– CHAPTER SEVEN –

THE END GAME: DECISIONS BY REVIEWING COURT AND PROCESSES AFTER DECISION

CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL
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THE END GAME: DECISIONS BY REVIEWING COURT AND PROCESSES AFTER DECISION

I. INTRODUCTION [§7.0]

This chapter discusses decisions by the reviewing courts and proceedings after decision. It addresses the requirements for appellate opinions in California. It gives an overview of the doctrine of stare decisis and the implications, as well as processes, of publication. The chapter also covers what happens after the Court of Appeal files its decision. It examines the rules governing finality of decisions and offers general guidance on seeking rehearing in the Court of Appeal and review in the California Supreme Court. It discusses basic procedures for handling cases in which the California Supreme Court has granted review. Finally, the chapter looks at the process of seeking certiorari in the United States Supreme Court.

II. REQUIREMENTS FOR REVIEWING COURT OPINIONS [§7.1]

Decisions by reviewing courts are rendered as opinions and orders. An opinion is the disposition of a cause, such as an appeal or a writ with an order to show cause, on the merits with a written statement of reasons. Orders include such decisions as summary denials of a writ, denials of a petition for review, rulings on motions and applications, dismissals, sanctions, and interlocutory orders. The focus here is primarily on opinions in appeals.

A. "In Writing with Reasons Stated" [§7.2]

The California Constitution provides Supreme Court and Court of Appeal decisions that determine causes must be "in writing with reasons stated." (Cal. Const., art. VI, § 14.) That requirement does not apply to decisions such as writ denials and orders that do not determine causes on the merits. It "is designed to insure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicates that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected." (*People v. Rojas* (1981) 118 Cal.App.3d 278, 288-289.)

Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1262, 1264, explains the written opinion requirement:

> [A]n opinion sufficiently states "reasons" if it sets forth the "grounds" or "principles" upon which the justices concur in the judgment. . . . [¶] . . . The constitutional requirement is satisfied as long as the opinion sets forth those reasons upon which the decision is based; that requirement does not compel the court to discuss all its reasons for rejecting the various arguments of counsel.

In *People v. Kelly* (2006) 40 Cal.4th 106, counsel in the Court of Appeal filed a *Wende*[1] brief and the defendant filed a pro per brief raising substantive issues. The Court of Appeal dealt with the pro per contentions by saying it had "read and considered defendant's written argument." The Supreme Court held this conclusory statement was inadequate to satisfy the constitutional requirement for opinions. At the least the Court of Appeal must set out the facts, procedural history, the convictions, and the sentence, and must describe the contentions, stating briefly why they are being rejected. (*Id.* at p. 124.) Such a decision serves a number of functions: it provides guidance to the parties and other courts in subsequent litigation; it promotes careful consideration of the case; it conserves judicial resources by making a record of what has been decided and, possibly, persuading the defendant of the futility of further litigation. (*Id.* at pp. 120-121.)

The Court of Appeal is not required to address an issue on the merits if it is frivolous. (*People v. Rojas* (1981) 118 Cal.App.3d 278, 290 ["issues presented were ones which either were not raised in the trial court or lacked even a modicum of support in the record"].)

Section 6 of the Standards of Judicial Administration suggests the use of a "memorandum opinion" when the case is governed by a controlling statute or case and does not present any complications or when the appeal raises factual issues "determined by the substantial evidence rule." As explained in *People v. Garcia* (2002) 97 Cal.App.4th 847, 853:

> Memorandum opinions may vary in style, from a stereotyped checklist or "fill in the blanks" form to a tailored summary of the critical facts and the

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[1] *People v. Wende* (1979) 25 Cal.3d 436; see also *Anders v. California* (1967) 386 U.S. 738. These cases deal with procedures when counsel is unable to find any issues on appeal.

> applicable law. . . . The briefest formats are appropriate in cases . . . where the result is consistent with an intermediate federal or state appellate decision with which the court agrees, . . . cases decided by applying the authority of a companion case, cases in which the result is mandated by the United States Supreme Court, and cases where the appeal is not maintainable.

The difference between a short opinion and a memorandum opinion is unclear. In the absence of frivolous issues, concessions, or other factors permitting a summary disposition, any opinion presumably must meet constitutional standards. Many of the issues described in section 6 of the Standards would appear to be frivolous.

B. Time Frame [§7.3]

No formal rule sets out a specific deadline for filing an opinion. The "practical" deadline for filing an opinion is 90 days after the case is submitted. This limit follows from the law that a justice must certify no cause is before the justice that has been undecided more than 90 days in order to receive a paycheck. (Gov. Code, § 68210; see Cal. Const., art. VI, § 19.)

The 90-day clock starts on the date of submission. Submission usually occurs when the court has heard oral argument or approved its waiver and the time for filing briefs and papers has passed. (Cal. Rules of Court, rules 8.256(d)(1), 8.366(a), 8.524(h)(1).) Except for such specialized areas as certain juvenile dependency cases (e.g., rule 8.416(h)(2)), the rules do not specify a deadline for hearing oral argument or approving its waiver.

Vacating submission and resubmitting is allowed (Cal. Rules of Court, rules 8.256(e), 8.366(a), 8.524(h)(2)), but is considered an exceptional step, not to be used routinely as a way of dealing with backlog.

III. STARE DECISIS, PUBLICATION, AND CITABILITY [§7.4]

The doctrine of stare decisis requires or encourages courts to apply the same legal principles as previous courts in a similar situation, in order to promote consistency, equality, and foreseeability. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *Montejo v. Louisiana* (2009) ___ U.S. ___ [129 S.Ct. 2079].) Publication determines the stare decisis effect and citability of California state opinions, as explained

below, and so familiarity with its meaning and the processes affecting it is crucial to a grasp of case law authority.

A. Doctrine of Stare Decisis As It Applies in California [§7.5]

Stare decisis is the effect of a prior court decision on later court decisions in different cases. It can be both *vertical* (the authority of higher courts to bind lower ones) and *horizontal* (the duty of courts to follow the decisions of courts of equal rank). It can also be *intra-jurisdictional* – applying only to courts in the same geographical judicial hierarchy, or *inter-jurisdictional* – binding on courts in other areas as well.

There are some uniformities throughout the country. The decisions of the United States Supreme Court on matters of federal law are binding on all courts in the country. The decisions of the highest court in each state are binding on all lower courts in that state. No state court is bound to follow, as stare decisis, the decisions of a court of another state or of lower federal courts.[2]

Beyond these basic principles, however, the various state and federal court systems in the United States have produced a mixture of doctrines.

1. Vertical stare decisis [§7.6]

In California vertical stare decisis is statewide and inter-jurisdictional. A decision of a Court of Appeal is binding on every lower court in the state, not just those in its own appellate district, until another Court of Appeal or the Supreme Court contradicts it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].) If there are conflicting decisions, the trial court must choose between them (*id.* at p. 456) – presumably the one it considers the better reasoned (see *In re Alicia T.* (1990) 222 Cal.App.3d 869, 880). The court need not apply the decision of

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[2]Under the Supremacy Clause of the United States Constitution, a decision of a federal court of appeals is binding on the state court in the individual case. An example would be a federal habeas corpus order. But that decision is not binding as *precedent* in other state cases. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 375-376 (conc. opn. of Thomas, J.); *People v. Williams* (1997) 16 Cal.4th 153, 190; People *v. Memro* (1995) 11 Cal.4th 786, 882; *People v. Burnett* (2003) 110 Cal.App.4th 868, 882; *In re Alicia T.* (1990) 222 Cal.App.3d 869, 879.)

the Court of Appeal in its own appellate district, although for pragmatic reasons it usually does so.

In contrast, in the federal system, the decisions of a circuit court of appeals bind only the district courts in its own circuit. (*Jenkins v. United States* (2d Cir. 2004) 386 F.3d 415, 418-419.) Thus a district court in California is not required to follow the decisions of any circuit court other than the Ninth.

2. Horizontal stare decisis [§7.7]

California has no horizontal stare decisis. The Supreme Court may overrule itself. (E.g., *People v. Anderson* (1987) 43 Cal.3d 1104, overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131.) Similarly, a single Court of Appeal cannot bind itself, but may change its mind and overrule a prior decision. (E.g., *In re Angelica V.* (1995) 39 Cal.App.4th 1007, 1012, overruling its decisions in *In re Joyleaf W.* (1984) 150 Cal.App.3d 865, and *In re Brian B.* (1983) 141 Cal.App.3d 397.)[3] One Court of Appeal does not bind another Court of Appeal. (E.g., *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750, 760.) And different panels of the same court may simultaneously disagree with one another. (E.g., *In re Andrew B.* (1995) 40 Cal.App.4th 825 and *In re Kayla G.* (1995) 40 Cal.App.4th 878 [opposing decisions filed on same day by same division of same appellate district].[4]) For the sake of predictability, stability, and consistency, courts should give substantial weight to precedents and consider them for their persuasive value. For the most part, accordingly, they do honor stare decisis, especially in their own district, but they are not *required* to do so.

In the federal court system, the Supreme Court is not bound by horizontal stare decisis; it can overrule its own decisions and on a number of occasions has done so. (E.g., *Montejo v. Louisiana* (2009) ___ U.S. ___ [129 S.Ct. 2079].) The circuits are free to disagree with other circuits. (*United States v. Carney* (6th Cir. 2004) 387 F.3d 436, 444; *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1170; *Garcia v. Miera* (10th Cir. 1987) 817 F.2d 650, 658; see *Hertz v. Woodman* (1910) 218 U.S. 205, 212.)

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[3]The Supreme Court approved *Angelica V.* in *In re Sade C.* (1996) 13 Cal.4th 952, which held that in dependency cases the appellate court need not follow the no-merit procedures of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738.

[4]The Supreme Court resolved the conflict in *In re Sade C.* (1996) 13 Cal.4th 952, 982, fn. 11, disapproving *Andrew B.*

Unlike California, however, in a number of federal circuits, including the Ninth, horizontal stare decisis applies *within* the circuit, a doctrine known as "law of the circuit." Under this doctrine a decision is binding on all later three-judge panels of the circuit until a higher authority – the circuit sitting en banc or the United States Supreme Court – overrules it. (*Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, 899-900; *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1171-1173; *Burns v. Gammon* (8th Cir. 1999) 173 F.3d 1089, 1090, fn.2; see generally *Textile Mills Sec. Corp. v. Commissioner* (1941) 314 U.S. 326, 335; *Bonner v. Prichard* (11th Cir. 1981) 661 F.2d 1206, 1209.)

> [A] decision of a division is the decision of the court . . . . One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court.

(LaShawn A. v. Barry (D.C. Cir. 1996) 87 F.3d 1389, 1395, internal quotation marks omitted.) The doctrine is a prudential one – a matter of policy, not jurisdiction – and so allows the court to depart from its own precedents in certain unusual circumstances. (*Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866-867; *Miller v. Gammie*, at p. 900; *LaShawn A. v. Barry*, at p. 1395; *North Carolina Utilities Com. v. Federal Communications Com.* (4th Cir. 1977) 552 F.2d 1036, 1044-1045; see also *Hertz v. Woodman* (1910) 218 U.S. 205, 212.)

3. Law of the case [§7.7A]

A doctrine distinct from but related to stare decisis is law of the case, which binds both reviewing and lower courts to follow the initial decision of the appellate court on a point of law in later phases of the same case. (Stare decisis, in contrast, focuses on the duty to follow a ruling of law in *other* cases.)

> [W]here, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . ., and this although in its subsequent consideration [the reviewing] court may be clearly of the opinion that the former decision is erroneous in that particular. The principle applies to criminal as well as civil matters . . . , and it applies to [the Supreme Court] even though the previous appeal was before a Court of Appeal (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal 3d 425, 434).

(*People v. Stanley* (1995) 10 Cal.4th 764, 786, internal quotation marks omitted [under law of case doctrine, Court of Appeal pretrial writ decision on merits of search and seizure issue will not be revisited by Supreme Court in later automatic appeal]; see also *People v. Shuey* (1975) 13 Cal.3d 835.) For the doctrine to apply, the subsequent proceedings must involve the same facts, issues, and parties. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 668-670 [no law of case if later proceeding reviews different decision and involves additional party]; cf. *In re Ditsch* (1984) 162 Cal.App.3d 578, 582 [subsequent habeas corpus petition may raise law of case in attacking trial court's revised sentence for failure to follow previous directions of appellate court, even though statute had changed; those directions were "determinative of the rights of the same parties in any subsequent proceeding in the same case"].)

