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CALIFORNIA: An Introduction to Litigation: Appellate



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Appellate litigation in California reflects the size and diversity of the state. The California Supreme Court is at the forefront nationally in addressing emerging legal issues and the many panels of the intermediate Courts of Appeal ensure a deep and rich body of case law exploring a broad range of civil law issues.

Court Structure and Operation

The California Supreme Court consists of a Chief Justice and six Associate Justices. Members of the Supreme Court are appointed by the Governor after being reviewed by the California State Bar's Commission on Judicial Nominees Evaluation and then being confirmed by the Commission on Judicial Appointments. Supreme Court Justices serve 12-year terms, after which each appears on the ballot in a state-wide "retention" election.

The Supreme Court exercises discretionary review in civil matters. It accepts only cases raising important legal issues, often where the lower appellate courts are in conflict — granting about 5% of the petitions for review filed in civil cases. The Court's decisions bind all lower courts in the state. Understanding the narrow grounds on which the Court will grant review and the Court's broad power in shaping California law is critical in successfully litigating a matter in the California Supreme Court.

The Courts of Appeal hear all appeals from final trial court decisions and from certain prejudgment decisions. They also have the discretion to review other prejudgment decisions but rarely exercise that discretion — generally, the issue must be case-determinative. There are six Court of Appeal Districts, divided geographically, with headquarters in San Francisco, Los Angeles, Sacramento, San Diego, Fresno and San Jose. Some Districts are further segregated into Divisions. For example, the Second Appellate District in Los Angeles has eight divisions, with a total of 32 Justices. No District, and no Division within a District, is bound by any other Court of Appeal's precedent, though they try to harmonize where possible. Because of the sheer size and diversity of the appellate bench, knowledge of individual Districts and Divisions can be extremely helpful in assessing the likelihood of success on appeal, and in submitting briefing that will address matters that may be of particular interest to a given Justice.

Importance of Briefing

In cases where the Supreme Court grants review and in all appeals to the intermediate Courts of Appeal, the parties have a right to submit briefs and be heard at oral argument. The party seeking review of a lower court decision files an opening brief, the opposing party files a brief in response and the opening party is entitled to file a reply brief. Strong briefing is critically important, because the courts generally do not schedule oral argument until the panel has developed a tentative opinion resolving the case. California appellate courts are extremely sophisticated, with each Justice assigned several research attorneys to aid in review of cases and preparation of opinions. The enormous volume of appeals makes it essential that briefs present concise and cogent arguments.

Use of Technology

The Supreme Court and Courts of Appeal require electronic filing of petitions and briefs, as well as portions of the lower court record, via bookmarked PDFs. California also permits submission of fully hyperlinked briefs, allowing Justices and their attorney staff to see a cited case or portion of the record simply by clicking on the citation. This is particularly helpful in very complex appeals, where it might otherwise be cumbersome for a Justice or research attorney to physically comb through an extensive record to find a particular reference. Due to the COVID-19 pandemic, every District Court of Appeal and the Supreme Court can now hold argument remotely — which requires additional skills and preparation for counsel to handle effectively. With the pandemic waning, most courts are slowly returning to in-person argument, with varying policies surrounding remote appearance by individual counsel. Livestreaming is now common.

Oral Argument

Appellants have a right to oral argument in California, though they can choose to waive it. Counsel will usually know the assigned Division by the time briefing has commenced, but in Divisions with more than three members, the actual three-Justice panel that will hear and decide the case may not be known until oral argument. Cases are "submitted" at the conclusion of oral argument and the Court must decide the case within 90 days after submission.

Precedential Power of Decisions and Timing

All decisions of the Supreme Court are published in California's "official reports" and are binding on all lower state courts. Most Court of Appeal decisions are not published in the official reports, and *cannot* be cited as precedent or even for persuasive effect. However, anyone — party or non-party — may ask a Court of Appeal panel to designate an opinion for publication, and if the panel declines, may then ask the Supreme Court to order publication. Publication most often occurs where the opinion addresses a significant or new rule of law, applies a settled rule to a new fact situation, or contains a legal discussion that makes an important contribution to the law. The Supreme Court can also order — on its own or by request from anyone interested — that a Court of Appeal opinion not be published in the official reports. A carefully drafted request for depublishment may be a more viable way to prevent the development of adverse law for a client than attempting to surmount the difficulties of obtaining outright Supreme Court review.

Because of the large number of appeals, the median time between initiating an appeal and the filing of the Court of Appeal's opinion is about 19 months, though in some backlogged Districts it may stretch to 2 years or more. In the Supreme Court, which has issued an average of 80 written opinions a year over the past 5 years, there can be a delay of more than a year and a half between the grant of review and oral argument.

Specialized Appellate Bar

The complexity and nuance of both California's appellate system and its vast body of both statutory and case law have led to the development of a significant appellate Bar, reflected in both the State Bar's certification of appellate specialists and peer-reviewed organizations like the California Academy of Appellate Lawyers.

Given the substantial expenditure of time and resources required to prosecute an appeal in California, there is a growing recognition that in significant cases it may be necessary to lay the groundwork for a successful appeal in the trial court, by having appellate counsel consult with trial attorneys to preserve issues for review. It is also imperative that litigants assess, early and objectively, the likelihood of success on appeal, what success would mean after remand, and the potential consequences of a published loss.

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