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Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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Petitions for Rehearing in the Court of Appeal

By Karen M. Bray*

After the Court of Appeal issues a decision, a party disappointed with the result may wish to file a petition for rehearing. This article provides an overview of the grounds and considerations for such petitions, as well as a summary of deadlines for rehearing briefs and the potential means by which the court may dispose of such petitions.

Grounds for seeking rehearing

A petition for rehearing should not be viewed as an opportunity to reargue your case or to raise issues not previously addressed by the parties. Nor should a party file a petition merely to express disagreement with the court's decision, i.e., to argue the court reached the wrong result. Rather, rehearing petitions should be limited to the following circumstances:

(1) The Court of Appeal's decision contains a material omission or misstatement of fact. Indeed, a party who intends to file a petition for review in the Supreme Court must ordinarily first bring a factual error or omission to the Court of Appeal's attention and explain how the error impacts the disposition of the case. Cal. R. Ct. 8.500(c)(2).

(2) The decision is based upon a material mistake of law. For example, a petition may address a newly-issued appellate opinion that impacts

the decision or bring to the court's attention a material misinterpretation of controlling authority reflected in the decision.

(3) The decision is based upon an issue that was neither raised nor briefed by the parties. Cal. Govt. Code § 68081. Similarly, a petition for rehearing may be filed if the decision affirms a motion for summary judgment or adjudication on grounds different from the trial court if the parties had no opportunity to brief the alternative grounds. Cal. Civ. Proc. Code § 437c(m)(2).

(4) The directions to the superior court contained in the decision need to be clarified or altered.

(5) There was a defect in the appellate process leading up to the decision. For example, a petition for rehearing may be filed if a justice who was not present at oral argument is one of the three justices who ultimately participated in rendering the decision without the parties' consent.

(6) The court lacks subject matter jurisdiction. Because the lack of jurisdiction may be raised at any time, a petition for rehearing may raise this issue for the first time.

Considerations for the petitioner

Even if a petition is justified by one or more of the grounds stated above, counsel must be mindful of whether their client wishes to incur the additional expense of a petition for rehearing, particularly since such petitions are rarely granted. The cost for a petition for rehearing should not be substantial, however, because petitions should be kept as short as possible, honed to focus on the key issue(s) and facts. For example, the court is already familiar with the case so there is no need to set forth a general factual or procedural history.

Counsel should also consider the risk that a petition might motivate the Court of Appeal to strengthen its decision—for example, by clarifying it or expanding its rationale—thereby decreasing the likelihood of Supreme Court review.

Finally, counsel must pay special attention to the tone of the petition. Remember that the audience is the same panel that decided the case. An accusatory approach will not be well received.

Deadlines, answers, and replies

A petition for rehearing must be filed within fifteen days after the Court of Appeal issues a decision, and must have an orange cover. Cal. R. Ct. 8.40(b)(1), 8.268(b)(1)(A). The court loses jurisdiction to grant rehearing once a decision becomes final, which is usually thirty days after the decision is filed. Cal. R. Ct. 8.264(b)(1), 8.268(a)(2). Note that publication of an opinion that is initially not published restarts the clock. Cal. R. Ct. 8.268(b)(1)(B).

"A party must not file an answer to a petition for rehearing unless the court requests an answer." Cal. R. Ct. 8.268(b)(2). Normally, the court will not grant a petition for rehearing without requesting an answer.

Cal. R. Ct. 8.268(b)(2). If requested, the answer will be due eight days after the date of the request, unless the court sets another deadline. Cal. R. Ct. 8.268(b)(2). The answer should be short and succinct, explaining why the petition should be denied, and should have a blue cover. Cal. R. Ct. 8.40(b)(1).

The rules do not provide for reply briefs, and counsel should not attempt to file one unless there is a gross misstatement in the answer that can be addressed quickly and succinctly. Given the tight time constraints for ruling on petitions, any party wishing to file a reply should advise the court clerk and deliver the brief immediately.

Disposition

Petitions for rehearing circulate among the justices who decided the case, and the author of the decision usually recommends a disposition. There is no right to oral argument on the petition. Most frequently, petitions are denied summarily by a written order. It is not uncommon, however, for the Court of Appeal to issue an order that denies the petition but modifies the opinion. Neither type of order impacts the time when the underlying decision becomes final nor the deadline for filing a petition for review unless the modification affects the disposition or costs awarded by the Court of Appeal. Cal. R. Ct. 8.264(c)(2). Thus, an order correcting a typographical error or changing the court's reasoning does not impact the finality date.

If the court grants rehearing, the original decision is vacated and the matter is resubmitted to the court, which can consider all of the issues raised by the appeal and not merely those argued in the petition. Cal. R. Ct. 8.268(d). Usually, no further briefing or oral argument takes place. The court simply issues another opinion, as if the original one had never been issued. The normal deadlines concerning finality apply to that decision, and the decision can be the subject of a new petition for rehearing.



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[Back to Top](#)

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