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How To Convince Calif. And Texas High Courts To Hear A Case

Law360, New York (May 25, 2016, 9:21 AM ET) --


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The California and Texas Supreme Courts oversee the development of the law in two of the largest and most populous states in the country. Together, these two courts exert an outsized influence on the laws of other states and the nation. In many respects the two courts operate similarly, but in a few important ways they differ. What should lawyers who regularly practice in one court know before appearing in the other?

Showing importance of the case is the key strategy in both courts.

First, practitioners should know that the same basic strategy applies in either court. To overcome the daunting odds of getting either court to consider a case, the practitioner must show that the case is important enough to warrant the court's attention.

Both courts, like the United States Supreme Court, are courts of discretionary review that agree to hear only a select group of cases each year. The fact that a lower court got it wrong is not, by itself, a sufficient reason to expect review. If for no other reason, the sheer volume of cases prevents these courts from correcting every error by a lower court.

In Texas, the Office of Court Administration reports that on average during the last 10 years, 816 petitions were filed annually. In 2015, the court granted review in only 77 cases and issued 92 opinions on the merits (127 opinions, if concurrences and dissents are included). The number of cases the court can review is limited, because hearing petition-granted cases is only one task among many other judicial and administrative obligations that compete for the justices' attention.

Obtaining high-court review in California presents an even greater challenge. Every year, more than 5,500 civil and criminal petitions for review and more than 3,000 other proceedings are filed in the California Supreme Court — more than the number filed in the Texas Supreme Court, which reviews only civil cases. The California Supreme Court grants only 5 percent of petitions for review overall and even fewer (around 3 percent) in civil cases. According to the Judicial Council of California's 2015 Court Statistics Report, the California Supreme Court published 85 written opinions during the 2013-2014 fiscal year. Why does the California Supreme Court produce fewer opinions than the Texas Supreme Court despite a larger docket? One likely reason is that it has fewer justices — seven justices to review both civil and criminal cases, compared to nine justices in Texas for civil cases alone.

Although the numbers differ, in both courts the odds are stacked against review. Here are seven ways to beat the odds in each court.

1. In California, seek rehearing in the Court of Appeal; in Texas, forget it.

One difference between California and Texas high-court practice becomes relevant as soon as the intermediate appellate court rules. A party who intends to file a petition for review in the California Supreme Court ordinarily must bring a material factual error or omission in the Court of Appeal opinion to that court's attention on rehearing and explain how the error impacts the disposition of the case. If this action is not taken, the California Supreme Court may accept as true and accurate the Court of Appeal opinion's statement of the issues and facts. Thus, a petitioner usually should file a petition for rehearing in the Court of Appeal.

In contrast, in the Texas Supreme Court it makes no difference whether a motion for rehearing was filed. Motions for rehearing almost never change the outcome in the court of appeals, so they are generally considered a waste of time. From a more cynical standpoint, a motion for rehearing can even harm the prospect of further review if it prompts the court of appeals to "clean up" any blatant errors that might draw the Supreme Court's concern. For all of these reasons, experienced appellate advocates usually recommend saving time and money by proceeding directly to the Texas Supreme Court.

2. In the petition: focus on issues of statewide importance.

As noted above, the foremost consideration in each court is the same: Is the issue so important that it requires the court's attention? An effective petitioner will keep that consideration top of mind while crafting every component of the petition.

In California, "importance" is the first of the primary criteria for supreme court review. The criteria listed in the rules are: (1) whether review is necessary to secure uniformity of decision or to settle an important question of law; (2) whether the Court of Appeal lacked jurisdiction; and (3) whether the Court of Appeal decision lacked the concurrence of sufficient qualified justices. In addition, review may be granted to transfer the case back to the Court of Appeal for further proceedings.

The other favorable elements to highlight in a California petition for review confirm that "importance" is key. These elements include: (1) whether the Court of Appeal opinion was published or there was a dissenting opinion; (2) whether the issue concerns a newly enacted law that has caused — or very likely will cause — confusion and unnecessary litigation; and (3) whether the issue concerns an old legal principle that should be revisited in light of modern circumstances. If the same issue is already pending before the court in another case, that should be highlighted as well, because a later-filed petition may be accepted on a "grant and hold" basis.

Texas practice uses different wording, but the key consideration remains the same. Indeed, all of the enumerated considerations for granting review relate to whether the issue is important: (1) whether there is a dissent; (2) whether there is a conflict among the courts of appeals; (3) whether the case involves the construction or validity of a statue; (4) whether the case involves constitutional issues; and (5) whether the court of appeals committed an error important to the jurisprudence of the state. Other factors also may come into play, such as the amount in controversy, the degree of respect accorded the author of the court of appeals opinion, the proclivities of certain courts of appeals and, sometimes, the credibility of the lawyers.

