

Options After Losing an Appeal in the California Courts

In general, once a decision by a California court of appeal has been issued, the losing party still has some options to consider to pursue the matter further. These options include filing a petition for rehearing in the court of appeal, filing a petition for review in the California Supreme Court, and requesting depublication of a published decision. All of these options are quite limited and rarely successful, so litigants should think carefully before spending more time and resources on the appeal. This article provides a general overview of each.

Petition for Rehearing

A petition for rehearing is filed with the court of appeal that decided the case. In essence, a rehearing petition asks the court to reconsider its decision based on some significant error in the decision. California Rule of Court, rule 8.268 governs petitions for rehearing but does not specify the grounds; however, some grounds are specified elsewhere. For example, rule 8.500(c)(2) provides that before petitioning the California Supreme Court to review a decision based on an omission or misstatement of an issue or material fact, the party must first raise this issue in a request for rehearing. Government Code § 68081 requires rehearing upon a timely request when the court decided the case on an issue that was not raised by the parties and for which the court did not request supplemental briefing. Jurisdictional defects may also be raised in a rehearing petition.

Rehearing petitions are usually denied, especially with published decisions. However, a well-founded petition for rehearing often results in a minor modification or correction in the opinion. A party should not request rehearing unless an error exists in the decision that significantly affected the outcome of the appeal, such as a major factual error or the complete failure to address an important issue raised in the briefs. Rehearing is not intended to allow the parties to reargue the same points addressed in the earlier briefs.

A petition for rehearing must be filed very quickly, generally within 15 days after the decision is issued (there are a few exceptions identified in Rule 8.268(b)). The appellate court must decide whether to grant or deny rehearing before the decision becomes final, which is 30 days from the date the decision was issued. *See* Cal. Rules of Court, rule 8.264(b).

Petition for Review

A petition for review is filed in the California Supreme Court and asks the Court to review the court of appeal's decision. If the Court grants review, the lower court decision is automatically depublished (it cannot be cited as precedent), the Supreme Court will decide the issues specified in the order granting review, and the Supreme Court's decision will supersede the lower court one. Grounds for review are found in Rule 8.500(b) of the California Rules of Court. The primary ground argued for most civil cases is in Rule 8.500(b)(1): "When necessary to secure uniformity of decision or to settle an important issue of law." Generally, this section applies where the court of appeal decision is in conflict with decisions from other courts, or where the case involves a significant, unsettled issue of law that is likely to affect many people and future cases.

Petitions for review must follow a specific format set out in Rule 8.516. Among other things, the petition must include a statement of issues presented for review and why the case is appropriate for review. It must also include a copy of the court of appeal opinion.

A petition for review must be filed within 10 days after the court of appeal's decision has become final (usually 30 days after the decision is filed). Cal. Rules of Court, rule 8.500(e). It is important to note that, under Rule 8.500(e), the date of finality is not extended if the 30th day falls on a weekend or holiday. Also, with respect to writ petitions, a summary denial by the court of appeal is final immediately, so a review petition must be filed within 10 days after the denial. Cal. Rules of Court, rule 8.264(b)(2).

The Supreme Court accepts very few cases compared with how many petitions are filed. Judicial Council statistics from 2010 show that during fiscal year 2008 to 2009, the Court granted only 2% of the petitions filed; considering only civil appeals, the number is 3%. That number is comparable to other recent years as well. The chances of getting a petition granted are, therefore, very low. Some factors that may boost a litigant's chances of getting into the California Supreme Court include that the decision below is published; the decision conflicts with case law in other appellate districts; and the case involves an issue of broad public significance. Cases involving public entities, especially when the State of California is a litigant or has a strong interest in the case, also have a better chance of having review granted.

Request for Depublication

A published appellate decision is published in the official reports and constitutes precedent, a source of law in future cases. If publication of a decision could lead to further negative consequences for the losing party, such as where the party may have other cases involving similar issues, consider filing a request for depublication.

Unfortunately, if the request is granted, the result of the case is still the same for the parties, but the case would not be considered precedent any longer.

A request for depublication may be made by “any person” under Rule 8.1125(a) of the California Rules of Court. The request is made to the California Supreme Court in letter form. It must be submitted within 30 days after the decision becomes final (generally 30 days after the decision is issued, unless review is granted). Standards for publication of decisions are found in Rule 8.1105; so, to argue for depublication, a party should explain why the decision does not meet those standards. The request must also explain the nature of the requesting person’s interest in the matter.

As with the other options noted above, depublication orders are rare. The Judicial Council statistics show that in fiscal year 2008 to 2009, only 13 decisions were ordered depublished. The number has diminished significantly in recent years. From 1989 to 1993, the Court ordered over 100 opinions depublished each year, and the amount has steadily decreased since then.

Conclusion

A party who has just lost an appeal should consider whether to file a petition for rehearing, a petition for review, or a request for depublication if the decision was published. However, parties should think carefully before utilizing any of these procedures. Post-appeal remedies are limited and rarely effective. Under the right circumstances, however, a litigant can obtain relief through one of these procedures.

C. Athena Roussos is an attorney in Elk Grove, California. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.

Peg Carew Toledo contributed to this article. Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgsllaw.com.