The principal reason for the doctrine is judicial economy, to avoid repeated litigation of the same issues. The doctrine is a prudential one, a rule of procedure, and does not go to the jurisdiction of the court. It is not binding if its application would result in a substantial miscarriage of justice or the controlling law has been altered by an intervening decision.[5] (*People v. Stanley* (1995) 10 Cal.4th 764, 787; *In re Harris* (1993) 5 Cal.4th 813, 843; *In re Saldana* (1997) 57 Cal.App.4th 620, 627-627 [trial court properly granted habeas corpus and resentenced, despite previous appellate decision affirming judgment, when later Supreme Court decision, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, established contrary rule of law].)

B. How Publication Status Affects Stare Decisis and Citability [§7.8]

In California, as in a number of other jurisdictions, some cases are published and others are not. A case's publication status may affect its citability and its effect as both binding and persuasive precedent.

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[5]As to the trial court, however, jurisdictional limits apply on remand: a trial court has no jurisdiction after remand from the Court of Appeal to do other than follow the directions of the remand order, even though a later decision of the Supreme Court suggests the Court of Appeal decision on the law was incorrect. (See *People v. Dutra* (2006) 145 Cal.App.4th 1359, and §7.43, *post*, on scope of proceedings after remittitur; see also *In re Ditsch* (1984) 162 Cal.App.3d 578, 582 [habeas corpus petition may raise law of case in attacking trial court's revised sentence for failure to follow previous directions of appellate court, even though law had changed; those directions were "determinative of the rights of the same parties in any subsequent proceeding in the same case"].)

1. California cases cited to California courts [§7.9]

The California Rules of Court cover only cases cited to California courts. The law of other jurisdictions governs the citability of cases in those courts.

a. In general: rule 8.1115(a) [§7.10]

An opinion of a California court may be cited or relied on as precedent in the courts of the state only if it is published. (Cal. Rules of Court, rule 8.1115(a).) Unpublished opinions[6] are not binding precedent for purposes of stare decisis. The proscription on citation or reliance applies to unpublished orders of the Court of Appeal, as well as opinions. (*In re Sena* (2001) 94 Cal.App.4th 836, 838-839.)

It may be a violation of professional ethics, subjecting an attorney to discipline, knowingly to cite as authority a decision that is not citable. (See Bus. & Prof. Code, § 6068, subd.(d); Rules Prof. Conduct, rule 5-200 (B), (C), & (D).)

b. Exceptions: rule 8.1115(b) and similar situations [§7.11]

Under California Rules of Court, rule 8.1115(b), unpublished cases may be cited when the opinion is relevant under the law of the case, res judicata, or collateral estoppel doctrine. Another exception is for cases relevant to a different criminal proceeding or a disciplinary proceeding affecting the same defendant or respondent.

In addition to the exceptions specifically enumerated in the rule, counsel have occasionally discussed unpublished cases[7] – without protest from the court – when the use of the cases is consistent with the rationale underlying the general no-citation rule. A petition for review, for example, may point to unpublished cases to show conflicts among the courts on a particular issue, the frequency with which an issue arises, or the importance of an issue to litigants and society as a whole. A brief or petition may refer to the unpublished Court of Appeal opinion in a case pending before the California or United States Supreme Court in order to describe an issue in the pending case. These and

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[6]Unpublished opinions include those never certified for publication and those depublished by court order or a grant of review or rehearing.

[7]Unpublished opinions include those never certified for publication and those depublished by court order or a grant of review or rehearing.

similar uses are consistent with the general no-citation rule because they are referring to the unpublished cases, not as *authority* or *precedent* to persuade the court on the merits of an issue, but as *evidence* of some external fact.

When referring to unpublished cases for these purposes, counsel should avert possible criticism or misunderstanding by explicitly discussing California Rules of Court, rule 8.1115(a) and explaining why the references do not violate the rule. Counsel must also be scrupulous in confining the references to permitted purposes.

If a unpublished opinion is cited in a document, a copy of the opinion must be attached to the document. (Cal. Rules of Court, rule 8.1115(c).)

c. Depublished cases [§7.12]

An opinion of the Court of Appeal that was certified for publication becomes instantly uncitable upon an order for depublication, the grant of a rehearing, or the grant of review by the Supreme Court, unless the Supreme Court orders the Court of Appeal opinion to remain published. (Cal. Rules of Court, rule 8.1105(e).) The fact that the superseded opinion continues to be printed in the advance sheets to permit tracking pending review does not make the opinion citable. (*Barber v. Superior Court* (1991) 234 Cal.App.3d 1076, 1082.)

Appellate counsel should always check the status of recent cases to see if they are still published and therefore citable. If the case becomes depublished, it is counsel's obligation to inform the court and opposing counsel. Providing this information demonstrates knowledge, skill, candor, and ethics. Even if a case has become uncitable, counsel can argue the rationale of the case without citing it.

d. Cases not yet final [§7.13]

Clearing up previous confusion as to whether an opinion certified for publication could be cited immediately or had to await finality, California Rules of Court, rule 8.1115(d), specifically provides "a published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." In fact, it may be ineffective assistance of counsel *not* to cite a helpful case even if it was decided just yesterday. When a recent case has been cited in a brief, appellate counsel of course should regularly check the status of the case to see if it is still published and thus citable.

The *stare decisis* effect of a case not yet final is a different matter from citability. The law is inconclusive as to whether a not-final, published appellate decision is binding

on lower courts under *Auto Equity Sales, Inc.* (1962) 57 Cal.2d 450. (E.g., *Barber v. Superior Court* (1991) 234 Cal.App.3d 1076 ["our [earlier] decision never became final and is without any precedential value or binding force"; however, review had been granted before alleged reliance on opinion]; *Rogers v. Detrich* (1976) 58 Cal.App.3d 90, 103 ["final decision" is binding]; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1999) § 14:191 ["Once a published supreme court or appellate court decision becomes final, it is binding on lower courts under the doctrine of 'stare decisis'"]; cf. *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1098 [trial court's action in declining to follow Court of Appeal decision on ground it was not yet final "was brave but foolish . . . also legally wrong"; but prior opinion was directed toward that specific trial judge[8]]; Cal. Rules of Court, rule 8.1115(d), superseding in part *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547-1548 [published case could not be relied on before it was final].)

2. Non-California opinions and proceedings cited to California courts [§7.14]

California Rules of Court, rule 8.1115 expressly refers to opinions of the California Court of Appeal or an appellate department of the superior court and applies only to proceedings in California courts. A unpublished opinion from another court, such as a federal court or the court of another state, may be cited and relied on in a California proceeding. If a cited opinion is available only in a computer data base, a copy must be attached to the document in which it is cited. (Rule 8.1115(c).)

3. Unpublished California opinions cited to non-California courts [§7.15]

A unpublished California opinion may be cited in proceedings in another jurisdiction if the law of that jurisdiction permits.

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[8]The Court of Appeal noted: "Except in extraordinary circumstances, a trial judge should follow an opinion of the Court of Appeal that speaks to *conditions or practices in the judge's courtroom*, even though the opinion is not final, until the opinion is depublished or review is granted." (*Jonathon M. v. Superior Court*, *supra*, 141 Cal.App.4th at p. 1098, emphasis added.)

4. Federal courts and other jurisdictions with selective publication [§7.16]

In a jurisdiction with selective publication, citation to or reliance on unpublished cases in the courts of the jurisdiction may be restricted.

For example, with some exceptions unpublished opinions of the Ninth Circuit decided before January 1, 2007, cannot be cited to the courts of the circuit, and those opinions are not precedent. (U.S. Cir. Ct. Rules (9th Cir.), rule 36-3(a) & (b).)[9] However, by order of April 12, 2006, the United States Supreme Court directed that all unpublished decisions of the federal courts issued on or after January 1, 2007, may be cited to federal courts.[10]

C. What Gets Published and How [§7.17]

The California Constitution gives the Supreme Court authority to determine which decisions will be published. (Cal. Const., art. VI, § 14; Gov. Code, § 68902.) All opinions of the California Supreme Court are published in full. (Cal. Rules of Court, rule 8.1105(a).)

Opinions of the Court of Appeal and appellate division of the superior court are published if the rendering panel or the Supreme Court so orders.

1. Standards for publication of Court of Appeal opinions [§7.18]

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[9] http://www.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf

[10] Federal Rules of Appellate Procedure, rule 32.1, "Citing Judicial Dispositions":

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
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> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (ii) issued on or after January 1, 2007.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

An opinion of the Court of Appeal is published if a majority of the rendering panel certifies it for publication. (Cal. Rules of Court, rule 8.1105(b).) The court considers whether the opinion meets the standards of rule 8.1105(c).

Rule 8.1105(c) and (d), California Rules of Court, creates a presumption in favor of publication if the opinion meets certain listed criteria. The rule also identifies factors that should not be considered in deciding whether to certify an opinion for publication, such as court workload or embarrassment to attorneys, litigants, judges or others. The provisions in rule 8.1105 include:

> **(c) Standards for certification**
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> An opinion of a Court of Appeal or a superior court appellate division – whether it affirms or reverses a trial court order or judgment – should be certified for publication in the Official Reports if the opinion:
>
> (1) Establishes a new rule of law;
> (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
> (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
> (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
> (5) Addresses or creates an apparent conflict in the law;
> (6) Involves a legal issue of continuing public interest;
> (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
> (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
> (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.
>
> **(d) Factors not to be considered**
>
> Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion.

Partial publication of those sections of opinions meeting these criteria may also be ordered. (Cal. Rules of Court, rule 8.1110.)

2. Publication of opinions not originally ordered published [§7.19]

An originally unpublished opinion may later be ordered published by court order, on a court's own motion or on request of a party or other interested person. The order for publication makes it citable precedent. (Cal. Rules of Court, rule 8.1115(d).)

a. Court order [§7.20]

The Court of Appeal rendering the decision may order publication until the case becomes final as to that court. (Cal. Rules of Court, rule 8.1105(b); see rule 8.366(b) and §7.29 et seq., *post*, on finality.)

The Supreme Court at any time may order publication of a Court of Appeal opinion that was not certified for publication by the Court of Appeal. (Cal. Rules of Court, rule 8.1105(e)(2).) An order for publication does not mean the Supreme Court is expressing an opinion about the correctness of the result or law. (Rule 8.1120(d); see *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8.)

b. Request for publication [§7.21]

Under California Rules of Court, rule 8.1120(a), any party or other interested person may request by letter[11] that the Court of Appeal certify the opinion for publication.[12] The request for publication must be made within 20 days after the opinion is filed. (Rule 8.1120(a)(3).) It must state the person's interest and the reason why the opinion meets a standard for publication. (Rule 8.1120(a)(2).) To be persuasive, it should cite policy reasons, as well. The request must be accompanied by a proof of

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[11]It is conventional to address a letter to the court to the head clerk, asking him or her to forward it to the court, rather than writing to the justices personally.

[12]Unpublished opinions are available online at:
http://www.courts.ca.gov/opinions-nonpub.htm
Searchable opinions are available on the court website at
http://www.courts.ca.gov/opinions-slip.htm
Commercial computerized legal research resources also include unpublished opinions.

service on each party in the Court of Appeal proceeding. (Rule 8.1120(a)(4).) An original and one copy must be filed in the Court of Appeal.[13] (Rule 8.44(b)(6).)

The Court of Appeal has jurisdiction to act on such a request until the judgment becomes final as to that court – normally, 30 days after the date the opinion was filed. (See Cal. Rules of Court, rules 8.264, 8.366(b) and §7.29 et seq., *post*, on finality.) If the court denies the request or has lost jurisdiction to act on it, it must forward the request, with its recommendation and reasons, to the Supreme Court, which will order or deny publication. (Cal. Rules of Court, rule 1120(b).)

D. What Gets Depublished and How [§7.22]

1. California Supreme Court opinions [§7.23]

A Supreme Court opinion is superseded and is not published if the Supreme Court grants rehearing. (See Cal. Rules of Court, rule 8.1105(e)(1).)

An opinion of the California Supreme Court remains published even when the United States Supreme Court grants certiorari. The California Supreme Court opinion is binding on lower California courts pending the United States Supreme Court decision. (*People v. Jaramillo* (1993) 20 Cal.App.4th 196, 197-198.) If the United States Supreme Court reverses, the California Supreme Court decision remains published and is binding precedent on any point not in conflict with the United States Supreme Court's decision.

2. Court of Appeal opinions [§7.24]

A Court of Appeal opinion originally published may lose its publication status and become uncitable in several ways.

a. Rehearing or review [§7.25]

A grant of rehearing prevents publication of the original opinion. (Cal. Rules of Court, rule 8.1105(e)(1).) The new opinion on rehearing will supersede the original opinion and will be published only if so certified.

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[13]Some courts may ask for additional copies of the request. It is a good idea to call the clerk's office about local practice.

