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Seven Ways Up

FOCUS COLUMN

By Benjamin G. Shatz

Gay marriage. Half a billion dollar punitive damages awards. Wage and hour class actions affecting employers statewide. Tribal sovereignty rights versus fair political practices. Some cases have "Supreme Court" written all over them. But just how does a case actually reach the California Supreme Court, which celebrates its 160th birthday this year, and which sits at the apex of the largest court system in the world? There are at least seven different ways for a matter to be decided by the chief justice and six associate justices of California's highest court. Six of these are fairly straightforward, but the seventh has a greater air of mystery.

A quick review of the obvious - or perhaps not so obvious - first six ways for a case to reach the California Supreme Court. First, Article VI, Section 10 of the state Constitution grants the court original jurisdiction over "proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition" (i.e., writ petitions) filed directly in the Supreme Court, including habeas corpus petitions. Second, the Constitution also confers appellate jurisdiction "when judgment of death has been pronounced" in Article VI, Section 11. In other words, death penalty cases are automatically appealed from the trial court to the Supreme Court, skipping over the Court of Appeal. See Penal Code Section 1239(b). A backlog of death penalty cases at the Supreme Court, however, has prompted proposals suggesting that the Court of Appeal assist in resolving these appeals.

Third, appeals from decisions of the Public Utilities Commission also may be heard directly in the Supreme Court. These appeals, however, also may be heard by the Court of Appeal. Fourth, the court reviews recommendations of the Commission on Judicial Performance and the State Bar of California regarding misconduct by - and imposing discipline on - wayward judges and lawyers. And cases brought by judges against the commission are heard in the Supreme Court, in accordance with Article VI, Section 18(g) of the state Constitution.

Fifth is the certified question procedure. Under California Rule of Court 8.548, the U.S. Supreme Court, federal circuit courts of appeals or the highest court of another state, territory or commonwealth, may ask the California Supreme Court to decide a question of California law. This procedure, which took effect in 1998, has been invoked only about 40 times, mostly by the 9th Circuit. Pursuing this path to the Supreme Court requires jumping through two hoops: First counsel must persuade the originating court to certify the question to the Supreme Court; then the Supreme Court must accept the certified question. The odds of an acceptance - roughly 60 percent - are pretty good, considering the extremely low odds of obtaining discretionary review by the most familiar route, a petition for review.

A petition for review - the sixth way for a case to reach the Supreme Court - is a plea asking the court to invoke its discretionary appellate jurisdiction to review a Court of Appeal decision, afforded by Article VI, Section 12(b) of the state Constitution. Before 1985 this was called a "petition for hearing." The granting of petitions for review accounts for the vast majority of the court's docket. The process is well understood: A typical case begins at the trial court level in one of California's 58 superior courts; is appealed to the Court of Appeal as a matter of right; and then the aggrieved parties (i.e., the losers) seek discretionary review by the Supreme Court. Also well understood is how difficult it is to obtain review this way. The odds a petition for review in a civil matter will be granted - i.e., garnering at least four votes from the seven justices - are around 4 percent, a figure that rises slightly, if one also includes "grant and holds" and "grant and

transfers" (but those types of "grants" do not actually result in the Supreme Court directly resolving the merits of such cases).

The mechanics of a petition for review are straightforward. Such a petition must be filed within 10 days after the Court of Appeal's decision is final, meaning that most petitions for review are due 40 days from the issuance of the decision. If a petition for review is not filed however, does that mean the case is immune from Supreme Court review? Most lawyers probably would say yes, and as a practical matter, that would be right. But technically, the answer is no.

The mysterious seventh way to the top is the court's granting of review on its own motion. This so-called sua sponte grant is set forth in Rule 8.512(c): "If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court." Consider what this means: No party to the decision seeks to invoke the court's jurisdiction, yet the court - deus ex machina - reaches down and takes up the case anyway. What would make the court do that?

