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5 Ways To Sway Calif.'s High Court To Snap Up Your Case

By **Erin Coe**

Law360, San Diego (March 10, 2015, 5:15 PM ET) -- Attorneys asking the California Supreme Court to hear their clients' cases are hurting their chances if they simply list off the lower courts' errors, rather than showing how appellate courts are at odds and how the impact of a ruling would extend far beyond the immediate dispute. Here, attorneys share ways to convince the Golden State's top court to grant a petition for review.

Identify Conflicts and Issues of Importance

Attorneys should look for any conflicts among the lower courts as well as important questions of law that need to be resolved by the court, according to Rex Heinke, co-head of Akin Gump Strauss Hauer & Feld LLP's Supreme Court and appellate practice.

"If the case does not involve an important issue, but there's a conflict, the court might think it's not worth the time to sort out the conflict," he said. "For cases that raise an important issue but don't have a conflict, the California Supreme Court may see no need in granting review and might want to see how the courts of appeal come out on the issue first."

One of the most prevalent mistakes Heinke sees is a petition for review that concentrates on why the petitioner should have won, instead of on why the court should take the case.

"The California Supreme Court is not there to fix every wrong decision by the court of appeal; it's there to establish uniformity in the law and to answer important questions," he said. "That's what attorneys need to focus on."

A petition for review is different from a briefing on the merits, and petitioners should center on selling the California Supreme Court on the significance of the issue, not so much on the result, according to David Ettinger, a partner at Horvitz & Levy LLP and a contributor of the firm's California Supreme Court blog, At the Lectern.

"In the petition for review, you should say that no matter how the court decides the issue, it needs to be resolved, either because [there is] an issue of statewide importance and there has not been a definitive resolution or because the courts of appeal are in conflict over how to decide the issue," he said. "While attorneys want to advocate for why their client's resolution of the issue is the correct one, that should be secondary."

Because the California Supreme Court agrees to hear only between 3 percent and 4 percent of civil petitions,

attorneys should focus on why the court needs to grant review now and why the case at hand is the one to hear, according to Mary-Christine Sungaila, a partner at Snell & Wilmer.

“Have other petitions been filed on the issue, and have they been denied?” she said. “If the issue keeps percolating and there’s still a conflict, a petitioner can argue that parties still don’t know what to do and it’s really time for the court to hear the issue.”

Get To the Point

The California Supreme Court is inundated with thousands of civil and criminal petitions for review every year, and petitioners who are able to sum up the crux of the case in the first couple of paragraphs have a better chance of seeing their petition granted, according to Sungaila.

“If you aren’t able to answer why the court should grant review in the case after the first paragraph or two, then the petition is doomed,” she said. “The petitioner’s job is to put the important information up front so that the court has an easier time making its decision.”

Lawyers should avoid taking the court into the factual “weeds” by offering up too many details, such as weighing down a petition with lots of dates when the case doesn’t involve a statute of limitations question, according to Kirk Jenkins, chair of Sedgwick LLP’s appellate practice and author of the firm’s The Appellate Strategist blog.

“Provide the court the facts it needs to understand the legal issue you pose, but no more than that,” he said. “[And] stay as far under the page limit as you can responsibly manage.”

Attorneys also should make sure the case is a good vehicle to resolve a conflict or a question of law.

“The case should set up the issue well and allow for a clean decision,” Sungaila said. “There shouldn’t be another issue intermingled with it, and the court shouldn’t have to dabble with other issues to get to the issue you want.”

Consider the Court’s Causes du Jour

Disputes over the enforceability of arbitration clauses and the California Environmental Quality Act are some of the types of cases that have piqued the California Supreme Court’s interest in recent years, according to attorneys.

“Counsel needs to take into account the court’s record in recent years,” Jenkins said. “It’s possible to discern the types of issues that concern the court at any particular time, as well as how those issues are evolving over time.”

The state’s high court ruled in the closely watched Iskanian v. CLS Transportation Los Angeles LLC case in June that arbitration agreements with mandatory class waivers**are generally enforceable** in light of the U.S. Supreme Court’s Concepcion decision, but it held Private Attorneys General Act representative claims couldn't be waived. In the Concepcion case, the U.S. Supreme Court had held that arbitration agreements barring classwide relief and subjecting consumer complaints to individual arbitration are enforceable under the Federal Arbitration Act.

Then in 2013, the California Supreme Court ruled in Sonic-Calabasas A Inc. that Concepcion triggered the

reversal of a California law that allowed employees to take wage disputes to the labor commissioner before entering arbitration. The Iskanian and Sonic-Calabasas rulings show that the California Supreme Court is taking a closer look at arbitration precedents and aligning state arbitration law more closely with the direction taken by the U.S. Supreme Court.