A grant of review by the Supreme Court supersedes the lower court opinion, and the opinion, if previously certified for publication, is decertified by the grant of review. (Cal. Rules of Court, rule 8.1105(e)(1).) The Supreme Court may order a lower court opinion to be published in whole or in part at any time after granting review (rule 8.1105(e)(2)), but it rarely does so.

b. Order of Supreme Court [§7.26]

The Supreme Court may order depublication of a Court of Appeal or superior court appellate division opinion that was originally certified for publication. (Cal. Rules of Court, rule 8.1105(e)(2).) It may do so on denial of review, at the request of a party or other interested person (see §7.27., *post*), or on the court's own motion. Depublication is not an expression by the Supreme Court about the correctness of the result or the law in the opinion. (Rule 8.1125(d); *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8.) There is no time limit to the Supreme Court's power to depublish; a case can be depublished years after it is otherwise final, although such late action is rarely taken.

c. Request for depublication [§7.27]

Any person, whether or not a party, may request the Supreme Court to order depublication of a published opinion. (Cal. Rules of Court, rule 8.1125(a)(1).) The request must not be part of a petition for review. Instead, it must be by a letter[14] to the Supreme Court within 30 days after the case becomes final as to the Court of Appeal. (Rule 8.1125(a)(2) & (4); see rules 8.264, 8.366(b) and §7.29 et seq., *post*, on finality.) The request must not exceed 10 pages and must state the nature of the person's interest and the reasons the opinion should not be published. (Rule 8.1125(a)(2) & (3).) It must be accompanied by proof of service on the rendering court and on each party. (Rule 8.1125(a)(5).) Rule 8.44(a)(6) requires an original and one copy to be filed in the Supreme Court, but in practice the court wants additional copies. It is a good idea to check with the Supreme Court clerk's office about current requirements.

The Court of Appeal or any person may, within 10 days after the Supreme Court receives a depublication request, file a response either joining the request or giving reasons in opposition. A response submitted by anyone other than the rendering court must state the nature of the person's interest. A response must be accompanied by proof

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[14]It is conventional to address a letter to the court to the head clerk, asking him or her to forward it to the court, rather than writing to the justices personally.

of service on the Court of Appeal, each party, and each person requesting depublication. (Cal. Rules of Court, rule 8.1125(b).)

IV. DISPOSITION AND POST-DECISION PROCESSES IN COURT OF APPEAL [§7.28]

A. Disposition [§7.28A]

Penal Code section 1260 sets forth the authority of the reviewing court in ordering a disposition on appeal:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

The power to modify the judgment includes reducing the conviction to a lesser included offense if the evidence is insufficient as to the greater offense but sufficient as to the latter. (E.g., *People v. Ruiz* (1975) 14 Cal.3d 163, 165 [modifying conviction for possession of heroin for sale to simple possession of heroin]; *People v. Noah* (1971) 5 Cal.3d 469, 477 [modifying conviction for assault by a prisoner serving less than a life sentence to assault by means of force likely to produce great bodily injury].) It does not include reducing the conviction to more than one lesser included offense. (*People v. Navarro* (2007) 40 Cal.4th 668.)

A reversal in a defendant's appeal is deemed to be an order for a new trial unless the appellate court directs otherwise. (Pen. Code, § 1262.)

The grounds for decision must be based on issues the parties briefed or had an opportunity to brief. (Gov. Code, § 68081; *People v. Alice* (2007) 41 Cal.4th 668, 677-679; *In re Manuel G.* (1997) 16 Cal.4th 805, 812; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149.)

The filing of the opinion does not conclude the case legally: it is over only when no further appellate processes are available. The opinion may or may not conclude the case from a practical point of view: either party may decide to continue the litigation, or they both may decide further proceedings would be futile.

B. Finality of Decision [§7.29]

This section discusses finality as it applies to decisions by the Court of Appeal as the rendering court. "Rendering court finality" means that the court making the decision has lost jurisdiction to modify or rehear it. "Finality" has different meanings in different contexts.[15] (See *In re Pine* (1977) 66 Cal.App.3d 593, 596.)

1. Time of finality [§7.30]

Most Court of Appeal decisions become final as to the Court of Appeal 30 days after filing. At that point, the Court of Appeal loses jurisdiction to modify the opinion, grant rehearing, or order publication. (Cal. Rules of Court, rules 8.264(b)(1) & (c), 8.268(a), 8.366(b)(1), 8.387(b)(1), 8.470, 8.490(b)(2), 8.1105(b).) Grants of a writ, denials of a writ after issuance of an alternative writ or order to show cause, involuntary dismissals of an appeal, and interlocutory orders, as well as appellate opinions on the merits, are among these decisions.

Certain decisions are final immediately. The denial of a writ petition without the issuance of an alternative writ or order to show cause is usually final immediately (Cal. Rules of Court, rules 8.387(b)(2)(A), 8.490(b)(1)), except that the denial of a petition for writ of habeas corpus becomes final in 30 days if it is filed on the same day as the opinion in a related appeal (rule 8.387(b)(2)(B).)

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[15]For example, a judgment becomes final for California appellate review purposes when the time has passed for either the Court of Appeal or the California Supreme Court to review it under that court's appellate jurisdiction.

For purposes of starting the federal habeas corpus statute of limitations, the direct review process becomes final when no further appellate review is possible, including a petition for certiorari to the United States Supreme Court. (28 U.S.C. § 2244(d); see §9.5 of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.")

The same definition of direct review is used for determining the retroactive applicability of many changes in the law. (See *Teague v. Lane* (1989) 489 U.S. 288, 295-296; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5; *In re Spencer* (1965) 63 Cal.2d 400, 405-406; *In re Pine* (1977) 66 Cal.App.3d 593, 594-595; see ADI article, Measures Appellate Counsel Can Take in Responding to Changes in the Law Potentially Beneficial to Their Clients, append. on "General Principles of Retroactivity," at http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf .)

2. Change in judgment or publication status [§7.31]

When the court modifies the opinion after filing, the time for finality starts to run from the filing of the modification order if the modification changes the judgment. If the modification does not change the judgment, the original finality date applies. (Cal. Rules of Court, rules 8.264(c)(2), 8.366(b)(4), 8.387(d)(2), 8.490(b)(5).) The modification order must specify whether it changes the judgment.

If the court orders publication (whole or partial) after the opinion is filed, the finality period runs from the date of the order for publication. (Cal. Rules of Court, rules 8.264(b)(3), 8.366(b)(3), 8.387(b)(3)(B), 8.490(b)(4).)

3. Modification of finality date [§7.32]

The Court of Appeal may order early or immediate finality on its own motion when granting a peremptory writ petition or denying a writ petition after issuance of an alternative writ or order to show cause, "[i]f necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice." (Cal. Rules of Court, rules 8.387(b)(3)(A), 8.490(b)(3).)

The Court of Appeal has no direct power to extend rendering court finality. The court may accomplish that result indirectly by granting a rehearing. (See §7.33 et seq., *post*.)

C. Rehearing [§7.33]

The Court of Appeal may grant rehearing on a petition or on its own motion. (Cal. Rules of Court, rule 8.268(a), 8.366(a), 8.387(e).) A petition for rehearing is generally a brief argument contending the Court of Appeal should reconsider its decision because of errors or omissions in its analysis of the facts, the issues, or the law.

1. Grounds for rehearing [§7.34]

The grounds for granting rehearing are not defined by statutes or rules; however, some guiding principles emerge from case precedent and established practice. The petition is most often needed to call the court's attention to significant and material errors, such as a misstatement of fact, an error of law, an omission in the facts or law, or failure to consider an argument raised in the brief. Reliance in the opinion on a theory not briefed by the parties is another ground. (Gov. Code, § 68081; see *People v. Alice* (2007) 41 Cal.4th 668, 677-679; *In re Manuel G.* (1997) 16 Cal.4th 805, 812; *Adoption of*

Alexander S. (1988) 44 Cal.3d 857, 864; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149.) A petition for rehearing can be used when a strongly supportive case has just been decided, but that accident of timing is pretty rare. Occasionally a petition for rehearing might be tried to offer a new and especially compelling way of viewing a contention already raised, but the likelihood of persuading the court to go the other way at this point is remote.

A petition for rehearing generally is not appropriate merely to reargue the points made in briefs and rejected, if it appears the court properly understood the points and supporting authorities and simply disagreed with the conclusion being urged.

Generally, the petition should not address points that were not included in the briefs on appeal. (*Blackman v. MacCoy* (1959) 169 Cal.App.2d 873, 881-882; but cf. *In re Marilyn H.* (1993) 5 Cal.4th 295, 301, fn. 5.) An exception is jurisdictional issues, which may be raised at any time. (*Sime v. Malouf* (1950) 95 Cal.App.2d 82, 115-117.) Further exceptions might be made for issues based on new developments in the law or other good cause. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121.)

Naturally, it is imperative to file a petition for rehearing if correcting the problem in the opinion could materially affect the outcome of the case. Even if the correction would not affect the outcome, it is important the opinion accurately reflect the facts and issues "for the record," in the event any aspect of the appeal ever becomes material in a later proceeding. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448 [appellate opinion in prior case considered as evidence of underlying fact stated in opinion].)

2. Rule 8.500(c): petition for rehearing required in order to raise errors or omissions in Court of Appeal opinion as grounds for petition for review [§7.35]

Although a petition for rehearing is not generally a prerequisite for a petition for review, it is required if review is sought on the ground the Court of Appeal opinion contained errors or omissions of issues or facts. Rule 8.500(c) of the California Rules of Court provides:

> (1) As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.
>
> (2) A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court 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.

The purpose of rule 8.500(c) is to make Supreme Court review unnecessary just to correct obvious oversights of fact or law by the Court of Appeal, which it would have corrected if the errors had been pointed out in a petition for rehearing.[16] If the attorney does not intend to file a petition for review but the client wants to continue in pro per, the attorney should preserve it for the client by seeking to cure the error or omission; such a correction is a legitimate ground for rehearing, and as a practical matter, few clients would be able to prepare a petition for rehearing within jurisdictional time limits.[17]

3. Formal requirements for petition for rehearing [§7.36]

Information about filing and service requirements is summarized in chart form in chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," §1.154, appendix C.

a. Time limits [§7.37]

The date of the appellate opinion's filing is the controlling date in calculating time limitations. A petition for rehearing must be served and filed within 15 days after the filing of the decision. (Cal. Rules of Court, rule 8.268(b)(1); see also rule 8.25.) The presiding justice may grant leave to file a late petition for good cause if the opinion is not yet final. (Rule 8.268(b)(4).)

An order for publication made after the opinion is filed restarts the 15-day period, unless the party has already filed a petition. (Rule 8.268(b)(1)(B).) A modification to the opinion changing the judgment also restarts the period.[18] (Rule 8.268(b)(1)(C).)

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[16]If a case is in Division Two of the Fourth Appellate District, which provides tentative opinions, counsel may call attention to an error or omission after receiving the tentative. (See §6.10 et seq. of chapter 6, "Effective Use of the Spoken Word on Appeal: Oral Argument.") If the court does not correct the problem in the final opinion, counsel should still file a petition for rehearing if a petition for review is contemplated.

[17]Some courts take the position that clients represented by counsel have no standing to file in pro per and refuse to accept a petition for rehearing submitted by the client. A procedural way around that problem, if the client wants to file in pro per, would be for counsel to ask to be relieved right after the decision not to proceed further is made.

[18]The Court of Appeal order modifying the opinion must state whether the judgment is being changed. (Rule 8.264(c)(2).)

b. Format [§7.38]

Petitions for rehearing must conform to the provisions of California Rules of Court, rules 8.204 and 8.360, prescribing the general rules for the form of appellate briefs. (Rule 8.268(b)(3), 8.366(a).) The cover is orange. (Rule 8.40(b)(1).)

c. Filing and service [§7.39]

In criminal cases an original and four copies of a petition for rehearing must be filed in the Court of Appeal. (Cal. Rules of Court, rule 8.44(b)(3).) One copy must be served on each party represented by separate counsel and on the Attorney General. (Rules 8.268, 8.25(a)(1).) By practice the district attorney and the superior court should also be served. A copy should be sent to the appellant unless he or she has requested otherwise in writing. By policy, panel attorneys must also serve ADI or the applicable appellate project.

4. Substantive content and tone [§7.40]

Because the petition for rehearing contests the appellate opinion itself, the task of persuasion is a formidable one. The petition faces the obstacles of both institutional inertia (the court does not want to have to redo its work on the case) and, sometimes, personal psychological investment on the part of the justices (pride of authorship or resistance to acknowledging they were wrong).

