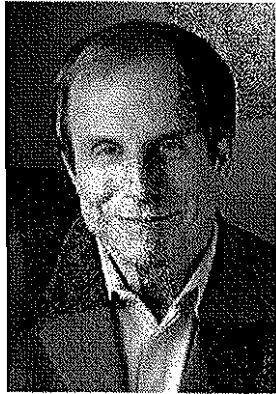




# The Marin Lawyer

An Official Publication of the Marin County Bar Association



## GENERAL MEMBERSHIP MEETING KQED FORUM HOST, MICHAEL KRASNY, TO SPEAK AT APRIL 28, MCBA GENERAL MEMBERSHIP LUNCH

Make sure to register on line, by phone or by email for the the **April 28, General Membership Luncheon**. MCBA is honored to have **Michael Krasny, Ph.D.**, host of KQED's award-winning Forum program as this month's guest speaker. Forum is a daily news and public affairs program covering

interviews with the leading newsmakers and cultural icons of our time in politics, the arts, literature, health, science, business and technology. It is widely believed that Michael Krasny conducts the best and most incisive interviews in the business and with the world's most prominent people including former President Jimmy Carter, Saul Bellow, Cesar Chavez, Robert Redford, Salman Rushdie, Carl Sagan, Gloria Steinham, Archbishop Desmond Tutu and Rosa Parks, just to name a few.

Michael Krasny is a veteran of Bay Area television and radio and has hosted the eclectic nationally heard Forum program for nearly two decades. Dr. Krasny has also been a professor of English at San Francisco State University since 1970, is a widely published scholar and critic, and a winner of multiple honors and awards for journalistic excellence. He will undoubtedly share stories, discuss his favorite interviews and possibly read from his new book about his vast experience behind the microphone.

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## Calendar of Events

**April 28<sup>th</sup>** General Membership Meeting  
12 - 1:30 pm

**April 6<sup>th</sup>** ADR Section Meeting  
12 - 1:30 pm

**April 21<sup>st</sup>** Probate & Estate Section Meeting  
12-1:30 pm

**April 26<sup>th</sup>** Probate & Trusts Mentor Group  
12 - 1:30 pm

**May 4<sup>th</sup>** Labor & Employment Section Meeting  
12 - 1:30 pm

Look for details each month in *The Marin Lawyer*

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Sara B. Allman was Guest Editor of this issue of *The Marin Lawyer*. Kate Rockas is Series Editor for 2010.

## THE PETITION FOR REVIEW: THE IMPROBABLE PATH TO REVIEW IN THE CALIFORNIA SUPREME COURT © 2010

By Sara B. Allman\*

### Introduction

If you are on the losing end of a state court civil appeal, chances are it is also the end of the line for your client. Typically, at this point, your client will have already expended tens of thousands of dollars pursuing or responding to the appeal—not to mention fees and costs in the trial court. But, it's been a long, hard fight, and it's difficult to let it go, particularly



*(Continued on page 12.)*

(General Membership, continued from page 1.)

Dr. Krasny is a Marin resident and has roots in the Marin Community. At the time of writing this article we do not know the specific topics he will discuss on Wednesday, April 28, but members can be assured of a stimulating and entertaining talk with plenty of opportunity to ask Michael questions about his career, Forum and his views on the most important subjects of the day.

This is one event you will not want to miss. At the new affordable MCBA guaranteed luncheon rate of \$25 per member, there is no reason not to reserve your seat for this meeting right away.

(Petition, continued from page 1.)

when a possible path to victory remains. That path starts off with the petition for review; but, in reality, it is very unlikely to lead your client anywhere but further into debt. In the event review is granted, there could be “briefs on the merits” and oral argument—along with even more expense.<sup>1</sup> You must first weigh the pros and cons of embarking on this path with your client and proceed only if warranted. (CRPR 3-200 and 3-700).<sup>2</sup> Assuming you get the go-ahead, this article addresses the technical requirements for filing a petition for review, the policy considerations applicable to the decision to grant or deny the petition, and what you can do to improve your chances of success.

