JUDICIAL COUNCIL OF CALIFORNIA

Report and Recommendations of the Advisory Committee to Implement Proposition 32

March 28, 1985

REPORT AND RECOMMENDATIONS OF THE ADVISORY COMMITTEE TO IMPLEMENT PROPOSITION 32

Proposition 32, approved by the voters in the November 1984 election, amended article VI, section 12 of the California Constitution to authorize the Supreme Court to review all or part of a decision of a Court of Appeal. Before the amendment, the Constitution was interpreted to require the Supreme Court, once it granted a "hearing," to consider and decide all issues in the case as though the case had never been in the Court of Appeal.

Proposition 32 takes effect on May 6, 1985, six months after its approval by the voters.

This report to the Supreme Court and to the Judicial Council is prepared at the direction of the Advisory Committee to Implement Proposition 32. A list of the advisory committee's membership is attached at pages 35 - 36.

The general organization of this report is reflected in the following table:

TABLE OF CONTENTS

SUMMARY AND OVERVIEW

The advisory committee held five meetings;[1/] the final recommendations contained in this report evolved from the committee's study of successive drafts of proposed rules during the course of those meetings. It wishes, in particular, to acknowledge the assistance it received from the State Bar Appellate Courts Committee, whose chair attended most of the committee's meetings at the committee's request.

Following the January 31st meeting, a draft of rules and comments reflecting the committee's decisions to that date was released to the press and mailed to an extensive list of members of the bench and bar, and to interested organizations. The March 22nd meeting was devoted primarily to a review of the resulting comments.[2/]

There was a high degree of consensus in the committee on the following issues:

1. Although it would be possible to conform the rules to the language of Proposition 32 by making more limited changes, the committee was of the view that, in light of the basic change effected by the constitutional amendment, broader modifications of practice and procedure before the Supreme Court would be appropriate to allow the court and litigants to gain the maximum benefit from the adoption of Proposition 32.

1/ December 14, 1984; January 11, 1985; January 25, 1985; January 31, 1985; March 22, 1985.

2/ A summary of comments received, and copies of letters from the Office of the State Public Defender; Larry Gill, Clerk of the Supreme Court; Charles Bushong, Secretary of the Supreme Court; and Mr. John P. McNicholas received too late for inclusion in the summary, are transmitted along with this report. Also included is the letter from Bancroft-Whitney raising special concerns.

The committee rejected the suggestion that the rules adopted at this time be designated "temporary," although it recognizes that some amendments will undoubtedly be necessary in the light of experience.

2. Key aspects of practice before the United States Supreme Court should be adapted for use in California. The most important appear to be:

a. Petitions invoking the Supreme Court's discretionary jurisdiction should be kept shorter and more precisely directed to the question why the case warrants Supreme Court review, to conserve the court's time.

b. Issues should be identified in the petition; all subsequent proceedings will normally be limited to the issues identified by the petitioner.

c. The parties should be expected to file new briefs in the Supreme Court if review is granted, because: (1) new briefs on the merits will help make it feasible to keep petitions short and focused on the reasons why review is appropriate; (2) counsel are likely to want to reorganize their arguments in light of the limited issues before the Supreme Court; and (3) both the parties and the court will be helped if the briefs address the issues in terms of the Court of Appeal decision.

On the other hand, as discussed below, there was no clear consensus on possible amendments to rules 976 and 977 governing the publication and citation of Court of Appeal opinions after review is granted. The committee found that these two rules presented the most difficult policy questions it addressed; and, in the course of its deliberations, took

tentative positions that it later reconsidered and changed. Its final recommendations as to these two rules, therefore, must be viewed in the light of these facts.

RULES TO BE CONSIDERED BY THE SUPREME COURT

Two rules reviewed by the committee, rules 976 and 977, fall within the jurisdiction of the Supreme Court: rule 976, because it implements the court's power under the Constitution (article VI, section 14) over publication of opinions; and rule 977 because it modifies rules of stare decisis laid down in the court's decisions, and implements rule 976. The remaining rules are within the jurisdiction of the Judicial Council, although they affect the Supreme Court directly.

Rule 976

Rule 976 governs the publication of Court of Appeal opinions; subdivision (d) of that rule provides that an opinion superseded by a grant of hearing is not to be published. (As a practical matter, the opinion is likely to be published in an advance sheet, but deleted from the bound volume.) This publication practice follows logically from the legal doctrine that a grant of hearing nullifies the Court of Appeal decision. That legal doctrine is changed by Proposition 32: the Court of Appeal action in the case stands as a valid judgment subject to possible reversal upon review, just as a superior court judgment stands as a valid judgment subject to possible reversal during the pendency of an appeal to a Court of Appeal.