Counsel should strive to be compelling and concise and to explain exactly what the problem is and why it affects the client. At the same time, counsel must be sensitive to the court's possible reactions and maintain an attitude of great respect. The tone should remain objective and avoid any intimation of personal criticism. Counsel should emphasize the importance of a correct decision and the injury to the client, not the court's "foolishness" in making the error; it helps to use language critiquing the "opinion," rather than the "court."

A contemptuous or irate attitude is beneficial neither to the client's interests nor to counsel's stature before the court.[19] Ideally counsel wants, not to target the court as an

[19]In *In re Koven* (2005) 134 Cal.App.4th 262, 264, 276-277, the court held in contempt an appellate counsel who, in a petition for rehearing, accused the court of "deliberate judicial dishonesty" and other misconduct.

enemy or portray it unflatteringly, but to enlist the court as an ally, showing counsel's confidence in and respect for the court's desire to do justice and reach the right result, and its willingness to recognize and correct its own mistakes.

5. Answer [§7.41]

Under California Rules of Court, rule 8.268(b)(2), a party may not file an answer to a petition for rehearing in the Court of Appeal unless the court so requests; the rule indicates a petition for rehearing normally will not be granted unless the court has requested an answer. The answer should defend and reinforce the opinion of the court, conform to rule 8.204, and have a blue cover. (Rules 8.268(b)(3), 8.40(b)(1).)

6. Disposition [§7.42]

A rehearing may be granted on a petition, or on the court's own motion, before the decision becomes final. Under California Rules of Court, rule 8.264(b), a decision of the Court of Appeal normally becomes final 30 days after filing, and thereafter the court loses jurisdiction over the cause.[20] If the court fails to act on a petition while it has jurisdiction, then the petition is deemed denied. (Rules 8.268(c).) An order for publication restarts the 30-day period. (Rule 8.264(b)(3).)

The court may deny the petition for rehearing, yet still modify the original opinion. If the order for modification does not change the judgment, the date of finality and the time to petition for review in the Supreme Court are not extended. However, if the order changes the judgment, then the clock begins to run anew from the date of the modification, for purposes of finality and petitioning for rehearing and review. (Cal. Rules of Court, rules 8.264(c)(2), 8.268(b)(1)(C).) The order modifying the opinion must state whether the judgment is being changed. (Rule 8.264(c)(2).)

D. Remittitur [§7.43]

The remittitur is the document sent by the reviewing court to the court or other tribunal whose judgment was reviewed. A remittitur is issued after an appeal or original proceeding, except on the summary denial of a writ petition. (Cal. Rules of Court, rules 8.272(a)(2), 8.366(a), 8.387(f), 8.490(c), 8.540(a).)

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[20]For a discussion of finality, see §7.29 et seq., *ante*.

The remittitur functions as a transfer of jurisdiction from the appellate court to the lower court. (*Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.) Policy considerations require that only one court have jurisdiction over a case at any given time. The filing of a notice of appeal divests the trial court of jurisdiction and vests it in the Court of Appeal. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) The remittitur revests it in the lower court.

> [T]he essence of remittitur is the returning or revesting of jurisdiction in an inferior court by a reviewing court. The reviewing court loses jurisdiction at the time of remittitur and the inferior court regains jurisdiction.

(*Gallenkamp*, at p. 10.) Until the remittitur issues, the trial court lacks jurisdiction to retry a case or, with certain exceptions,[21] make other orders. (*People v. Sonoqui* (1934) 1 Cal.2d 364, 365-367; *People v. Saunoa* (2006) 139 Cal.App.4th 870.)

If further proceedings in the trial court are ordered, the scope of the trial court's authority is limited by the terms of the remittitur. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656 Code Civ. Proc., § 43; *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147.) This is true even if a later decision of a higher court casts doubt on the correctness of the decision. (*People v. Dutra* (2006) 145 Cal.App.4th 1359.)

A remittitur from the Court of Appeal normally goes to the superior court. A Supreme Court remittitur goes to the Court of Appeal in a review-granted case and to the lower court or tribunal in other types of proceedings. (Cal. Rules of Court, rule 8.540(b).)

1. Issuance [§7.44]

Court of Appeal remittiturs are governed by rule 8.272 of the California Rules of Court. They are issued when a case is final for state appellate purposes, i.e., no further appellate review within the California judicial system is available. (Certiorari to the United States Supreme Court or original post-conviction writ remedies may still be open.)

If no review in the California Supreme Court is sought, the remittitur for a Court of Appeal opinion will be issued when the time for the Supreme Court to grant review

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[21]For example, the trial court retains authority to correct clerical error, correct custody credits, recall the sentence (Pen. Code, § 1170, subd. (d)), modify or revoke probation, and make orders in juvenile cases.

expires – normally on the 61st day after the opinion's filing. (Cal. Rules of Court, rules 8.272(b)(1)(A), 8.366(a).) The Supreme Court may extend that time when it is considering granting review on its own motion. (Rule 8.512(c)(1).)

If review is sought, the remittitur will issue immediately upon a denial of the petition for review or dismissal of review. (Cal. Rules of Court, rules 8.272(b)(1)(A), 8.366(a).)

If review is granted and the case is decided by the Supreme Court, the Supreme Court will issue a remittitur to the Court of Appeal, which in turn will issue one to the superior court. (Cal. Rules of Court, rules 8.272(b)(2), 8.366(a), 8.540.)

The Court of Appeal may order immediate issuance of a remittitur on stipulation of the parties or dismissal of the appeal. (Cal. Rules of Court, rules 8.272(c)(1), 8.316(b)(2), 8.366(a).) The court may stay issuance of the remittitur for a reasonable period. (Rules 8.272(c)(2), 8.366(a).)

2. Recall [§7.45]

For good cause the court may recall the remittitur on its own or a party's motion, thereby reinvesting jurisdiction over the case in the appellate court. (Cal. Rules of Court, rule 8.272(c)(2).) Good cause may consist of such grounds as ineffective assistance of appellate counsel or a change in the law abrogating the basis for the previous judgment. (E.g., *People v. Mutch* (1971) 4 Cal.3d 389, 396-397*; In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn.12; *People v. Lewis* (2006) 139 Cal. App.4th 874, 879.) The recall order does not supersede the opinion or affect its publication status. (Cal. Rules of Court, rules 8.272(c)(3).) As the court explained in *In re Grunau* (2008) 169 Cal.App.4th 997, 1002:

> By recalling the remittitur, an appellate court reasserts jurisdiction on the basis that the remittitur, or more often the judgment it transmitted, was procured by some improper or defective means. Technically the court does not reclaim a jurisdiction it has lost, but disregards a relinquishment of jurisdiction that is shown to have been vitiated.

In criminal cases, a petition for writ of habeas corpus may be the vehicle for requesting the remittitur be recalled. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484-

490, fn. 12; see §8.62 of chapter 8, "Putting on the Writs: California Extraordinary Remedies.")

V. PETITIONS FOR REVIEW IN THE CALIFORNIA SUPREME COURT [§7.46]

If the case presents a new or important question of law or an issue on which districts or divisions of the Court of Appeal are in conflict, or if it is necessary to exhaust state remedies in order to preserve an argument for subsequent federal review,[22] a petition for review in the California Supreme Court should be considered. A petition should be filed if it seems (a) appropriate given the criteria for petitions and (b) reasonably necessary to protect the client's interests. The fact the client or attorney disagrees with the Court of Appeal or is unhappy with its reasoning is usually not itself a sufficient reason for petitioning.[23] The decision whether to seek review should be made soon after the Court of Appeal opinion is filed.

If counsel decides not to file a petition, the client must be notified promptly and provided with information on how to file a petition for review in pro per, including the date by which the petition must be filed and the address of the Supreme Court.[24]

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[22]Exhaustion of state remedies is a valid consideration if the client has a serious potential federal issue that has been raised adequately in the Court of Appeal. It is not appropriate to petition "just in case something should come up in the federal courts." See §7.70, *post*, on abbreviated petitions for review to exhaust state remedies. See also §9.66 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," on steps to take to preserve federal issues.

[23]An occasional exception can occur when the Court of Appeal has obviously misapplied undisputed law or denied the appellant procedural due process during the appeal. In that situation the Supreme Court has occasionally granted review and transferred the case back to the Court of Appeal with directions. (See Cal. Rules of Court, rules 8.500(b)(4), 8.528(d); e.g., *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301, 2005 Cal. Lexis 2771; see §§7.79 and 7.94, *post*.)

[24]Petition for review information forms for clients are on the ADI website: http://www.adi-sandiego.com/PDFs/Pet%20for%20review%20info%2012-09-2.pdf Basic information is on the court website at http://www.courts.ca.gov/2962.htm . Caution: Some of the information (e.g., on filing fees) does not apply to criminal cases.

A. Grounds for Review and Factors Relevant to the Discretionary Decision [§7.47]

The grounds for review in the Supreme Court are found in California Rules of Court, rule 8.500(b). Review by the Supreme Court of a decision of a Court of Appeal may be ordered when: (1) it appears necessary to secure uniformity of decision or to settle important questions of law, (2) the Court of Appeal was without jurisdiction, (3) because of disqualification or other reason the decision of the Court of Appeal lacked the concurrence of the required majority of the qualified judges, and (4) the Supreme Court determines further proceedings in the Court of Appeal are necessary.

The Supreme Court grants review in roughly four percent of the petitions filed. One of the reasons for this low percentage is that the dominant role of the Supreme Court is supervisory. It promotes justice, not necessarily by ensuring the correct result is reached in each individual case, but by maintaining uniformity in the decisional law and overseeing the development of the law.

The Supreme Court may, on its own motion, order review of the Court of Appeal decision (Cal. Rules of Court, rule 8.512(c)(1)), but this power is rarely used. (See *Haraguchi v. Superior Court (People)*, review granted Dec. 20, 2006, S148207.) During the pendency of a case in the Court of Appeal, the Supreme Court may also order the case transferred to itself, on its own or a party's motion. (Rule 8.552(a); e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256.)

1. Uniformity of decision [§7.48]

The likelihood that conflicting appellate authority will prompt the Supreme Court to grant review depends on a number of factors. These include the ages of the conflicting cases, the importance of the issue, the frequency with which it arises, and the extent to which other courts have questioned or followed the various conflicting cases.

2. Important questions of law [§7.49]

Among the factors relevant to the Supreme Court's judgment that a legal question is an important one warranting review are issues of first impression; issues of broad or frequent applicability; differences between California law and the law of other states, treatises, or restatements; criticism of California law by other courts or commentators; the joinder of amicus curiae in the petition; statistics, reports, commentaries, and news articles suggesting the issues are likely to recur; and the impact of the issue on the judicial system. (See Appellate Court Committee, San Diego County Bar Association, California

Appellate Practice Handbook (7th ed. 2001) § 8.81, pp. 307-30.) Another consideration may be the quantity of pending cases with the same issue.

The fact an opinion is published increases the likelihood review will be granted, as does the existence of concurring or dissenting opinions substantially at odds with the majority reasoning.

3. Other grounds under rule 8.500(b) [§7.50]

The second and third grounds for review under California Rules of Court, rule 8.500(b) (lack of jurisdiction in the Court of Appeal and lack of a majority) seldom arise. (Cf. *Pennix v. Winton* (1943) 61 Cal.App.2d 761, 777.)

The Supreme Court does exercise with some regularity its power under the fourth ground to grant review and transfer a matter to the Court of Appeal for further proceedings. (Cal. Rules of Court, rule 8.500(b)(4).) This procedure is used often when the Court of Appeal proceedings were improperly truncated (for example, by the summary denial of a writ petition or the dismissal of an appeal), when new law may affect the Court of Appeal decision, or when the Court of Appeal made a clear error that needs correction but not plenary Supreme Court review.[25]

4. Considerations apart from rule 8.500(b) listed grounds [§7.51]

The Supreme Court has broad discretion in determining whether to grant review. On the one hand, the court may grant review even when grounds under California Rules of Court, rule 8.500(b) are technically absent – as when it sees a serious injustice or error in the individual case – although a grant of review for this reason is relatively infrequent.

On the other hand, very often the court does not grant review despite the presence of one or more conditions under California Rules of Court, rule 8.500(b). For example, in a case involving an extremely important issue of law, the Supreme Court may deny review because the Court of Appeal has settled the question in a manner that will adequately guide other courts. Similarly, the Supreme Court may decide not to intervene

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[25]In *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301, 2005 Cal. Lexis 2771, for example, the Court of Appeal had dismissed the appeal on the ground the notice of appeal was inadequate. The Supreme Court granted review and transferred the case to the Court of Appeal with directions to reinstate the appeal and deem the notice of appeal properly filed.

despite conflicting appellate court opinions because the issue is rare or its impact is minimal. Or the court may wish to defer consideration of an issue until it has been refined through repeated deliberations in the lower courts.