### Grounds for Review

The petition for review is simply a request that the California Supreme Court hear your client’s case. In fact, before 1985, when a constitutional amendment took effect, the “petition for review” was referred to as the “petition for hearing.” Before the constitutional amendment, the

<sup>1</sup> Not all cases accepted for review are briefed on the merits and set for oral argument. The Supreme Court has the discretion to “grant and hold” a case that raises an issue that is already before the court until its opinion in the “lead case” is filed. Once the opinion in the lead case is filed, the court may then dismiss your petition or transfer your case to the Court of Appeal for reconsideration in light of the lead opinion. The court may alternatively “grant and transfer” a case to the Court of Appeal for further consideration in light of a case decided after the Court of Appeal’s decision.

<sup>2</sup> Filing a petition for review is a prerequisite to filing a petition for writ of certiorari in the Supreme Court of the United States; whether or not to preserve that right is another factor to consider in deciding whether or not to file a petition for review.

Supreme Court reviewed the trial court’s decision; now it reviews the Court of Appeal’s decision. Unlike the trial courts and the Court of Appeal, the Supreme Court does not have to hear your case. The decision to grant review of a decision of the Court of Appeal and decide the case on the merits is entirely discretionary. (Cal. Const., Art. VI, Sec. 12 (b).) At least four justices of the Supreme Court must agree to grant review (CRC 8.512(d)(1)). The “grant” rate is typically less than 5%, and the court receives several thousand petitions each year. A couple hundred petitions for review at a time may be decided at the court’s “Wednesday conferences.”

The Supreme Court is a court of public policy. Most practitioners do not appreciate that the court is not concerned with correcting errors in the decisions of the Court of Appeal; its role is to ensure consistency in the law and to decide important public policy issues. In line with this role, the primary ground on which the Supreme Court will grant review is where it appears necessary to secure uniformity of law and to settle an important issue of law. (CRC 8.500 (b) (1)<sup>3</sup> Your task on a petition for review is to convince the court that your case is worthy of its limited time and attention, not to complain anew about how the Court of Appeal misapplied the law.

A direct conflict in the decisions of the Court of Appeal provides a clear-cut basis for review. For instance, the Supreme Court recently, and unanimously, granted review of a decision out of The Fourth District, Division One, *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal. App.4th 686 (*Howell*), pertaining to the collateral source rule. *Howell* held that the “negotiated rate differential”—the difference between the full billed rate for medical care and the actual amount paid as negotiated between a medical provider and an insurer—is a collateral source benefit under the collateral source rule, recoverable by the plaintiff. *Howell* expressly disagreed with the reasoning of other appellate decisions holding that the plaintiff is limited in economic damages to the amount the medical provider accepts as payment, such as *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298. It was not surprising that the Supreme Court granted the petition for review in *Howell* since it squarely presented grounds for review: inconsistency in the law and an important institutional issue that impacts Californians statewide.

(Continued on page 13.)

<sup>3</sup> The other, less common, grounds for review are: the Court of Appeal lacked jurisdiction (CRC 8.500 (b) (2)); a majority of the panel did not agree to the Court of Appeal’s decision (CRC 8.500 (b) (3)), and in order to send the matter back to the Court of Appeal with instructions (CRC 8.500 (b) (4)).

(Petition, continued from page 12.)

A unique factual dispute will not compel review—in fact, it is just the opposite. The Supreme Court is less inclined to consider issues that turn on the facts of your particular case. You will need to demonstrate that the issue presented is of broad public interest and is *not* fact-specific. Even then, review may be denied where the issue presented is not yet ripe or more appropriately is a matter for the state legislature to decide. If the case is not published, and therefore establishes no precedent, review also is more likely to be *denied*. If there is a dissenting opinion, and thus an indication of disagreement among the justices of the Court of Appeal on the panel who decided the case, it is more likely that review will be *granted*.