Recognizing the importance of this change in legal doctrine, the advisory committee voted to recommend that rule 976(d) be changed, but directed the staff to present for the Supreme Court's consideration a second version of the rule retaining the present publication practice. The first version is:

Version 1:

Rule 976. Publication of appellate opinion

(a)-(c) * * *

(d) [Superseded opinion] No opinion superseded by the granting of a hearing (prior to May 6, 1985), rehearing, or other judicial action shall be published.

Unless otherwise ordered by the Supreme Court, grant of review by the Supreme Court of a decision of a Court of Appeal does not affect the certification of the Court of Appeal opinion for publication or partial publication pursuant to subdivision (c)(1) or rule 976.1.

The arguments in support of and against retaining these opinions in the bound volumes may be summarized:

Arguments for retention in bound volumes:

1. For those doing research, it will be possible to see how the approach to the identical question differed when the case reached the Supreme Court.

2. The Supreme Court's task of opinion writing may, in some cases, be simplified when it can refer to a published Court of Appeal opinion for further factual detail, or for a discussion of a legal question.

3. When the Court of Appeal has decided issues not dealt with by the Supreme Court, the intermediate court opinion is not lost as a statewide precedent if the opinion is retained in the bound volume.

4. This is the procedure followed in the federal system and in other states having intermediate appellate courts.

Arguments against retention in bound volumes:

1. Research may be complicated. There will be more risk of counsel erroneously relying on the Court of Appeal opinion in a case in which the Supreme Court has granted review.

2. Confusion may arise if the Supreme Court and the Court of Appeal opinions deal with the issues in different terms.

3. Publication of Court of Appeal opinions that are reviewed by the Supreme Court will result in the bound volumes containing large quantities of extraneous material that, at best, is not useful as precedent.

4. If, on the other hand, the rule were to provide that after review is ordered the Court of Appeal opinion shall not be published unless by specific order of the Supreme Court, there would be a maximum of flexibility for the court to provide for publication -- immediately or in conjunction with its opinion -- when it would be useful.

The advisory committee recognized that the Supreme Court might not wish to adopt "Version 1" of rule 976. The version of the rule retaining the present publication practice follows:

Version 2:

Rule 976. Publication of appellate opinions

(a)-(c) * * *

(d) [Superseded opinions] No opinion superseded by the granting of a hearing, review, rehearing, or other judicial action shall be published.

After decision on review or dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part. If it does so, the opinion of the Court of Appeal is deemed to have been first published upon its publication in the advance sheets to the Official Reports after that order.

Committee comment:

This version would continue, for the new procedure of review, the prior practice of withdrawing a Court of Appeal opinion from publication. The Court of Appeal opinion would thus lose precedential value unless the Supreme Court expressly orders it published at a later time. The last sentence of (d) clarifies when the republished Court of Appeal opinion has precedential effect.

Rule 977

The advisory committee found a significant divergence of views concerning rule 977, which governs the citation of Court of Appeal opinions. This becomes important if rule 976(d) is modified to retain in the bound volumes some or all Court of Appeal opinions in cases reviewed by the Supreme Court. If rule 976(d) remains substantially unchanged, as in Version 2 above, no change in rule 977 need be contemplated.

Several possible citation rules were considered, including:

1. The federal rule: the Court of Appeal opinion not only may be cited during and after Supreme Court review, but it retains its stare decisis impact (cf., "the law of the circuit") until the Supreme Court rules otherwise.

2. Making the Court of Appeal opinion citable as to any issue, but without binding force pending review (i.e., modifying the Auto Equity Sales rule.)

3. Making the Court of Appeal opinion uncitable as to any issue while review is pending, but citable thereafter except to the extent that the Supreme Court ruled differently.

4. Permitting the Court of Appeal opinion to be cited while review is pending, on issues not designated by order of the Supreme Court (if the court issued such an order); not citable on any issue pending review, in the absence of an order of the Supreme Court designating issues; and citable after review, to the extent that the Supreme Court did not rule differently.

Among the factors considered by the advisory committee were: the desirability of retaining as precedent the Court of

Appeal decision on questions not reviewed by the Supreme Court; the relative ease or difficulty of legal research; and the possibility of errors by counsel.

