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Handling Expedited Appeals

In the state and federal appellate courts, some civil appeals are given priority over other civil appeals and placed on a faster track. In any appeal, counsel should consider whether the appeal is entitled to priority, whether to file a motion requesting that the appeal be expedited, and whether to seek more immediate relief by way of a writ petition or request for a stay. This column explores those issues as well as what happens when an appeal is expedited.

Appeals Entitled to Preference in State Court

In the California state appellate courts, there are several categories of civil appeals that are given mandatory statutory preference over other types of appeals. To determine if an appeal is entitled to preference, it is necessary to review the statutes or rules that govern such actions. Civil appeals entitled to preference include child dependency proceedings; appeals involving termination of parental rights; proceedings to recover possession of real property; arbitration proceedings; eminent domain proceedings; cases involving assessment of environmental impacts; contested election proceedings; and some proceedings involving taxation or assessments of property, among others.

Some statutes also provide trial-setting preference to certain actions; in other words, some actions are entitled to preference in the trial courts. While these statutes do not expressly provide that the actions are entitled to calendar preference on appeal, the statutes may implicitly do so. Examples of cases given priority in the trial courts include cases involving ailing elderly parties or other parties suffering from serious illnesses; contested child custody proceedings; actions for damages caused by the defendant during commission of a felony for which the defendant was convicted; and parties to personal injury or wrongful death actions who are under the age of 14. The appellate courts have discretion to grant priority to these appeals upon the motion of any party to the appeal. And, even if there is no statute or rule that grants priority to a particular action, an appellate court may still grant a motion for preference because of exigent circumstances in the case.

Counsel should also consider whether expediting an appeal is in the client's interest. In most cases falling into the categories listed above, appellants usually have strong reasons to have the appeal decided as quickly as possible. For example, in a child custody case, a parent who will lose custody or significant visitation time has a strong interest in having the appeal decided quickly. The appellate court will be far more hesitant to reverse a custody determination once the child has adjusted to the new custody arrangement. In such cases, counsel may want to consider whether an expedited appeal is sufficient, or whether the client will suffer irreparable harm even if the appeal is given preference.

When an expeditious resolution of an issue is necessary, another option to consider is filing a petition for writ of mandate while at the same time filing an appeal. While courts

do not normally grant writ relief where a direct appeal is available, they have discretion to do so if an expedited appeal is inadequate under the particular circumstances of the case. A writ proceeding can be decided in a matter of weeks or a few months, while an appeal given preference may still take a year or more to resolve. Further, counsel should consider whether to seek a stay in the trial court or a writ of supersedeas in the appellate court, to maintain the status quo until the appeal is resolved.

If the appeal is entitled to priority, counsel should promptly file a motion for preference in the appellate court under Rule 8.240 of the California Rules of Court. While many courts have developed procedures to identify appeals subject to preference at the outset of the appeal, do not assume that this practice is always followed.

If the court grants the motion, the appeal will be given “calendar preference,” meaning that once briefing is completed, the case will be given priority on the court’s calendar over other cases. The court may also shorten the time for the record to be prepared, may shorten the briefing schedule, and may decline to allow any extensions. Counsel should be prepared for all of these possibilities.

Appeals Entitled to Priority in Federal Court

In the Ninth Circuit, cases are calendared based on the dates that the notices of appeal are filed, except for direct criminal appeals, state death penalty appeals, and civil appeals given statutory priority. The court may also advance a case for calendaring by up to six months in order to have it heard at the same time as another case involving the same legal issues. The highest priority cases are state death penalty cases and direct criminal appeals, which are given priority over all other cases. A single judge or a panel of judges may order an appeal to be expedited.

The most common civil appeals that are expedited in the Ninth Circuit are appeals involving temporary or permanent injunctions. Other cases include recalcitrant witness appeals under 28 U.S.C. § 1826 and appeals involving deprivation of medical care to inmates or other cruel or unusual punishment. The court may also give priority to appeals where good cause is shown, including cases involving rights under the United States Constitution or under a Federal statute. *See* 28 U.S.C. § 1657.

If an appeal is expedited, the court may order a shortened briefing schedule, may refuse any extensions without a compelling reason, and may order the case to be placed on the oral argument calendar within a few weeks after the briefs are filed. I had a Ninth Circuit appeal last year where the court ordered my client to file the opening brief and excerpts of record in a fairly complicated appeal just three weeks after the trial transcript was finished. At the same time, the court scheduled oral argument in the case to be heard only a couple of months later.

And, even though the court may take these actions, it is still possible that the appeal may take a year or more to resolve. Unlike the state courts, which are required to decide cases within 90 days after cases are submitted, the Ninth Circuit does not have strict deadlines

to issue decisions following oral argument or submission of a case. In the expedited appeal I mentioned above, the court still has not issued a decision even though the court heard oral argument last July. Do not assume that just because the case is expedited, it will be decided quickly. As in state court, if the client may be irreparably harmed by a long, dragged-out appeal, counsel should consider whether to seek a stay or file a writ petition for more immediate relief.

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