As might be expected, the court exercises this power in extremely rare circumstances. One situation prompting the court to use this power is where a petition for review is filed, but it is defective in some way. For example, in *Hygienic Health Food Co. v. Grant*, 188 Cal. 131 (1922), the court granted a hearing sua sponte because petition was filed late; and in *Rockridge Place Co. v. City Council of Oakland*, 178 Cal. 58 (1918), a petition was considered defective because it was filed by an entity that technically was not a party to the action. Obviously, this would only occur in a case of extreme interest to the court.

That same reason holds true even in cases where no petition was filed. Thus, in *S.G. Borello & Sons Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989), involving whether sharefarmers were employees or independent contractors, no petition for review was filed, yet a majority of Supreme Court justices viewed the issue to be of such substantial importance that it took the case (and reversed the Court of Appeal). The majority noted the issue had implications for employer-employee relationships in other contexts and that a large number of amicus briefs had been filed. Two dissenting justices, however, opined that review was improvidently granted.

A plainer example of the court swooping in to address an important unsettled issue of law is American Motorcycle Association v. Superior Court, 20 Cal.3d 578 (1978), involving the apportionment of liability among multiple tortfeasors on a comparative negligence basis. See also *Arnel Development v. Costa Mesa*, 28 Cal.3d 511 (1980), in which sua sponte review was granted on an important legal question whether zoning ordinances were legislative or adjudicative acts). And sometimes the Supreme Court catches wind of a Court of Appeal decision that is so obviously wrong, it pounces on the decision immediately to reverse it, as in *Ponce v. Marr*, 47 Cal.2d 159 (1956). In *Ponce*, the Court of Appeal opinion erroneously stated that an appellate court precedent that had been affirmed by the Supreme Court still could be regarded as authoritative on points not addressed by the Supreme Court. In response, the Supreme Court explained that this "is not a correct statement of law and, if allowed to stand, would result in confusion with reference to the subject."

Another situation is when the amount at stake simply does not justify the effort and expense for a party to seek review. Thus, in *Skaff v. Small Claims Court*, 68 Cal.2d 76 (1968), George Skaff presumably opted not to incur the expense of attempting to take his case to the Supreme Court in light of the small amount in controversy. The issue in his case, however, was a novel and important one affecting the day-to-day operations of small claims courts. Consequently, the court took the case on its own initiative.

Another fascinating example is *Chicago Title Insurance Co. v. Great Western Financial Corporation*, 69 Cal.2d 305 (1968), an antitrust action that the Supreme Court took up on its own without providing any explanation, and then affirmed the Court of Appeal's decision. Legal lore, however, tells how the court was prompted to do this by a letter from the attorney general, who was not involved in the case, but wished to have the high court resolve the issue.

Finally, another form of sua sponte review (perhaps an eighth path to the Supreme Court) is when the court "transfers" a matter to itself even before the Court of Appeal has made a ruling at all. This option is made available in Article VI, Section 12(a) of the state Constitution.

In *Ferguson v. Keays*, 4 Cal.3d 649 (1971), the Supreme Court transferred to itself three separate matters still pending in the Court of Appeal, to address the collateral question whether the Court of Appeal had authority to waive a statutory fee for indigents seeking appellate relief. After deciding that fees could be waived, each matter was retransferred back to the Court of Appeal to proceed on the merits.

Lastly, in *Raven v. Deukmejian*, 52 Cal.3d 336 (1990), and *Brosnahan v. Brown*, 32 Cal.3d 236 (1982), the court transferred cases to itself involving the validity of initiative measures at the urging of the attorney general. And this also happened in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208 (1978), although without mention of a request by the attorney general. This appears to be a "cut out the middle man" approach for initiatives that seemed destined for high court review.

The court's power to take a case of its own accord - either by sua sponte grant of review after decision or transfer - is exercised only extremely rarely.

Still, practitioners should recognize that the absence of a petition for review does not necessarily mean the case will not be taken up.

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