During the course of the committee's meetings, various of these alternatives received favorable votes. For example, the possible rule summarized in paragraph 4 above received a favorable vote at one meeting; but upon seeing the rule drafted, the committee concluded that it was excessively complicated.

The alternative that finally received a favorable vote of the committee was version 1, below:

Version 1

Rule 977. Citation of unpublished opinions and opinions after review granted prohibited; exceptions

(a) [~~Rule~~Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b)-(c) * * *

(d) [Citation and precedential force after review ordered] After the Supreme Court has ordered review of a decision of a Court of Appeal:

(1) [Pending review] Unless otherwise ordered by the Supreme Court, pending decision by the Supreme Court a published opinion of a Court of Appeal in the cause is without binding or other precedential value, and shall not be cited except to inform a court of the grant of review and the issues involved. Any reference to the Court of Appeal opinion shall include citations to the grant

of review and any subsequent action by the Supreme Court.

(2) [After decision on review] After decision by the Supreme Court, a published opinion of a Court of Appeal in the cause is not binding upon trial courts or appellate departments to the extent that it [differs from] [is inconsistent with][3/] or is disapproved by the Supreme Court.

The fact that the Supreme Court opinion does not discuss an issue is not an expression of the opinion of the Supreme Court on the correctness of the resolution of the issue by the Court of Appeal or on the correctness of any discussion of it in the Court of Appeal opinion.

Committee comment:

Under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, "decisions of every division of the [Courts of Appeal] are binding upon all the justice and municipal courts and upon all the superior courts of this state. . . ." As the grant of review casts doubt upon the viability of the Court of Appeal decision, however, it would seem appropriate to modify the rule of Auto Equity Sales once review has been granted. By adopting this amendment to the rule, the Supreme Court makes Auto Equity Sales inapplicable pending decision on review, and also prohibits citation of the Court of Appeal opinion during that period even as persuasive authority. This conforms to long-established California practice under which a Court of Appeal opinion loses precedential value when hearing is granted. In unusual situations, the Supreme Court may by order preserve the precedential value of the Court of Appeal opinion pending

---

3/ Alternate language.

Supreme Court review. The Court of Appeal opinion may, in any event, be cited to inform a court of the grant of review and the issues involved in the case before the Supreme Court.

After decision by the Supreme Court, the opinion of the Court of Appeal, if published, regains precedential value to the extent it is not inconsistent with the Supreme Court opinion. In this respect, the amendment departs from prior California practice.

An alternate version, preferred by a substantial number of committee members, is:

Version 2:

> Rule 977. Citation of unpublished opinions and opinions after review granted prohibited; exceptions
>
> (a) [~~Rule~~Unpublished opinons] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).
>
> (b)-(c) * * *
>
> (d) [Citation and precedential force after review ordered] After the Supreme Court has ordered review of a decision of a Court of Appeal:
>
> (1) [Pending review] Unless otherwise ordered by the Supreme Court, pending decision by the Supreme Court a published opinion of a Court of Appeal in the cause may be cited but is without binding authority. Any reference to the Court of Appeal opinion shall include citations to the grant of

review and any subsequent action by the Supreme Court.

(2) [Same as in Version 1, above.]

This version would, pending review, place the Court of Appeal opinion in the same category as a decision in another jurisdiction: possibly persuasive, but not binding.

In presenting the Supreme Court with these alternative versions of rules 976 and 977, it is the intent of the advisory committee to identify the policy questions clearly, while deferring to the court for resolution of those questions.

RULES TO BE CONSIDERED BY THE JUDICIAL COUNCIL

Discussion and Highlights

Proposition 32 authorizes the Judicial Council to:

> provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

In addition, under its preexisting rulemaking power (art. VI, sec. 6), the Judicial Council has historically made and amended rules governing the petition for hearing process, and for procedure in reviewing courts generally.

The new and amended rules recommended by the advisory committee, along with its proposed official committee comments, are attached. Several changes were made in the draft rules in the light of the suggestions received after they were circulated for comment; these changes do not significantly affect the general structure of the rules as circulated. The following summarizes the highlights of the proposed amendments and new rules:

Rule 22 (Oral argument) -- The petitioner for review would have the right to open and close oral argument, unless otherwise ordered.

Rule 25 (Remittitur) -- Technical changes.

New rule 27.5 (Transfer before decision) -- Procedure and criteria spelled out for the first time. "Before decision" means before the decision is final as to the Court of Appeal.