B. Formal Requirements for Petition [§7.52]

Information about filing and service requirements is summarized in chart form in chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," §1.154, appendix C.

1. Time limitation [§7.53]

A party seeking review must serve and file a petition for review within 10 days after the decision of the Court of Appeal becomes final. (Cal. Rules of Court, rule 8.500(e)(1).)

a. 30-day finality cases [§7.54]

Decisions of the Court of Appeal are usually final as to that court 30 days after filing of the decision. (Rule 8.264(b)(1).) Grants of a writ, denials of a writ after issuance of an alternative writ or order to show cause, involuntary dismissals of an appeal, and interlocutory orders, as well as opinions in an appeal, are among these decisions. In most cases, therefore, a petition for review must be filed within the window period of 31-40 days after the filing of the Court of Appeal opinion.[26]

As with other filing deadlines, if the 10th day falls on a non-business day, the due date is the next business day. (Code Civ. Proc., § 12a; *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 955.) A caveat: if the day of finality is a non-business day, the 10-day period for filing a petition for review still starts on the non-business day. (Cal. Rules of Court, rule 8.500(e)(1).) In other words, the "next business day" rule applies to the *filing* date, not to starting the clock on the petition for review.

b. Immediate finality cases [§7.55]

Some decisions are final immediately and in those cases a petition for review must be filed within 10 days of the filing date of the decision denying or granting relief. For

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[26]An order for publication after the opinion is filed or a modification of the opinion changing the judgment restarts the period of finality. (Rule 8.264(b) & (c).)

example, with the exception noted below, the denial by the Court of Appeal of a petition for an original writ, when it has not issued an alternative writ or an order to show cause, is final immediately (i.e., on the date the denial is filed).[27] (Cal. Rules of Court, rules 8.264(b)(2)(A), 8.366(a) & (b)(2).) Other examples of immediately final decisions are denials of bail pending appeal, voluntary dismissals of an appeal, denials of a petition for writ of supersedeas, and denials of a transfer of a case within the appellate jurisdiction of the superior court. (Rules 8.264(b)(2)(B), 8.366(a).)

c. Habeas corpus denial on same day as opinion in related appeal [§7.56]

An exception to the rule of immediate finality for summary writ denials is that the denial of a petition for writ of habeas corpus filed on the same day as a decision in a related appeal becomes final at the same time as the related appeal, even if no order to show cause has issued. (Cal. Rules of Court, rule 8.387(b)(2)(B).) Separate petitions for review are required for the writ proceeding and the appeal if they were not consolidated in the Court of Appeal and no order to show cause was issued. (Rule 8.500(d).)

d. Premature petition [§7.57]

A petition for review submitted for filing before the Court of Appeal decision becomes final will be received and deemed filed the day after finality. (Cal. Rules of Court, rule 8.500(e)(3).)

e. Extending time [§7.58]

The time for filing a petition for review cannot be extended, but the Chief Justice may relieve a party from default from failure to file a timely petition if the time for the court to grant review on its own motion has not expired. (Cal. Rules of Court, rules 8.500(e)(2), 8.512(b)(1).) In contrast, an extension of time to file an answer or reply may be granted. (Rules 8.500(e)(4) & (5), 8.60(b), and Advisory Committee comment to rule 8.500(e); see §7.71, *post*.)

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[27]To avoid confusion, the appellate courts have been advised to issue alternative writs or orders to show cause before setting writ matters for oral argument. (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024-1025, fn.8.)

2. Format [§7.59]

Except as otherwise provided in California Rules of Court, rule 8.504, a petition for review must comply with the provisions of rule 8.204, providing the general rules for the form of appellate briefs. (Rule 8.504(a).) The original petition and each copy filed in the Supreme Court must contain or be accompanied by a conformed copy of the opinion of the Court of Appeal and any order for modification or publication, but the service copies do not require an attached opinion. (Rule 8.504(b)(4).) No other attachments are permitted except for an opinion required by rule 8.1115(c) [available only in computer-based source] or up to 10 pages of relevant lower court orders, exhibits, and citable regulations, rules, or other relatively non-accessible law. (Rule 8.504(e)(1) & (2).) The cover is white. (Rule 8.40(b)(1).)

3. Length [§7.60]

If produced on a computer, a petition for review must not exceed 8,400 words including footnotes and must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The certifying person may rely on the word count of the computer program used to prepare the document. (Cal. Rules of Court, rule 8.504(d)(1).) Upon application, the Chief Justice may permit for good cause a petition greater than the specified length or the inclusion of more annexed material. (Rule 8.504(d)(4).)

4. Filing and service [§7.61]

Unless the petition is filed simply to exhaust state remedies under California Rules of Court, rule 8.508, an original and 13 copies of a petition for review or answer must be filed in the Supreme Court.[28] (Rule 8.44(a)(4).) One copy of the petition must be served on the superior court clerk and clerk of the Court of Appeal. (Rule 8.500(f)(1).) One copy must be served "on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule." (Rule 8.25(a)(1); see also rule 8.500(f).) Additionally, by policy the applicable appellate project and district attorney should be served. The client should also get a copy unless he or she has asked not to receive documents pertaining to the case.

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[28]An exhaustion-only petition under rule 8.508 requires only an original and *eight* copies. (Cal. Rules of Court, rule 8.44(a)(4).)

A petition for review is filed when it has been file stamped by one of the Supreme Court clerk's offices. (Cal. Rules of Court, rule 8.25(b)(1).) It is not filed on the date of mailing unless the provisions of rule 8.25(b)(3) are being used.[29] The Supreme Court's main clerk's office is San Francisco. The clerk will file stamp (conform) an extra copy to show the date of filing. Counsel should provide an extra copy to be returned to him or her when conformed. In the rare instance when filed documents are lost, proof of filing within the time limit can be critical.

If documents need immediate attention, they should prominently state the urgency on the cover.

C. Purpose and Substantive Content [§7.62]

1. Purpose of petition [§7.63]

The objective of a petition for review (other than an exhaustion petition) is to obtain review, not reversal or affirmance. If the petition is granted, new briefs on the merits will be filed. Thus there is no reason to include extended merits briefing in the petition beyond what is required to ensure the court knows what the issues are and why further consideration of them is needed (for example, why the Court of Appeal's treatment was inadequate or erroneous).

The critical function of a petition is to attract the interest of the Supreme Court and persuade it that review is necessary. Counsel's persuasive skills should be focused on the message "Why you should hear this case," not "Why my client should win." Since the granting of petitions for review is completely discretionary and counsel is competing with numerous other briefs and petitions for the attention of the justices and their research attorneys, appellate counsel should make the petition as concise, interesting, and compelling as possible.

For this reason, the petition for review should not just repeat the arguments already rejected and try at length to persuade the Supreme Court on the merits. It should develop the theme of why review is necessary. Questions of law become more important when they have consequences beyond the individual case. It should point out any social or

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[29]Under rule 8.25(b)(3) a petition for review (or other document) is timely "if the time to file it has not expired on the date of: (A) Its mailing by priority or express mail as shown on the postmark or the postal receipt; or (B) Its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt."

political concerns involved, any implications for the judicial system, and the frequency with which the issues arise. The petition should note any conflicts among the Courts of Appeal and any dissenting or concurring opinions.[30] The alleged incorrectness of the result reached in the Court of Appeal and injustice to the individual client would be factors to point out, but that will rarely suffice to differentiate the particular case from most others seeking review.

From this, it should go without saying that *it is inappropriate simply to copy the briefs wholesale, stick on a new cover and an "Issues Presented" section, and file that as a petition for review.* Such petitions are filed all the time, but they represent poor advocacy.[31]

2. Content [§7.64]

Rule 8.504(b) of the California Rules of Court prescribes the contents of a petition for review. It need not contain all of the elements of an opening brief, such as statement of appealability or of the facts and case, etc. Frequently counsel include such matters to help the court understand the issue, but it is not necessary and in some situations might be a distraction.

a. Issues presented [§7.65]

The body of the petition for review must begin with a concise, non-argumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail, and the petition must explain how the case presents a ground for review. (Cal. Rules of Court, rule 8.504(b)(1) & (2); §§7.47 et seq. and 7.63, *ante*.) If rehearing was available, the petition must state whether it was sought and how the court ruled. (Rule 8.504(b)(3).)

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[30]As discussed in §7.11, *ante*, unpublished opinions may be useful in showing a conflict among courts, the frequency with which an issue arises, the general importance of the issue, and other facts relevant to granting review. When referring to unpublished cases for these purposes, counsel should avert possible criticism or misunderstanding by explicitly discussing California Rules of Court, rule 8.1115(a), which prohibits reliance on a case not published, and by explaining why the references do not violate the rule. Counsel must also be scrupulous in confining the references to permitted purposes.

[31]An exception might be when the sole purpose of the petition is to exhaust state remedies for federal purposes. See §7.70, *post.*

b. Required attachments [§7.66]

The opinion or order sought to be reviewed, and any order modifying the opinion or directing its publication, are required attachments to a petition for review under California Rules of Court, rule 8.504(b)(4) and (5). No other attachments are permitted except an opinion required by rule 8.1115(c) [available only in computer-based source], and up to 10 pages of exhibits or orders of a trial court or Court of Appeal that the party considers unusually significant or relevant citable regulations, rules, or other relatively non-accessible law. (Rule 8.504(e)(1) & (2).) Incorporation by reference is prohibited, except for references to a petition, answer, or reply filed by another party in the same case or another case with the same or similar issues, in which a petition for review is pending or has been granted. (Rule 8.504(e)(3).)

c. Argument [§7.67]

The argument section of a petition for review should carry out the theme of why review is necessary – usually (1) to secure uniformity of decision or (2) to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1); §§7.47 et seq. and 7.63, *ante*.) The argument should point out any social or political concerns implicated by the issues and any consequences beyond those related to the petitioner. It should alert the court to any other pending cases that raise identical or related issues and when appropriate may explain how the instant case highlights the issues more clearly than other pending cases.

d. Depublication request [§7.68]

In addition to or in lieu of review, a request for depublication may be made. (Cal. Rules of Court, rule 8.1125.) However, that measure offers no remedy to the individual client, and to the extent it suggests depublication is an adequate substitute for a grant of review, it may actually render a disservice to the client. Counsel therefore must be exceedingly cautious about making such a request and generally should eschew it. The court can depublish on its own – and often does – without counsel's request.[32] (Rule 8.1105(e)(2).)

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[32]See §7.27 for the formal requirements of a request for depublication.

e. Alternative remedies [§7.69]

The petition for review may also suggest a disposition other than a full review and decision on the merits by the Supreme Court. An example would be a "grant and hold" (Cal. Rules of Court, rule 8.512(d)(2)), when the issue is already pending in the Supreme Court. Another example would be a grant of review and transfer to the Court of Appeal with instructions (rules 8.500(b)(4), 8.528(d)); this might be appropriate when, for example, the Court of Appeal decision omits or misstates important matters, when a relevant new decision has been issued,[33] when the court has denied a writ petition summarily, or when the court has dismissed an appeal for improper reasons.

D. Abbreviated Petition To Exhaust State Remedies [§7.70]

Rule 8.508 of the California Rules of Court permits an abbreviated petition for review when no grounds for review under rule 8.500(b) exist, but a petition for review is needed to exhaust state remedies for potential habeas corpus relief in federal court. The Supreme Court may still grant review if the case warrants it.

An exhaustion petition for review need not comply with California Rules of Court, rule 8.504(b)(1) and (2), which requires a non-exhaustion petition begin with a statement of the issues presented for review and explain how the case presents a ground for review under rule 8.500(b). Only an original and *eight* copies need be filed in the Supreme Court – as opposed to an original and 13 for a non-exhaustion petition. (Cal. Rules of Court, rule 8.44(a)(1) & (4).)

The words "Petition for Review To Exhaust State Remedies" must appear prominently on the cover. (Cal. Rules of Court, rule 8.508(b)(1).) The petition must comply with rule 8.504(b)(3) through (5). It must state it presents no grounds for review under rule 8.500(b) and is filed solely to exhaust state remedies for federal habeas corpus purposes. (Rule 8.508(b)(3)(A).)

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[33]Often such a transfer will order reconsideration in light of a Supreme Court decision, but it may be based on Court of Appeal decisions, as well. (See, e.g., *In re Henderson* (November 19, 2009, No. S177100) [petition for review granted an transferred to Court of Appeal "with instructions to vacate its opinion and reconsider its disposition in light of" two Court of Appeal decisions].)