Earlier this month, the California Supreme Court ruled that a Berkeley developer's proposed new home construction doesn't require an environmental impact report under CEQA. Experts say this ruling provided clarity on how CEQA categorical exemptions may be viewed by courts but left open the door for project opponents to continue to challenge the validity of categorical exemptions.

Compared with the court under former Chief Justice Ronald George, the court under Chief Justice Tani Cantil-Sakauye seems more interested in taking up petitions for review in cases that involve issues of importance even if they haven't percolated for long at the court of appeal level, according to Sungaila.

"Under the George court, it had a tendency to wait for courts of appeal to figure an issue out, and even if it was interested in an issue, it would wait to see more petitions for review," she said. "But the current court seems more willing to take an issue it's interested in, rather than waiting for the courts of appeal."

For instance, the California Supreme Court granted review in a franchisor liability case involving Domino's Pizza, and in August, it cleared the pizza chain's corporate parent from being tagged as a defendant in a sex harassment suit brought by a franchisee's former worker, according to Sungaila, who represented Domino's in the matter. The court granted review in the matter when there was no other conflicting state case pending, though there had been decisions from courts in other states.

Attorneys may want to take a closer look at cases that don't fit the classic role of being ripe for review, according to Sungaila.

"A petition may not have to cry out for a conflict to be fixed," she said. "A case may involve issues of statewide importance that have been taken up by other states, and a petitioner may have a chance of presenting it to the court."

Secure Support from Parties Outside the Case

The California Supreme Court will be more likely to grant a petition for review if the petitioner can attest that groups well beyond the parties at issue have an interest in the case and are seeking clarity and guidance on the law, according to attorneys.

"The parties in a case invariably think the case is important and should be taken up, but the court is interested in whether a decision in this case would affect others, how many and in what way," Heinke said. "The more a case could affect a large number of people and organizations, the more likely the court will take it."

If attorneys think a client is going to file a petition for review, they should start evaluating whether trade organizations and other groups would be interested in backing the petition, he said.

"You really need to approach an organization early, because it usually has to talk to its members and its committee or board of directors about approving a filing of an amicus brief," he said. "These briefs can help a petition a lot by showing the importance of a case."

Petitioners may find it useful for amici to further explore a court of appeal split on an issue and describe the

real-world impact of that split, or in a case where there is an issue of industrywide importance but not yet a split of authority, petitioners may want industry groups to weigh in to explain the significance of and urgent need for clarity on the issue, according to Sungaila.

In the Domino's case, amicus letters from the International Franchise Association, National Council of Chain Restaurants and individual companies, including Jack In The Box, were able to show the industry's interest in having the California Supreme Court decide the issue of franchisor vicarious liability, rather than waiting for it to percolate through the appellate courts, she said.

Seek Alternative Paths for Court Input

Sometimes the California Supreme Court denies hearing a case that seems to have all the makings of a successful petition for review.

Michael Rubin, a partner at Altshuler Berzon LLP, is still surprised that the state's high court refused to take up a court of appeal's decision overturning a massive $105 million verdict against Starbucks Corp. in what was the largest tip-pooling case in 2009. A court of appeal ruled in Jou Chau v. Starbucks Corp. that a trial court had erred in ordering the company to pay back $105 million in improperly distributed tips.

"It was an issue that had a significant impact on workers, employers and customers throughout the state; there was an uncertainty about what the proper legal standard should be; and there was a seemingly compelling presentation of the issues that identified where the court of appeal may have gone wrong and how the California Supreme Court could address the issues consistent with public policy," said Rubin, who assisted with the petition in that case. "I continue to rue the fact that the court denied review in that case."

With the California Supreme Court hearing only a tiny percentage of the cases that seek review, attorneys should keep in mind potentially easier avenues to obtain input from the court.

If parties have a case before the Ninth Circuit, they can ask the federal appeals court to certify a question of state law to the California Supreme Court, according to Ettinger. The state high court tends to be fairly deferential when the Ninth Circuit raises a question, and in 2010, it agreed to answer questions certified to it by the Ninth Circuit in 66 percent of cases, he said.

The California Supreme Court in March 2014 agreed to weigh in on questions certified to it by the Ninth Circuit in a pair of appeals brought on behalf of CVS Pharmacy Inc. cashiers and JPMorgan Chase Bank NA tellers whose bids for class certification were rejected. Both lawsuits accuse the employers under PAGA of violating wage-order language requiring that all "working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."

The Ninth Circuit in February asked the California Supreme Court to clarify aspects of the state labor code in a proposed class action involving Nordstrom Inc. employees, asking the state's high court to weigh in on a law that prevents employees from working more than six consecutive days.

"It's not actually a petition for review, but it allows the Ninth Circuit to do the work for you," he said. "Because of the principles of comity, the California Supreme Court will much more often than not be willing to help out another court if it's asking for a decision on an issue, rather than a party."