If the Court of Appeal's opinion misstates or omits facts, a petition for rehearing should first be filed in the Court of Appeal to attempt to correct the errors before filing a petition for review in the Supreme Court. If you do not give the Court of Appeal the opportunity to correct factual errors in its opinion, the Supreme Court can take the facts from the opinion. (CRC 8.500 (c) (2)). A petition for rehearing in the Court of Appeal generally must be filed within 15 days after the opinion is filed (See, CRC 8.268(b)).

### The Technical Requirements

As of January 1, 2010, all petitions for review must be filed in the Supreme Court clerk's office in San Francisco. The original petition for review (and 13 copies) must be served and filed within 10 days after the Court of Appeal decision becomes final. (CRC 8.500 (e) (1); 8.44 (a) (1).) This typically occurs 30 days after the opinion is filed, although there are certain specified decisions that become final immediately. (CRC 8.264 (b) (2)) Decisions that become final immediately make for an uncomfortably quick 10-day turn around for filing the petition. If the Court of Appeal decides to publish its decision after it is filed unpublished, or modifies its judgment, the 30 day period re-commences from the date the order of publication or modification is filed. (CRC 8.264 (b) (3), CRC 8.264 (c) (2).)

A tricky timing issue occurs when the 30<sup>th</sup> day for *finality* falls on a weekend, holiday or day the court is closed—in that event, the date of finality is *not* extended and the 10 days to file the petition begins to run from that day. (CRC 8.500 (e) (1)). In contrast, if the 10<sup>th</sup> day for *filing* the petition for review falls on a weekend, holiday, or day the court is closed, the date for filing the petition is extended to the next court day. (CCP § 12; CRC 8.60(a).) Although there is a possibility for relief from default, you cannot get an extension to file a petition for review, so you need to make sure that you file your petition for review on

time. (CRC 8.500 (e) (2)) If you mail it to the court within the 10 day window by priority or express mail or by an overnight courier, it will be deemed filed timely. (CRC 8.25 (b) (3))

Formatting standards for a petition for review, such as typeface, margins, pagination, etc., are the same as for a Court of Appeal brief, and are described in CRC 8.504 and 8.204. Briefs are color-coded in the wonderful world of appeals. A petition for review is required to have a *white* cover.<sup>4</sup> (CRC 8.40 (b) (1)) A petition for review is limited to 8,400 words and there must be a certificate of word count at the end of the petition.<sup>5</sup> (CRC 8.504 (d) (1)) If the appellate opinion was not final immediately, the petition for review must state whether a petition for rehearing was filed and, if so, the outcome (CRC 8.504 (b) (3)). The opinion of the Court of Appeal and any modification of the opinion must be attached to the petition. (CRC 8.504 (b) (4)) With a few exceptions, no other attachments or incorporation by reference is allowed. (CRC 8.504 (e)) The caption page is required to be identical to the caption in the lower court, and the parties keep their same designations as “appellant” and “respondent” in the Supreme Court. (CRC 8.504 (b) (6)). The petition must be served on all parties, as well as on the clerk of the Court of Appeal and the superior court

<sup>4</sup> An answer is required to have a blue cover, a reply a white cover. (CRC 8.40 (b) (1))

<sup>5</sup> The word count includes the footnotes but excludes the tables, opinion, allowable attachments and the certificate itself. (CRC 8.504(d) (1) and (3))

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*(Petition, continued from page 13.)*

clerk, and a proof of service should be filed with the petition. (CRC 8.25 (a) (2); CRC 8.500 (f)).<sup>6</sup> The filing fees presently total \$590, as specified by Government Code sections 68926.1 and 68927.