An exhaustion petition for review must contain a brief statement of the underlying proceedings, including the conviction and punishment, and the factual and legal bases of the federal claims. (Cal. Rules of Court, rule 8.508(b)(3)(B) & (C).) It is important for this statement to present the facts and issues sufficiently to exhaust state remedies under federal law. (For guidance on exhaustion, see §9.66 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," and O'Connell, "Exhaustion" Petitions for Review Under New Rule 33.3, on ADI website.)[34]

E. Answer and Reply [§7.71]

Rule 8.500(a)(2) and (e)(4) of the California Rules of Court permits, but does not require, an answer to a petition for review. The answer is due within 20 days after the filing of the petition.[35] A party may request an extension of time in which to file an answer. (Rules 8.500(e)(4), 8.50(a), 8.60(b), and Advisory Committee comment to rule 8.500(e); contrast rule 8.500(e)(2), not permitting extensions to file petition for review.) An answer may ask the Supreme Court to address additional issues if the court grants review of any issue presented to the Court of Appeal but not mentioned in the petition for review. (Rule 8.500(a)(2).) When the Court of Appeal declined to reach important issues because it reversed on other grounds, an answer may be required to alert the Supreme Court to these issues. (See, e.g., *In re Manuel G.* (1997) 16 Cal.4th 805, 814, fn. 3.)

The answer should generally support the result reached in the Court of Appeal. (However, it may ask the Supreme Court to reconsider certain aspects of the Court of Appeal's decision in the event review is granted.) It should point out any errors of fact or law in the petition for review. It may rebut the claimed need for the Supreme Court's intervention, for example, by explaining why any decisional conflict is insignificant or disputing the importance of the issue being raised. If opposing counsel has failed to comply with California Rules of Court, rule 8.500(c)(2), which requires a petition for rehearing in certain cases, the answer should point out that omission.

The answer may not exceed 8,400 words including footnotes. (Cal. Rules of Court, rule 8.504(d)(1).) The cover is blue. (Rule 8.40(b)(1).) Except as otherwise

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[34]http://www.adi-sandiego.com/PDFs/Exhaustion_petition_for_review_under_rule_8-508.pdf

[35]Contrast rules 8.268(b)(2) and 8.366(a) (answer to petition for rehearing in Court of Appeal not permitted unless court so requests).

provided in rule 8.504, the answer must comply with the provisions of rule 8.204. (Rule 8.504(a).)

Within 10 days after the filing of the answer, the petitioner may serve and file a reply, not exceeding 4,200 words including footnotes. (Cal. Rules of Court, rules 8.500(a)(3) & (e)(5), 8.504(d)(1).) A party may request an extension of time in which to file a reply. (Rules 8.500(e)(5), 8.50, 8.60(b); third paragraph of Advisory Committee Comment to rule 8.500(e).)

F. Amicus Curiae [§7.72]

Amici curiae may file letters in support of or opposition to review (commonly called "me too" letters). They must comply with California Rules of Court, rule 8.500(g).

G. Disposition of Petition [§7.73]

The Supreme Court must act within 60 days after the filing of a petition but may and often does extend the time to rule an additional 30 days. (Rule 8.512(b)(1).) The total time including extensions may not exceed 90 days after the filing of the last timely petition for review.[36] (*Ibid.*)

Denials or dismissals of review and orders for transfer or retransfer are final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A) & (B).)

1. Decision-making process [§7.74]

The processes for considering petitions for review are described in the Internal Operating Practices and Procedures of the California Supreme Court.[37]

Staff attorneys at the Supreme Court assess petitions for review in non-capital criminal cases according to such criteria as significance, the likelihood of a grant, length, issues, and publication status. They prepare a memo and make a recommendation as to

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[36]If no petition for review is filed by a party, the Supreme Court may, although it rarely does, order review on its own motion within 30 days of finality of the decision in the Court of Appeal. This time may be extended up to an additional 60 days. (Rule 8.512(c)(1).)

[37] http://www.courts.ca.gov/documents/2007_Supreme_Court_Booklet.pdf

disposition. (Cal. Supreme Ct., Internal Operating Practices and Proc. (2003), IV C, Conference Memoranda.)

Cases are then assigned to the "A" or "B" list. The "A" list is for cases warranting serious consideration (about 30-40%), and the "B" list is for routine matters in which the recommendation is to deny review. Any justice may request to move a case to the "A" list or may request a supplemental memorandum. (Cal. Supreme Ct., Internal Operating Practices and Proc. (2003), IV D & H, Conference Memoranda.)

The justices meet approximately weekly to confer on pending matters, including petition for review dockets, habeas corpus dockets, automatic appeals (capital cases), assorted motions, compensation of counsel, and publication and depublication requests. Matters on the "B" list are not discussed and will be denied. Matters on the "A" list are discussed and then voted upon in order of seniority among the justices. Any justice may request that a case on either list be continued to a later conference for further consideration. (Cal. Supreme Ct., Internal Operating Practices and Proc. (2003) III, Conferences, IV E-H, Conference Memoranda.)

2. Decision [§7.75]

The Supreme Court must rule within 60 days after the last petition for review is filed, although it may extend the time so that the total does not exceed 90 days. (Cal. Rules of Court, rule 8.512(b)(1).) A vote of at least four justices is required to grant review. (Rule 8.512(d)(1).)

a. Denial [§7.76]

The Supreme Court most commonly denies petitions for review. A denial is final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A).)

b. Grant of full review [§7.77]

The court may grant review by an order signed by at least four justices. (Cal. Rules of Court, rule 8.512(d)(1).)

Upon granting full review, the Supreme Court may and often does specify what issues are to be within the scope of the review. (Cal. Rules of Court, rule 8.516(a)(1).) This order is not binding on the court, and it may later expand or contract review, as long as the parties are given an opportunity for argument. (Rule 8.516(a)(2).)

c. Grant and hold [§7.78]

The Supreme Court may dispose of the petition other than by granting full review. In a "grant and hold" disposition, it grants the petition and holds the case pending decision in another case on which the court has granted review. (Cal. Rules of Court, rule 8.512(d)(2).)

d. Grant and transfer [§7.79]

In a "grant and transfer" disposition, the court grants the petition and transfers the case back to the Court of Appeal, usually with instructions. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d).) The court may choose this type of disposition when further action but not full Supreme Court review is needed – for example, when the Court of Appeal denied a writ petition summarily, when the opinion failed to consider substantial issues or authorities, or when a controlling decision was filed after the opinion. (See, e.g., *People v. Howard* (1987) 190 Cal.App.3d 41, 45; *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301, 2005 Cal. Lexis 2771.)

A "grant and transfer" order is final immediately. (Rule 8.532(b)(2)(B).) Any supplemental briefing in the Court of Appeal after remand or transfer from the Supreme Court is governed by rule 8.200(b).[38] (Rule 8.528(f).)

e. Order affecting publication status [§7.80]

The court may also deny the petition but publish or depublish the Court of Appeal opinion. Depublication leaves the opinion as the law of the case but prevents it from being cited as precedent in future cases. (Cal. Rules of Court, rule 8.1115(a).) Neither publication nor depublication expresses the Supreme Court's views about the correctness of the opinion. (Rules 8.1120(d), 8.1125(d).) See §7.8 et seq., *ante*, for further discussion of publication.

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[38]Rule 8.200(b)(1) imposes a short deadline of 15 days after the finality of the Supreme Court decision to file a supplemental brief, with 15 days for opposing counsel to respond. The brief is limited to matters arising after the previous Court of Appeal decision, unless the presiding justice permits other briefing. (Rule 8.200(b)(2).)

f. Dismissal of review [§7.81]

A grant of review can later be dismissed for any reason without Supreme Court decision. The court might do so, for example, if it no longer wishes to consider the issues, if the case was on a "grant and hold" and after the lead case has been decided the Supreme Court believes the Court of Appeal decision was substantially correct, or if the case becomes moot. (Cal. Rules of Court, rule 8.528(b).)

g. Retransfer [§7.82]

If the case had been transferred to the Supreme Court under California Rules of Court, rule 8.552 while pending in the Court of Appeal, it may be retransferred without decision. (Rule 8.528(e).)

VI. PROCEEDINGS IN REVIEW-GRANTED CASES [§7.83]

This section deals with non-capital criminal cases in which the California Supreme Court has granted review. (Death penalty cases are governed by separate rules. Civil cases in the Supreme Court are for the most part governed by the same rules as non-capital criminal cases.)

A. Appointment of Counsel [§7.84]

If review is granted on at least one requested issue, counsel's appearance in the Supreme Court on an appointed case will be made under a new appointment by the Supreme Court, with a recommendation by the appellate project. Often counsel who represented appellant in the Court of Appeal is appointed by the Supreme Court, but sometimes for one reason or another a change is made. All appointments in the Supreme Court are designated *assisted*, by policy of the court and the appellate projects. (See §§1.3 and 1.4 of chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," for further information on assisted and independent cases.)

B. Briefing on the Merits [§7.85]

Briefing is governed by rule 8.520 of the California Rules of Court. Unless otherwise ordered, briefs must be confined to the issues specified in the order granting review and others "fairly included" in them. (Rule 8.520(b)(3).) Extensions of time,

permission to file an over-length brief, and other variations from the rules require the order of the Chief Justice. (Rule 8.520(a)(5) & (c)(4).)

Information about filing and service requirements is summarized in chart form in chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," §1.154, appendix C.

1. Opening brief on the merits [§7.86]

Under rule 8.520(a)(1) of the California Rules of Court, after the court grants review, the petitioner[39] must within 30 days of the order granting review file an opening brief on the merits.[40] An original and 13 copies must be filed in the Supreme Court. (Rule 8.44(a)(1).) Unless otherwise ordered, an opening brief on the merits in non-capital cases may not exceed 14,000 words including footnotes.[41] (Rule 8.520(c)(1).) The cover is white. (Rule 8.40(b)(1).) At the beginning of the body the brief must quote any Supreme Court orders specifying the issues or, if there is no such order, quote the issues stated in the petition for review and any additional ones from the answer. (Rule 8.520(b)(2)(A) & (B).) Attachments are governed by rule 8.520(h).

2. Answer brief on the merits [§7.87]

Within 30 days after the filing of the petitioner's brief, the opposing party must file an answer brief on the merits. (Cal. Rules of Court, rule 8.520(a)(2).) The answer brief may not exceed 14,000 words including footnotes,[42] and the cover is blue. (Rules 8.520(c)(1), 8.40(b)(1).)

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[39]In some situations it is unclear which party is to be deemed petitioner – for example, if petitions from opposing sides were both granted, or if the court granted review on its own motion. In such cases the court may designate which party is deemed the petitioner or otherwise direct the sequence of briefing. (Rule 8.520(a)(6).)

[40]In lieu of a new brief on the merits, a party may file in the Supreme Court the appellant's opening, respondent's, and/or reply brief(s) filed in the Court of Appeal. (See rule 8.520(a)(1)-(4).) That practice is not preferred and is rare in criminal cases.

[41]A word-count certificate is required. (Rule 8.520(c)(1).)

[42]A word-count certificate is required. (Rule 8.520(c)(1).)

3. Reply brief [§7.88]

The petitioner may file a reply brief within 20 days after the filing of the opposing party's brief. (Cal. Rules of Court, rule 8.520(a)(3).) It may not exceed 8,400 words including footnotes.[43] (Rule 8.520(c)(1).) The cover is white. (Rule 8.40(b)(1).)

4. Supplemental brief [§7.89]

A supplemental brief of no more 2,800 words including footnotes may be filed by either party no later than 10 days before oral argument and must be limited to new authorities, new legislation, or other matters not available in time to be included in the party's brief on the merits. (Cal. Rules of Court, rule 8.520(d).)

5. Amicus curiae brief [§7.90]

Amicus briefs may be filed with the court's permission. Rue 8.520(f) of the California Rules of Court governs these briefs.

6. Judicial notice [§7.91]

Judicial notice under Evidence Code section 459 in the Supreme Court requires compliance with California Rules of Court, rule 8.252(a). (Rule 8.520(g).)

C. Oral Argument [§7.92]

Unless the court permits more time, oral argument in non-capital cases is limited to 30 minutes per side. (Cal. Rules of Court, rule 8.524(e).) The petitioner opens and closes; if there is more than one petitioner, the court sets the order. (Rule 8.524(d).)

Under rule 8.524(f) of the California Rules of Court, in non-capital cases, only one counsel per side may argue – even if there is more than one party per side – unless the court orders otherwise.[44] A request for more attorneys to argue must be filed no later than 10 days after the order setting oral argument. (Rule 8.524(f)(2).) Except for rebuttal, each attorney's segment may be no less than 10 minutes. (Rule 8.534(f)(3).)

