although it can reflect one), and an unpublished opinion only affects the parties to the litigation. This makes it difficult to argue that the decision has the type of statewide importance that warrants Supreme Court review.

While the Supreme Court does, on occasion, grant review of unpublished decisions, it does so at a much lower rate than published decisions. Hence, asking the court to convert your unpublished victory into a published one would seem to increase the odds that the Supreme Court might decide to review it.

But anyone can request that an unpublished opinion be published. The procedure is set forth in CRC 8.1120(a)(1). A publication request must be made by letter to the court issuing the opinion, within 20 days after the opinion is filed. (CRC 8.1120(a)(3).) The letter must concisely state the requesting person or entity's interest and the reason why the opinion meets the standards for publication. (CRC 8.1120(a)(2).) A copy of the letter must be served on all parties. (CRC 8.1120(a)(4).)

If the appellate court does not act on the request before the decision is final in that court, it must forward the request to the Supreme Court within 15 days after the decision is final, together with a copy of the opinion and a recommendation for the disposition, with a brief statement of reasons. (CRC 8.1120(b)(2).

The rules make no provision for the parties in the case to weigh in on a publication request, which suggests that the courts are not terribly concerned with the parties' opinions about the request. As a result, my practice is not to respond, although I have seen other lawyers write letters urging the court not to publish.

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Depublication

The rules also allow "any person" to ask the Supreme Court to order the depublication of a published opinion. The procedure is set out in CRC 8.1125. A depublication request cannot be made as part of a petition for review; but must be a separate letter to the Court, not to exceed 10 pages. (CRC 8.1125(a)(2).) The letter must be filed within 30 days after the decision is final in the Court of Appeal, and as with publication requests, it must state the interest of the person or entity making the request, the reason why depublication is sought, and must be served on all parties and the rendering court. (CRC 8.1125(a)(3)-(5).)

Rule 8.1125 does include a provision allowing the rendering court, or any person, to submit a response to a depublication request. (CRC 8.1125 (b).) The response must be no more than 10 pages long and must be served on all parties and on the rendering court. (*Ibid*.)

Drafting and responding to petitions for review

The grounds for review in the Supreme Court are stated in CRC 8.500(b). The rule specifies four grounds for review, but in practice the only relevant grounds are in subparagraph (1): "When [review is] necessary to secure uniformity of decision or to settle an important question of law." (The other grounds deal with jurisdictional defects or for the purpose of transferring the case to the Court of Appeal.)

A petition must be filed within 10 days after the decision is final in the Court of Appeal. (CRC 8.500(e)(1).) CRC 8.504 details what must be contained within a petition or an answer to a petition. The rule requires that the body of the petition "must begin with a concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail." (CRC 8.504(b)(1).) The petition must also explain how the case presents a ground for review under Rule 8.500(b). (CRC 8.504(b)(2).) Other requirements are that, if a rehearing petition could have been filed in the Court of Appeal, the petition must state whether it was filed and, if so, how the court ruled; and it must attach a copy of the Court of Appeal decision or order for which review is sought. (CRC 8.504(b)(3)-(5).

Drafting a good petition for review is *hard*. You typically cannot repurpose some prior document you filed in the case, because until you get to the Supreme Court, the issue on appeal is normally whether the trial court's decision was the correct one. The Supreme Court is generally not much concerned with whether the trial court or the Court of Appeal decided the case correctly. Its institutional role is not to correct lower-court error; it is to *make law*. Accordingly, if the basis for your petition is that the Court of Appeal got it wrong, the Justices may be privately sympathetic, but they will not grant review.

A good petition addresses the grounds for review stated in Rule 8.500(b)(1) and shows why the issue for review is important – either because the Court of Appeal has split on how to resolve it, or because the issue itself is intrinsically important to large groups of people or to institutions in the State.