### The Tenor of the Petition, Answer and Reply

The most effective petitions for review are short and neutral in tone but designed to pique the interest of the court. Narrow your arguments to present the most compelling reasons why the court should grant review in your case. Emphasize any conflict in the decisions of the Court of Appeal and articulate how the decision is important beyond its importance to the parties. Resist the temptation to include every issue—you will be able to say more in the event review is granted and the case is briefed on the merits. A petition for review must include: a statement of the issues presented for review in a “concise” and “non-argumentative” manner...”framing them in terms of the facts of the case but without unnecessary detail...” (CRC 8.504(b) (1)) The petition for review should include a short introduction, statement of relevant facts, a discussion of how the criteria for review are met—with arguments and authorities that support granting review, and a brief conclusion.

If you represent the party that prevailed in the Court of Appeal, you may elect to *not* respond to a petition for review—particularly where there is no likelihood it will be granted. Or, you can file an answer. An answer must be filed within 20 days after the petition for review is received by the clerk of the Supreme Court, but the deadline can be extended (CRC 8.500 (a) (2)). Like the petition, the answer is subject to the requirements for appellate briefs in the Court of Appeal. Whereas the petition attempts to pique the interest of the court, an effective answer presents the case as nothing new and suggests the petition be given short shrift. If additional issues merit the court’s review, the answer may request that the court address them in the event review is granted. (CRC 8.500 (a) (2), CRC 8.504(b)). Alternatively, a separate petition for review may be filed within the deadline for filing a petition—10 days after the Court of Appeal opinion is final (CRC 8.500 (e) (1)).

The petitioner may also file a reply, due 10 days after the answer is filed, and limited to 4,200 words (CRC 8.500(e) (5)). Like the petition and the answer, the reply is subject to the same requirements as briefs in the Court of Appeal.

<sup>6</sup> In certain cases, the Attorney General’s office must also be served. (CRC 8.29 (c) (1) and (2), 8.500 (f) (2).)

### Amici Curiae Letters

Amici curiae (“friend of the court”) letters supporting or opposing the grant of review may be instrumental in the court’s decision. Amici curiae letters demonstrate the impact of the Court of Appeal’s opinion from another perspective and give additional reasons why a case merits or does not merit the court’s review. The letters are lodged with the court, not filed, so they do not appear on the court’s electronic docket. An amici curiae letter must describe the interest of the party submitting it. (CRC 8.500 (g) (2))

### The Decision

After a petition for review is received, the court has 60 days to make its decision; the time can be extended up to 90 days after the filing of the last timely petition (that is, 30 more days in addition to the standard 60 days for the court to make its decision.) (CRC 8.512 (b) (1)) The court’s central staff prepares a conference memorandum and recommends a disposition to the court based on whether or not the case presents sufficiently important issues for review. There is an “A” list for cases where some action is recommended and a “B” list where the recommendation is to deny. The decision is made at the Wednesday conference. A case can be continued to a later conference to allow for a “supplemental conference memorandum” that makes a different recommendation from that of the original conference memorandum to be circulated. The Supreme Court has very wide latitude to review “all or part of a decision.” (CRC 8.516) Potential dispositions of petitions for review include: grant; grant and hold; grant and transfer; deny; submitted (warrants special discussion); and deny and depublish.

### Conclusion

If your case presents broad issues of public policy or a conflict in the decisions of the Court of Appeal, you should consider filing a petition for review. The path to obtaining review, however, is improbable—it may turn out to be an exercise in futility. Make sure to carry plenty of provisions and prepare your client for the journey.

*\* Sara B. Allman is president of Allman & Nielsen, P.C. She practices civil litigation in state and federal courts. She passed the Appellate Law Specialization Examination last year and is working on satisfying the remaining requirements for certification as an appellate specialist by the State Bar of California. She can be reached at Allman & Nielsen, P.C., 100 Larkspur Landing Circle, suite 212, Larkspur, CA 94939; telephone: (415) 461-2700, e-mail: all-niel@comcast.net.*