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[43]A word-count certificate is required. (Rule 8.520(c)(1).)

[44]The rule is different in the Court of Appeal, which allows one counsel "for each separately represented party." (Rules 8.256(c)(3), 8.366(a).)

D. Decisions and Post-Decision Proceedings in the Supreme Court [§7.93]

1. Disposition [§7.94]

On a grant of review, the Supreme Court is reviewing the judgment of the Court of Appeal. It may order that the judgment wholly or partially be affirmed, reversed, or modified and may direct further actions or proceedings. (Cal. Rules of Court, rule 8.528(a).) The court usually will decide all the issues on which review is granted, although it may decide only some and then transfer the case back to the Court of Appeal for decision on the remaining issues. (Rule 8.528(c).)

Alternatively, the Supreme Court may not decide any issues on the merits. It may dismiss review. (Cal. Rules of Court, rule 8.528(b).) It may, without reaching a decision, transfer the cause with directions for further proceedings in the Court of Appeal. (Rule 8.528 (d).) If the case was transferred before decision in the Court of Appeal under rule 8.552, the Supreme Court may retransfer the case to the Court of Appeal. (Rule 8.528(e).)

2. Finality of decision [§7.95]

With certain exceptions, a decision of the California Supreme Court becomes final as to that court 30 days after filing. The court may order earlier finality. The Supreme Court may also extend the period for finality up to an additional 60 days, as long as the order extending time is made within the original 30 days or any extension thereof. (Cal. Rules of Court, rule 8.532(b)(1).)

Certain Supreme Court decisions are final immediately: denial of a petition for review, dismissal, transfer, retransfer, denial of a writ petition without an order to show cause or alternative writ; and denial of a supersedeas petition. (Cal. Rules of Court, rule 8.532(b)(2).)

3. Rehearing [§7.96]

The Supreme Court may order rehearing as provided in California Rules of Court, rule 8.268(a). (Rule 8.536(a).) Any petition for rehearing must be filed within 15 days of the decision. Any answer must be filed no later than eight days after the petition. Since rule 8.536(a) requires compliance only with subdivisions (1) and (3) of rule 8.268(b), the proscription of rule 8.268(b)(2) against the filing of an answer without request from the court is inapplicable. At least four justices must assent to grant rehearing. (Rule 8.536(d).)

4. Remittitur [§7.97]

The remittitur is the document sent by the reviewing court to the court whose judgment was reviewed, which reinvests the lower tribunal court with jurisdiction over the case. If the decision reviews a Court of Appeal decision, the remittitur is to the Court of Appeal. It is issued when a case is final for state appellate review purposes, i.e., no further review within California (other than by original post-conviction writ remedies) is available. A Supreme Court remittitur is governed by rule 8.540 of the California Rules of Court.

a. Issuance [§7.98]

In a case before the court on a grant of review, the Supreme Court remittitur is addressed to the Court of Appeal. (Cal. Rules of Court, rule 8.540(b)(2).) It issues when the opinion is final – normally on the 31st day after filing of the Supreme Court's decision, absent a rehearing or order shortening or extending the time for finality. (Rules 8.532(b), 8.540(b)(1).) If there are to be no further proceedings, the Court of Appeal must immediately issue its own remittitur to the lower court. (Rule 8.272(b)(2).)

If the case was not before the Supreme Court on a grant of review – e.g., an automatic appeal or transfer – the remittitur is sent to the applicable lower court or tribunal. (Cal. Rules of Court, rule 8.540(b)(3).) A remittitur is not issued on the summary denial of a writ petition. (Rule 8.540(a).)

The California Supreme Court may order immediate issuance of the remittitur. (Cal. Rules of Court, rule 8.540(c)(1).) It may stay issuance of the remittitur for a reasonable period. (Rule 8.540(c)(2).)

b. Recall [§7.99]

The court may recall the remittitur, on its own or on motion, for good cause and thereby reinvest jurisdiction over the case in the court. The recall order does not supersede the opinion or affect its publication status. (Cal. Rules of Court, rule 8.540(c)(3).) In criminal cases, a petition for writ of habeas corpus may be the vehicle for requesting the remittitur be recalled. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484-490, fn.12.)

VII. CERTIORARI IN THE UNITED STATES SUPREME COURT [§7.100]

If the California Supreme Court has denied review of a case with a federal constitutional issue or has granted review but decided the issue adversely, an option is a petition for writ of certiorari filed in the United States Supreme Court. The petition is part of the direct appellate process.

This section discusses only the basics of certiorari petitions in state criminal cases. It does not purport to be a comprehensive treatment. Further resources for Supreme Court practice include the Rules of the Supreme Court of the United States,[45] the Supreme Court website,[46] and Stern et al., Supreme Court Practice (8th ed. 2002).[47]

A. Uses of Certiorari [§7.101]

1. Last step in direct appeal from state judgment [§7.102]

A petition for certiorari is the last part of the direct appeal process for state cases. It is relatively uncommon because of the long odds against success.

Unlike a petition for review to a *state* high court, a certiorari petition is not required to preserve issues for later collateral review. (*Fay v. Noia* (1963) 372 U.S. 391, 435-437, overruled on other grounds in *Wainwright v. Sykes* (1977) 433 U.S. 72, 84-85; cf. *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845, 848 [to be preserved for future federal review, issue must be presented to state's highest court in which review is available]; *Roberts v. Arave* (9th Cir. 1988) 847 F.2d 528, 530.) Its use is therefore

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[45]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States. The rules are available online: http://www.supremecourt.gov/ctrules/ctrules.aspx .

[46]http://www.supremecourt.gov/

[47]Because the Stern book was published in 2002, before the revision of the Rules of the Supreme Court of the United States effective May 1, 2003, some rule references in it may be out of date.

primarily substantive – to obtain review of the issues after the state appellate processes have been exhausted – rather than procedural.[48]

2. Criteria for certiorari [§7.103]

The primary concern of the United States Supreme Court is to decide cases presenting issues of importance beyond the particular facts and parties involved. Most often it accepts a case to resolve conflict or disagreement among lower courts and to determine an issue of broad social or legal importance.

The test whether to file a petition for certiorari is whether there is a reasonable chance of getting certiorari granted. For the Supreme Court to consider the case, there must a strong, adequately preserved federal issue that has important societal implications. As the Supreme Court rules warn:

> A petition for writ of certiorari will be granted only for compelling reasons. . . .¶ A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(U.S. Supreme Ct. Rules, rule 10.) Only about 1 percent of the petitions filed are granted.[49]

Because of the slim chance of success, only a few certiorari petitions are filed in appointed cases each year, and so it is seen as an exceptional step. ADI should review the issue and give appointed counsel input as to whether the petition is worth filing.[50]

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[48]Occasionally certiorari may be used for procedural reasons. For example, if an issue that might result in a substantial favorable change in the law is pending before the United States Supreme Court, it may well be desirable to petition for certiorari in cases with similar issues in order to keep them in the direct appellate review process. For the most part changes in the law are retroactive only to cases still on direct appeal. (*Teague v. Lane* (1989) 489 U.S. 288, 295-296; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5; see ADI article, "Measures Appellate Counsel Can Take in Responding to Changes in the Law Potentially Beneficial to Their Clients, appendix on "General Principles of Retroactivity": http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf

[49]http://www.supremecourt.gov/casehand/guideforifpcases2010.pdf

[50]Compensation for the petition normally requires project director pre-approval.

The discussion in §§7.47 et seq. and 7.63, *ante*, on factors affecting the decision of the California Supreme Court whether to grant review, is applicable in large part to certiorari in the United States Supreme Court, as well.

3. Federal habeas corpus as additional or alternative remedy [§7.104]

In addition to or instead of certiorari, federal review after an unsuccessful state appeal may be sought through a petition for writ of habeas corpus.[51] (See chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.")

a. Advantages of habeas corpus [§7.105]

In contrast to certiorari, which is unlikely to succeed if the issue is not one of considerable social significance, habeas corpus most often focuses on injustice in the individual case. Further, one has *right* to consideration on the merits in habeas corpus if foundational requirements are met, whereas certiorari review is a matter of *discretion* and is exercised very rarely. Thus in cases involving application of standard authority, certiorari is virtually unattainable, and habeas corpus is the remedy of choice.

b. Advantages of certiorari [§7.106]

In federal courts habeas corpus is a highly restricted remedy, both procedurally and substantively. (See chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," for extended treatment of this topic.) Under the Antiterrorism and Effective Death Penalty Act (28 U.S.C. § 2241 et seq.), for example, a federal court may not disturb a state judgment unless the state judgment was an unreasonable application of or contrary to established United States Supreme Court precedent. (28 U.S.C. § 2254(d).)

Federal habeas corpus thus cannot be used to decide an issue not already resolved by the United States Supreme Court. Even if state court decision was contrary to established federal circuit court precedent, and therefore wrong or unreasonable under circuit law, habeas corpus relief is unavailable unless the state decision was also contrary to established or an unreasonable application of United States Supreme Court precedent. (See *Kane v. Espitia* (2005) 546 U.S. 9 (*per curiam*) [circuit court split on whether

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[51] From a practical viewpoint, appointed counsel will not receive compensation under their appellate appointment for federal habeas corpus litigation, although payment may be available from the federal court. Certiorari is compensable under the appellate appointment, but only if reasonable under the criteria discussed here.

Faretta v. California (1975) 422 U.S. 806, requires pro per prisoner access to legal materials cannot be resolved in federal habeas corpus, when neither *Faretta* itself nor any other Supreme Court decision has addressed the topic]; *Mitchell v. Esparza* (2003) 540 U.S. 12, 17; *Lockyer v. Andrade* (2003) 538 U.S. 63, 71-73.)

Further, even if there is United States Supreme Court precedent, relief is barred unless the state court's application of it was not only wrong, but also "unreasonable." The test is whether the state court's decision was objectively unreasonable. "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." (*Williams v. Taylor* (2000) 529 U.S. 362, 410, italics original.)

If there is no established United States Supreme Court precedent, therefore, or if the state decision was wrong but not objectively unreasonable, certiorari may be the only federal remedy available. Similarly, if federal habeas corpus is barred because of a procedural problem not applicable to certiorari, the latter may be the only option. (See chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," for discussion of various procedural requirements for federal habeas corpus.)

c. Use of both remedies [§7.107]

If the case meets the applicable criteria, *both* certiorari and federal habeas corpus may be sought. Certiorari, as part of the regular appellate process, ordinarily should be sought first.[52] There is some question whether the habeas corpus petition *may* be filed until the time for certiorari has passed.[53]

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[52]The one-year federal deadline for filing a habeas petition does not begin until the period for filing for certiorari has passed. (See 28 U.S.C. § 2244(d); *Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157, 1158-1159; see also *Clay v. United States* (2003) 537 U.S. 522 [similar timing for 28 U.S.C. § 2255 motion for relief from federal convictions]; cf. *Lawrence v. Florida* (2007) 549 U.S. 327; *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925 [period for filing certiorari petition not counted as part of state *collateral* proceedings for purposes of tolling limitations period].)

[53]See *Kapral v. United States* (3d Cir. 1999) 166 F.3d 565, 570, and *Feldman v. Henman* (9th Cir. 1987) 815 F.2d 1318, 1321 (federal court should not entertain habeas corpus petition when petition for certiorari from a *federal* appellate decision is pending); cf. *Roper v. Weaver* (2007) 550 U.S. 598, per curiam (defendant could have filed federal habeas corpus petition after state denied *collateral* relief, even though petition for certiorari was pending from the state decision). These cases do not necessarily answer the

It is also possible to seek certiorari after federal habeas corpus review of a state judgment. Numerous decisions of the United States Supreme Court in this category are cited in chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus."

B. Jurisdiction [§7.108]

It is not possible to review this subject in depth here. The discussion focuses on some of the most commonly encountered principles in criminal appeals.

1. Legal authority [§7.109]

The United States Supreme Court and the federal judiciary are established in article III of the United States Constitution. Section 2 describes federal judicial and Supreme Court authority over state criminal cases (in relevant part):

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States – to Controversies between . . . a State and Citizens . . . . In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The specific jurisdiction of the United States Supreme Court over state court judgments is governed by 28 United States Code section 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. Exhaustion of state remedies [§7.110]

Certiorari jurisdiction requires that state appellate review processes be exhausted. To be considered on certiorari, an issue must be raised and/or decided on appeal in the state's highest court in which a decision could be had, and that court's decision must be final. (28 U.S.C. § 1257(a); see *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [same in habeas corpus].)

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question whether a *state* prisoner must wait for the conclusion of the certiorari period on *direct appeal* to file the federal petition.