Answers to petitions are optional and there is some doubt about whether they matter much to the Court. I've been told that petitions generally rise and fall on the way the appellate decision was drafted. Nevertheless, your client will often be uncomfortable allowing the other side to address the Court without offering some response. I try to keep my answers very short – two to four pages, if possible. My goal is to focus on the grounds for review in Rule 8.500(b)(1) and show why the petition fails to articulate any basis for review under those grounds. You would be surprised by how often petitions fail to do that. If you choose to file an answer, it is due 20 days after the petition is filed. (CRC 8.500(e)(4).)

The rules allow for a reply in response to an answer. (CRC 8.500(b)(5). These too should be very short, if you file one at all. In my view, you have either shown why the issue(s) you seek to have reviewed are important in your petition or you have not. If you succeeded, the answer can't change that; if you failed, the reply can't change that.

Post-appeal proceedings in the trial court

If you were the respondent and you won, the case is likely over unless the Supreme Court grants review. If you were the appellant and you won, the case is likely going back to the trial court on remand. So, what happens in that event? In general, it will depend on how the appellate court framed the disposition of the appeal. This is a complex subject, so if there are any questions, you'll need to do more specific research.

As a general rule, if the opinion simply reverses the judgment below without providing specific directions to the trial court, it will be considered an "unqualified reversal," whose effect is to vacate the judgment or order at issue in the appeal and remand the case to the trial court for a retrial on all issues. (See, e.g., *Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896; *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 743.) In the new trial the parties are able to produce new evidence. (*Weightman v. Hadley* (1956) 138 Cal.App.2d 831, 836.) Likewise, the parties are free after remand to seek leave to amend their pleadings to state new claims or defenses. (See, e.g., *Estate of Horman* (1971) 5 Cal.3d 62, 72-73; *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1500.)

An unqualified reversal and remand also reopens discovery, so that the last date for completion of discovery as of right is based on the *new* trial date. (Code Civ. Proc., § 2024.020; *Fairmont Ins. Co. v. Super. Ct.* (*Stendell*) (2000) 22 Cal.4th 245, 247.)

A potential malpractice trap

Be aware of a *potential malpractice trap*, however. Section 472b of the Code of Civil Procedure says, "When an order sustaining a demurrer without leave to amend is reversed or otherwise remanded

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by any order issued by a reviewing court, *any amended complaint shall be filed within 30 days* after the clerk of the reviewing court mails notice of the issuance of the remittitur." In *Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 Cal.App.4th 38, 42, the trial court relied on this statute to dismiss the plaintiffs' action because the plaintiffs failed to file an amended complaint within the 30-day deadline after their case was remanded. The Court of Appeal affirmed, stating, "The plain language of section 472b set a deadline. The plaintiffs did not meet it. The trial court correctly granted Aetna's motion to dismiss the Pagarigans' case against Aetna." (*Id.*, at p. 42.)

General rules aside, the appellate opinion will control the scope of the proceedings on remand. As the court explained in *Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518, "The fact that the rule we discuss is a 'general' rule implies that it has limitations. One limitation is that a case is to be set at large for retrial only when that is the intent of the appellate court. 'Judgment reversed' at the end of an opinion is, of course, strong indication of such intent. But when the opinion as a whole establishes a contrary intention, the rule is inoperative."

What? The same trial judge?

When a case is remanded it will usually be assigned to the same department in the Superior Court that decided it, and hence to the same trial judge if that judge is still assigned to that department. Sometimes, the case will be assigned to the same judge even if they are in a different department. In either event, if you are sent back to the same judge you succeeded in getting reversed on appeal, you have the right under section 170.6 of the Code of Civil Procedure to file a peremptory challenge, even if you previously used up your challenge before the appeal. (Code Civ. Proc., § 170.6, subd. (a)(2).) The deadline to file a challenge is 60 days after the party or counsel has been notified of the judge's assignment. (*Id.*)

Note that there is no automatic procedure in the Rules of Court that directs trial courts to take any particular action after the remittitur issues and jurisdiction has been restored to the trial court. Most courts will set a status conference on their own shortly after the case comes back to them. If they fail to do so, you should file a request for a status conference, so you can get your case moving again.

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