3. Be quick and to the point.

In light of the courts' workloads and the number of petitions each receives, a petition should grab the court's attention from the start with carefully crafted issues and then show why the case is the right vehicle to resolve those issues. Unless four of the seven California justices or three of the nine Texas justices believes the case is worth future review, the petition stage marks the end of the line. In both courts, the goal at this stage is an invitation to submit briefing on the merits. In the briefs on the merits, the goal is to persuade four justices in California, or three justices in Texas, to vote to grant review.

4. Evaluate the issues that are on the minds of the justices.

Both supreme courts sometimes set out to significantly refine a particular area of the law and take up multiple cases to do so. For example, the California Supreme Court a decade ago repeatedly granted review in cases involving a premises owner's liability for third-party conduct, especially under the peculiar risk doctrine. More recently, the court has shown an interest in clarifying the enforceability of arbitration clauses.

The same is true in the Texas Supreme Court, which often finds that statutes offer fertile ground for review. For example, the court has been deciding multiple cases involving the Public Information Act (the Texas equivalent of the Freedom of Information Act), the anti-SLAPP statute, which allows early dismissal of meritless suits that involve matters of public concern, and statutes imposing procedural hurdles for plaintiffs in health care-liability cases.

5. Keep the court's internal procedures in mind.

It is also important to consider the court's internal procedures in preparing a petition.

In California, after a petition is filed in the California Supreme Court, a member of the central staff prepares a conference memorandum, which is designed to assist the justices in assessing whether a case is appropriate for review. The author of the conference memorandum will assign the petition to either the "A" or the "B" list. Cases generally are placed on the "A" list if there was a published opinion below (particularly if there was a dissenting justice), and where the appellate court opinion reflects a split of authority on an issue. Those on the A list are set for vote at conference, while those on the B list are denied without discussion at conference unless a justice requests otherwise. At a typical conference, the justices consider approximately 250 matters, 20 to 30 of which are "A" list matters. The petition therefore should not only focus on the criteria for review from the court rules, but should make clear why the case meets the standards to be on the "A" list.

In Texas, in contrast, the petition process was set up to avoid the middleman. The petition is a short document sent directly to the justices with no internally prepared analysis. Thus, the petition for review generally should be addressed directly to the justices, (although some justices obtain assistance from their law clerks in reviewing petitions). The petition, which is limited to 4,500 words, should provide the court with an easy to understand explanation for why it should consider the appeal.

If at least three justices vote for the case to proceed, then full briefing will be ordered and a "study memo" will be prepared by the chambers of one justice in rotation order. Thus, unlike the petition for review, the brief on the merits should take a deep dive into the issues for its audience of justices and law clerks who will independently analyze the case. Only after review of the briefs does the court decide

whether to grant review, possibly set the case for oral argument, and ultimately render a decision on the merits.

6. Secure support from amici.

Both courts are more likely to grant a petition for review if amici can demonstrate that the case has repercussions for an entire industry or that its impact otherwise extends well beyond the parties to the case.

The fundamental strategy of showing statewide importance again comes into play. Amicus support of a petition can increase the likelihood of review by demonstrating widespread interest in the case and the broad impact of the Court of Appeal's decision. Members of both courts have also indicated that amicus letters can help the courts understand the ramifications of the appellate decision, including the impact of continued instability in the law and the degree to which further conflicts should be tolerated.

Amicus briefs are valuable at each stage of the process. However, since either court can (and usually does) deny review early in the process, amicus briefs may be most valuable shortly after the petition is filed.

7. Seek alternative paths for court input.

Petitions for review face long odds in either supreme court, but there are other avenues to obtain input from each court.

In the California Supreme Court, a party (or anyone else) may ask the court to depublish an unfavorable decision of the Court of Appeal. While this leaves the decision intact for the parties concerned, a depublished decision is no longer binding authority that could work mischief in later cases.

Moreover, although both courts reject most petitions for review filed by the parties, they tend to weigh in when a federal court of appeals certifies an unresolved question of state law. In 2010, for example, the California Supreme Court agreed to answer questions certified to it by the Ninth Circuit in 66 percent of cases. Similarly, the Texas Supreme Court almost always agrees to take certified questions from the Fifth Circuit, and they are becoming much more common than in the past.

Conclusion

Navigating the discretionary review procedures before the highest courts of California and Texas is tricky, and the odds of review low. By keeping these observations in mind, most of which hinge on demonstrating the importance of the case, the likelihood of review can be maximized.

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