12-1984

Take My Case - Please

Myron Moskovitz
Golden Gate University School of Law, mmoskovitz@ggu.edu

Follow this and additional works at: http://digitalcommons.law.ggu.edu/pubs
Part of the Law Commons

Recommended Citation
4 California Lawyer 49 (Dec. 1984)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.
Take my case—please

Convincing the appellate court to hear a case is never easy

by Myron Moskovitz

Your case is so touching
Your tale is sad.
But we're too busy
So it's too bad.

Legend has it that one appellate court occasionally turned away petitioning lawyers with this legal ditty. Nevertheless, the inability to get a hearing before an appellate court—when one has no right to an appeal and a court review on the merits is discretionary—is no laughing matter.

The mirthless truth is that attorneys have had little success in convincing appellate courts to review petitions on the merits. Last year the California Supreme Court denied 91 percent of the petitions for hearing presented to it. As a practical matter, the court has unbridled discretion in accepting such petitions, and it rarely gives any reason for denying them. The poem quoted above is effusive compared to the more common postcard message: “Petition denied.”

Unfortunately, such a method of denying petitions means that no substantial body of law exists on how courts arrive at their deci-

Myron Moskovitz is a law professor at Golden Gate University School of Law and an author and lecturer on appellate practice.
Effectiveness

Sions. Only a few cases and court rules touch on the issue—and only in general terms. California Rule of Court 29(a), for example, says that the Supreme Court may grant a hearing "where it appears necessary to secure uniformity of decision or the settlement of important questions of law." Neither the rules nor the cases, however, clearly define what "important" is.

So how do you persuade a court of the importance of your petition? The answer varies from court to court; it depends on the interests of the judges and on their workload.

First things first

No matter where or when you file your petition, remember: Persuading the court to hear your case on the merits is not enough; you need to convince the court to hear your argument.

Try to exacerbate any conflict among the cases.

Stated crudely, the attitude of most appellate courts is: "So what if the lower court mistreated you and your client? Given the volume of litigation these days, mistakes sometimes happen. If we took every one of these cases, we would have no time for our real job—clarifying the law for a broader group of people. You've had your day in court, so goodbye."

Nevertheless, appellate courts do grant petitions in certain cases, and those cases share certain features. Here are some things to look for in your case and, if the record permits, to emphasize in your petition.

Show serious injustice. If possible, show that the lower court's ruling will result in a serious injustice to your client. In a criminal case, the appellate court may care little that a motion to suppress evidence was improperly denied, if the record shows that your client was guilty. But if the record shows the possibility of innocence, the court may grant a hearing. For this purpose, point to persuasive testimony of your client's innocence, even though the substantial evidence rule precludes the use of this testimony in a brief on the merits.

In a civil case, show, if possible, that the lower court did not merely misunderstand the law, but made disparaging remarks on appellate court cases, or otherwise behaved arbitrarily or injudiciously. Where appropriate, it might help to stress that the case involves huge sums of money.

Stress conflict or bad law. When arguing the merits of a case, it is often best to reconcile possibly conflicting decisions, but when petitioning for a hearing, the strategy is different: Try to exacerbate any conflict among cases. Appellate justices view one of their principal functions as resolving conflicts or clarifying murky rulings in lower court decisions. Emphasize such conflicts or lack of clarity when petitioning for a hearing.

If the lower court opinion will be published, the decision may affect others besides you and your client. If the opinion states a new and incorrect rule of law, the appellate court will probably want to get rid of it.

Stress the effect of leaving bad law in a published opinion when possible—except when petitioning the state Supreme Court for a hearing. That court has the authority to "depublish" lower appellate court decisions. Cal Rule of Ct 976 (c)(2). The decision stands, but it will not appear in the published reports. If the court can resolve that point simply by ordering depublication, it does your client no good at all.

Emphasize social significance. Where possible, show that institutions or groups—such as hospitals, police, school administrators or insurance companies—need guidance. Attach newspaper clippings, magazine articles or other material demonstrating the concerns of those affected by the issue. Note, however, that you must
first request and receive permission from the chief justice to attach such exhibits to a petition for hearing in the California Supreme Court. Cal Rule of Ct 28(d)(4). If, for example, your case involves the question of whether a high school official may lawfully detain a student, show the court that educators worry about the paucity of legal guidance on school detentions.