Rule 28 (Review by Supreme Court) --

a. "Hearing" is changed to "review" in light of the new constitutional language.

b. The time for the court to grant review on its own motion is unchanged.

c. Time for the court to grant on petition is changed to run from filing of petition; initial jurisdictional period is changed to 60 days, but permissible extension cut to 30 days, leaving total at 90 days.

d. Time for answer is 20 days from filing of petition.

e. The petition is required to state issues on which review is sought (compare rule 21.1, Rules of the United States Supreme Court); answer may state additional issues on which review is sought only if the petition is granted. These statements govern the scope of briefing and argument unless the court specifies the issues differently.

f. Petitioner is allowed to file a reply if the answer states new issues.

g. Permissible length of the petition and answer is reduced to 30 pages (25 if printed) from 50 pages (40 if printed), because new briefs are likely if the petition is granted.

Rule 29 (Grounds for review) -- Technical amendment only.

New rule 29.2 (Issues on review) -- Clarifies the Supreme Court's power to decide causes on limited issues; and to specify the issues to be briefed and argued.

New rule 29.3 -- Briefs on the merits -- Requires that new briefs on the merits be filed, or that a party express intention to rely on the Court of Appeal brief and submit copies of it for the Supreme Court. Allows less time for a party to

give notice of intention to rely on the Court of Appeal brief than is allowed for a new brief. Provides expressly for supplemental briefs addressing new authorities.

New rule 29.4 (Disposition of causes) -- Enumerates the ways in which the Supreme Court can dispose of a cause.

New rule 29.6 (Errors in terminology) -- States a rule of liberal construction.

New rule 29.9 (Transitional provisions) -- Generally provides that the date of grant determines whether the cause is before the Supreme Court on hearing or on review; a petition for hearing pending on the changeover date is automatically deemed a petition for review. Grants a grace period to August 1, 1985, for filing petitions conforming to the new requirements.

Rule 44 (Color of covers) -- Technical amendment.

Rule 45 (Extension) -- Clarifies power to extend time under the new procedure.

CONCLUSION

The advisory committee has presented two alternative versions of amendments to rules 976 and 977 for the Supreme Court's consideration. Recommended new and amended Judicial Council rules are presented on pages 13 through 32, for the council's consideration.

California Rules of Court, rules 22, 25, 28, 29, 44 and 45 would be amended, and new rules 27.5, 29.2, 29.3, 29.4, 29.6 and 29.9 would be adopted, to read:

Rule 22. Oral argument

Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument, except that in a case in which a sentence of death has been imposed each party shall be allowed 45 minutes; (2) not more than one counsel on a side may be heard except that different counsel for the appellant or the moving party may make opening and closing arguments and in a case in which a sentence of death has been imposed two counsel may be heard in either opening or closing argument for each side; (3) each party and intervener who appeared separately in the court below may be heard by his or her own counsel; and (4) the appellant on a direct appeal or the moving party shall have the right to open and close. On Supreme Court review of a Court of Appeal decision, the petitioner for review is the moving party.

If two or more parties file notices of appeal or petitions for review, the court will indicate the order of argument.

Rule 25. Remittitur

(a) [Issuance and transmission] A remittitur shall issue after the final determination of (1) Supreme Court review of a decision of a Court of Appeal;~~(1)~~ (2) any appeal~~, or;~~ ~~(2)~~ (3) any original proceeding in which an alternative writ or order to show cause has been issued addressed to a lower court, board or tribunal~~;~~ or ~~(3)~~ (4) any original proceeding determining on the merits the validity of the decision of a lower court, board or tribunal without issuance of an order to show cause or alternative writ. A remittitur shall not be issued when an original petition is summarily denied.

Unless otherwise ordered, the Clerk of the Supreme

Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur (i) upon the expiration of the period during which a ~~hearing~~ review in the Supreme Court may be determined including any extension of the period in the particular cause or (ii) as provided in this subdivision or rule 29.4(c). The remittitur shall be deemed issued on the clerk's entry in the record of the case, and shall be transmitted immediately, with a certified copy of the opinion or order, to the lower court, board or tribunal. On Supreme Court review of a decision of a Court of Appeal the remittitur shall, unless otherwise ordered, be addressed to the Court of Appeal, accompanied by a second certified copy of the remittitur and by two certified copies of the opinion or order; and the Court of Appeal shall issue its remittitur forthwith after an unqualified affirmance or reversal of its judgment by the Supreme Court, or after finality of such further proceedings as are mandated by the Supreme Court.