For the purposes of non-capital criminal appellate practice, that means that in most California felony cases the issue must be raised squarely (1) as a federal constitutional issue, with reliance on federal authority such as an amendment to the United States Constitution, and (2) successively in the superior court, in the Court of Appeal, and in a petition for review to the California Supreme Court.[54] (See §9.99 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," on steps to preserving a federal issue in state court.) If a petition for review is granted and the case decided on the merits, the issue must be raised appropriately in the brief on the merits.

If the state court failed to *decide* the federal issue, the petitioner must show the failure was not due to lack of proper presentation. (See *Street v. New York* (1969) 394 U.S. 576, 582 ["when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary"].)

3. Finality of state court decision [§7.111]

The state court decision must be final for the United States Supreme Court to review it. If further state proceedings are to take place, the court lacks jurisdiction. (28 U.S.C. § 1257(a); *Florida v. Thomas* (2001) 532 U.S. 774, 777.) The decision must be final in two senses: (1) no further review or correction is possible in any other state tribunal and (2) the decision determines the litigation, not merely interlocutory or intermediate parts of it. (*Jefferson v. City of Tarrant* (1997) 522 U.S. 75, 81.) "It must be the final word of a final court." (*Market Street R. Co. v. Railroad Comm'n of Cal.* (1945) 324 U.S. 548, 551.)

In certain circumstances, the court has treated state judgments as final for jurisdictional purposes although further proceedings were to take place. (*Florida v. Thomas* (2001) 532 U.S. 774, 777; *Flynt v. Ohio* (1981) 451 U.S. 619, 620-621 (*per curiam*). *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 divided cases of this kind into four categories: (1) the federal issue is conclusive or the outcome of further proceedings preordained (*id.* at p. 479); (2) the federal issue will require decision

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[54]An issue need not have been raised in a lower court if failure to do so does not constitute a waiver or other form of procedural default preventing consideration at the next higher level – or if the court decides the issue even though not raised. (*Francis v. Henderson* (1976) 425 U.S. 536, 542, fn. 5; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 376-377.)

regardless of the outcome of state proceedings (*id*. at p. 480); (3) the federal claim has been finally decided and cannot be reviewed after the further state proceedings (*id*. at p. 481); and (4) the federal issue has been finally decided, the party seeking certiorari might prevail on nonfederal grounds in the later state proceedings, reversal of the state court on the federal issue would preclude further litigation on the relevant cause of action, and a refusal immediately to review the state decision might seriously erode federal policy (*id.* at pp. 482-483).

California state review is concluded when the decision of the California Supreme Court is final and no further review in state court is possible. If a petition for review is denied, the decision is final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A).) When a petition for review is granted and California Supreme Court decides the case on the merits, the decision is final in 30 days, with certain exceptions. (Rule 8.532(b)(1).) The California Rules of Court should be consulted for other situations; see also §7.29 et seq., §7.73 et seq., and §7.93 et seq., *ante*.)

4. Dispositive federal issue [§7.112]

The case must present a federal issue that affects the outcome of the case. As *Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126, states: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

The United States Supreme Court has no jurisdiction to interpret state law.[55] If a state decision rests on independent and adequate state grounds, the United States Supreme Court has no jurisdiction to review it, even though federal issues may be involved. (See *Coleman v. Thompson* (1991) 501 U.S. 722, 729; §9.46 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.") If it is ambiguous whether the state court relied on an independent and adequate state ground, the court uses a test:

[55]There are a very few exceptions. "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' (*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). See *Ward v. Love County*, 253 U.S. 17 (1920); *Terre Haute & I.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579 (1904)." (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 691, fn. 11; see also *Bush v. Gore* (2000) 531 U.S. 98, 112-115 (conc. opinion. of Rehnquist, C.J.).)

> When a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

(Michigan v. Long (1983) 463 U.S. 1032, 1040-1041; see also *Florida v. Powell* (2010) ___U.S.___ [130 S.Ct. 1195]; *Harris v. Reed* (1989) 489 U.S. 255, 261-262 [same test for habeas corpus].)

C. Certiorari Petitions [§7.113]

Petitions for certiorari are governed by the Rules of the Supreme Court of the United States. Guidelines for the filing of a petition for writ of certiorari by an unrepresented indigent appellant are available at the website of the Supreme Court.[56]

1. Counsel's membership in the United States Supreme Court Bar [§7.114]

Counsel must be admitted to the United States Supreme Court Bar in order to file documents in that court. (U.S. Supreme Ct. Rules, rule 9.)[57] The procedures for gaining membership are prescribed in rule 5 of the Supreme Court rules. Several ADI staff attorneys are members of the Supreme Court bar and can serve as sponsors for attorneys seeking admission.

2. Time for filing [§7.115]

The petition must be filed within 90 days from the entry of the decision by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.)[58] The decision may be the denial of review, the filing of an opinion, or the denial of a petition for rehearing

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[56]http://www.supremecourt.gov/casehand/guideforifpcases2010.pdf

[57]The rules are available online: See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[58]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

following a decision on a grant of review.[59] "Filing" means actual receipt of the documents by the Supreme Court's clerk, or postmarking of first class mail, or consignment to a third-party commercial carrier for delivery within three calendar days. (U.S. Supreme Ct. Rules, rule 29.) Extensions of time may be granted by application to a justice but are disfavored. (U.S. Supreme Ct. Rules, rules 13, ¶ 5, 22 [application to individual justice]; see also rules 21 [motions and applications], 30 [computations and extensions of time], & 33, ¶ 2 [format].)

3. Procedures for filing in forma pauperis [§7.116]

Except for an unrepresented inmate confined in an institution, it is necessary to file, along with the petition for certiorari, an original and 10 copies of a motion for leave to proceed in forma pauperis with a supporting declaration in compliance with 18 United States Code section 3006A. (U.S. Supreme Ct. Rules, rules 21, 39.)[60] The Supreme Court website gives a sample and instructions on how to complete the in forma pauperis documents.[61]

4. Formal requirements for certiorari petition [§7.117]

Formatting requirements for certiorari petitions filed in forma pauperis are set out in rule 33, paragraph 2(a) of the Supreme Court rules;[62] these include size of paper, spacing, binding, and signature. Rule 34, paragraph 1 prescribes what must appear on the cover; paragraph 2 specifies required tables; paragraph 3 governs identification of counsel of record. The petition may not exceed 40 pages. (U.S. Supreme Ct. Rules, rule 33, ¶ 2(b); see rule 33, ¶ 1(d) for exceptions.) An original and 10 copies are required for in forma pauperis petitions, except in the case of unrepresented inmates who are confined.

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[59]The crucial date for starting the 90-day period is the *filing* of the state high court order or opinion, not its *finality* under state law. However, since the state decision must be final in order for the United States Supreme Court to have jurisdiction, a petition for certiorari filed before the state decision becomes final is premature.

[60]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[61]http://www.supremecourt.gov/casehand/guideforifpcases2011.pdf

[62]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

(U.S. Supreme Ct. Rules, rules 12, ¶ 2, & 39, ¶ 2.) Rule 29 governs service and the proof of service. (U.S. Supreme Ct. Rules, rule 29, ¶¶ 3 & 5.)

5. Contents of certiorari petition [§7.118]

Rule 14 of the Rules of the Supreme Court of the United States prescribes the contents and arrangement of a petition for writ of certiorari.[63] Stern's Supreme Court Practice offers comprehensive guidance in preparing each of the component parts of the petition. (Stern et al., Supreme Court Practice (8th ed. 2002) Procedure in Connection with Petitions for Certiorari, ch. 6, p. 339 et seq.)

a. Required sections [§7.119]

The typical petition must contain, in the indicated order, (1) the question presented for review; (2) a list of all parties (unless shown in the caption); (3) a table of contents and a table of authorities; (4) citation of the opinion and orders in the case; (5) a statement of Supreme Court jurisdiction, including the date of the judgment to be reviewed and any order regarding rehearing, and the statutory basis for jurisdiction;[64] (6) the constitutional, statutory, and other provisions related to the case, set out verbatim (lengthy provisions may be reserved for the appendix and merely cited at this point); (7) a concise statement of facts, including a description of how and when the federal issues were presented to the state courts and how they were ruled on, with quotations or summaries taken from the record and record citations; (8) an argument on the need for certiorari; and (9) an appendix.

The appendix must include, in the following order: the opinion of the state court (Court of Appeal or California Supreme Court) from which certiorari is sought; other relevant findings and orders such as the trial court decision; any order by the California Supreme Court denying review; and any order by the California Supreme Court denying rehearing.

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[63]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[64]For review of a state judgment, the statutory basis is 28 United State Code section 1257(a). In specialized situations, other statements on jurisdiction are required. (U.S. Supreme Ct. Rules, rule 14.)

b. Argument [§7.120]

Although compliance with all requirements is essential, the argument on the need for certiorari is the pivotal section of the brief. The case must be presented in a way that will capture the court's attention and distinguish it from the 99 percent for which certiorari will be denied. It is advisable to focus the discussion on conflicts among state high courts or federal courts or on the social and legal importance of the question of federal law presented, rather than on the injustice to the individual party or the mere incorrectness of the state court decision. (U.S. Supreme Ct. Rules, rule 10.)[65]

Stern offers insights into the court's certiorari screening processes in chapter 4, "Factors Motivating the Exercise of the Court's Certiorari Discretion." (Stern et al., Supreme Court Practice (8th ed. 2002) p. 219 et seq.). The discussion on crafting a persuasive petition for review (§7.47 et seq. and §7.63 et seq., *ante*) is also applicable in many respects to petitions for certiorari.

D. Other Filings [§7.121]

1. Opposition and reply [§7.122]

Opposition to the petition may be filed. (U.S. Supreme Ct. Rules, rule 15, ¶ 1.)[66] If requested, it is then mandatory.[67] (*Ibid.*) In addition to addressing the issues raised in the petition, counsel filing an opposition has an obligation to point out, at this stage of the proceedings and not later, any perceived misstatements of law or fact in the petition, or the objection may be waived. (*Id.*, ¶ 2.) The opposition is due 30 days after the case is placed on the docket. (*Id.*, ¶ 3.) An indigent respondent filing an opposition may proceed in forma pauperis as specified in the rules. (*Ibid.*; see also U.S. Supreme Ct. Rules, rule 39.)

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[65]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[66]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[67]Frequently the Supreme Court will request opposition when the petition is filed by the Attorney General.

The petitioner may reply to the opposition if new points have been raised. The reply brief may be filed in forma pauperis if the petitioner has qualified for that status. (U.S. Supreme Ct. Rules, rules 15 ¶ 6, 39.)[68]

Formal requirements for an opposition and reply filed in forma pauperis include format (U.S. Supreme Ct. Rules, rules 33, ¶ 2(a) & 34);[69] page limits – 40 and 15 pages, respectively (rule 33, ¶ 2(b)); cover, tables, and identification of counsel (rule 34); and number of copies – original plus 10 (rules 12, ¶ 2 & 39).

2. Amicus curiae briefs in support of or in opposition to petition for certiorari [§7.123]

Amicus curiae briefs relating to the grant or denial of a petition for certiorari are permitted by written consent of all parties or by leave of court. They are governed by rule 37, paragraph 2 of the Rules of the Supreme Court of the United States.[70]

E. When Certiorari Is Granted . . . [§7.124]

It is beyond the scope of this manual to deal with procedures in the United States Supreme Court past the petition for certiorari stage, but counsel are referred to the Stern treatise, which offers comprehensive guidance on Supreme Court practice. (Stern et al., Supreme Court Practice (8th ed. 2002).)

Payment for appointed counsel for appearances in the Supreme Court beyond the petition stage is very much an ad hoc matter, given the infrequency with which certiorari petitions are granted. ADI will actively consult with any attorney making an appearance before the Supreme Court in a Fourth Appellate District case, both on the matter of compensation and on the substance of the case.

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[68]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

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POSTSCRIPT ON U.S. SUPREME COURT RULE NUMBERING [§7.125]

The Rules of the Supreme Court of the United States use a different form of numbering from that of the California Rules of Court. The Supreme Court rules refer to subdivisions or paragraphs by adding a period to the rule number and then the paragraph number – for example, rule 29, paragraph 3 is called "Rule 29.3" when another Supreme Court rule cross-references it.

This numbering system can be confusing to California practitioners, because in California periods are used in the number of the rule itself – for example, rule 8.300. For clarity, this manual uses paragraph symbols rather than periods in citing to subdivisions of the Rules of the Supreme Court of the United States. Attorneys are alerted to the problem so that in reading the text of the Supreme Court rules (or cases or texts referring to the rules) they will be able to find cross-referenced rules.