If your case contains an issue involving the validity of a certain contractual provision, try to show that the provision is commonly used in form contracts throughout the court's jurisdiction. If the issue involves the validity of a local ordinance, list other cities or counties that have enacted similar ordinances.

Pique the court's interest. Learn which issues concern the court. Look over recent decisions by the court in the area dealing with your appeal. Discuss your case with a practitioner familiar with the court; you might find an approach that will catch the court's eye. Even if the legal issues affect only your client, they might hold some fascination for the court.

If part of your case involves baseball, movie stars, steamy sex or any other popular subject, emphasize it. The judge who reads your petition might want to tell his friends that he decided "The Reggie Jackson Case."

Show immediacy. Often appellate judges hope a difficult issue will evaporate. If the trial court denied your pre-trial motion to suppress evidence or motion for summary judgment, why should the appellate court hear your case now? You might win the case at trial or the case might settle, sparing the court the burden of handling it.

If your case includes such a weakness, discuss it in your petition. Here are some possible approaches:

- The case will not settle because it involves political or ideological differences, not just money.
- A trial cannot save you because the trial court's ruling makes your loss inevitable. In a criminal case, for example, the trial court denied your motion to suppress a confession.
- The damage will have been done by the completion of a trial or ordinary appeal. If the trial court denies a preliminary injunction to restrain injury to property or to restrain violations of election laws, it may cause irreparable harm.
- The case presents an ideal opportunity for the court to clarify the law because the facts of the case create an excellent vehicle for addressing the legal issues. If the case were to "wash out" at trial, it would deprive the appellate court of this opportunity.

Drafting the petition

Check the court's rules for what

The Business Management Package For The Legal Professional

The legal market has developed a growing demand for a Business Management Package designed especially for law firms. With this in mind, we designed LawPartner, a software package with the purpose of maximizing the efficiency, effectiveness, and profitability of "any" size law firm.

Billings/Accounts Receivable Features:
- Invoices and Statements
- Prebilling Worksheet for charges or debits
- Prebilling Worksheet for payments and credits
- Unbilled Inventory Report
- Summary of Accounts Report
- Bills and Adjustments Report
- Aged Accounts Receivable Report
- Client/Matter Accounting Report

Docket/Calendaring Features:
- By Attorney
- For the Office
- By Type of Activity
- By Calendar Keyword
- Limitation Notices Calendar
- Special Calendar

Management Reporting Features:
- Directory of Active Cases
- Office Summary Report
- Summary by Activity Type Report
- Summary by Expense Type Report
- Matter Summary of Activity Type Report
- Attorney Contribution Report
- Attorney Performance Report

LITIGATION MANAGEMENT & SUPPORT
General Ledger Accounting
For additional information:
OA Software, Inc.
2165 The Alameda
San Jose, Ca 95126
(408) 554-9086
Effectiveness

the petition should contain. Make sure the court receives copies of any of the lower court record it needs.

If your case contains one or more of the attractive features discussed above, emphasize them, even if these features played only a minor role in the court below. It does not matter that the best chance for reversal on the merits lies with some more mundane issue. At this point, the goal is to get your foot in the door. Once the court takes the case, you can argue the case on the merits.

In addition, put a short summary of your petition at the beginning—no more than two or three pages. It should briefly summarize the key facts and state the features that might interest the court. Appellate court judges and law clerks

These suggestions may only increase the likelihood of success from very low to fair.

do not want to spend much time on these petitions. You have no assurance that they will read your petition carefully. They may skim it or read the first few pages. Your beginning summary should catch their attention quickly and get them to treat your petition seriously.

If your petition is denied after following these suggestions, don’t blame yourself (or me). The suggestions may only increase the likelihood of success from very low to fair. You may do a great job, but your petition may be denied for reasons beyond your control, such as the court’s workload. Don’t feel bad if this happens; you have lots of company.

Nevertheless, filing the petition may well be worth the effort. If you are one of the lucky few, you may salvage your client’s case—and the result might be a landmark decision.