Whenever the judgment of the reviewing court changes the length of a sentence to state prison or changes the applicable credits ~~applicable thereto~~, or changes the maximum permissible period of confinement of a person committed to the custody of the Youth Authority, without requiring further hearing in the trial court, the clerk of the reviewing court shall also transmit a copy of the remittitur and the opinion to the Department of Corrections or to the Youth Authority.

(b)-(e) * * *

[New] Rule 27.5. Transfer before decision

(a) [Transfer] On its own motion or on petition of a party, the Supreme Court may order a cause pending in a Court of Appeal transferred to itself. For purposes of this rule, a cause is pending until the decision of the Court of Appeal is final as to that court; a cause decided by the appellate department of a superior court is not pending in a Court of Appeal until it is ordered transferred pursuant to rule 62.

(b) [Grounds] Transfer before decision will not be ordered unless the cause presents issues of imperative public importance requiring prompt resolution by the Supreme Court, and justifying a departure from normal appellate processes.

(c) [Procedure] A party seeking transfer shall serve and file in the Supreme Court a petition setting forth the nature of the cause, the issues presented and how they arose, and why those issues warrant a transfer of the cause.

An answer to the petition may be served and filed within 20 days after the service of the petition.

(d) [Form of petition and answer] The petition and any answer shall conform as nearly as practicable to the requirements of rule 28(e).

(e) [Determination of petition] Transfer is granted by an order of the Supreme Court made on the affirmative votes of at least four judges.

Committee comment:

Transfer of a cause from a Court of Appeal to itself before decision has been a power of the Supreme Court under the current and predecessor language of the California Constitution. A recent case, under the version of article VI, section 12, in effect prior to May 6, 1985, is Brosnahan v. Brown (1982) 32 Cal.3d 236.

Rule 20 also applies to these transfers, and is cited in Brosnahan. However, rule 20 furnishes neither a procedure for seeking transfer before decision nor an indication of the criteria for determination of when a transfer is appropriate. This new rule, which is called for by article VI, section 12, as amended effective May 6, 1985, supplements rule 20 by providing the procedure and criteria.

Subdivision (b) is drawn from rule 18 of the United States Supreme Court Rules, applicable to petitions for certiorari prior to decision by a lower federal court. The language

is chosen to emphasize the extraordinary nature of this procedure, and the fact that the Supreme Court will entertain a petition only under the most compelling circumstances.

Rule 28. ~~Hearing in~~ Review by Supreme Court

~~(a) [Time within which court may grant hearing] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period or any extension thereof the Supreme Court may for good cause extend the time for one or more additional periods not to exceed a total of an additional 60 days.~~

(a) [Time within which the court may order review]

(1) [On own motion] If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that court the Supreme Court, on its own motion, may order review of the Court of Appeal decision. Within the original 30-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 60 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the decision becomes final as to the Court of Appeal.

(2) [On petition] Within 60 days after the filing, as provided in subdivision (b), of the last timely petition for review, the Supreme Court may order review of a Court of Appeal decision. Within the original 60-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 30 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the filing of the last timely petition for review.

(b) [Time for filing petition] A party seeking a ~~hearing~~ review must serve and file a petition ~~therefor~~ within 10

days after the decision of the Court of Appeal becomes final as to that court, ~~except that~~ but a petition may not be filed after denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. Proof shall be ~~made~~ filed of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. ~~When such copy is delivered to the clerk of the Court of Appeal, he,~~ who shall forthwith transmit to the Clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the Clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the Clerk of the Supreme Court.

A petition for review submitted for filing prior to the finality of the Court of Appeal decision as to that court shall be received by the clerk and shall be deemed to have been filed on the day after the decision becomes final as to the Court of Appeal.

(c) [Time for filing answer] An answer may be served and filed within 20 days after the ~~decision becomes final as to the Court of Appeal~~ filing of the petition.

(d) [Reply] If the answer presents additional issues for review, the petitioner may serve and file a reply limited to those additional issues within 10 days after the filing of the answer.

~~(d)~~(e) [Form of petition, ~~and~~ answer and reply]

(1) Except as provided ~~herein~~ in this rule, the petition, ~~and~~ answer and reply shall, insofar as practicable, conform to the provisions of rule 15.

(2) At the beginning of the body of the petition, the petition shall state the issues presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement should be short and concise and should not be argumentative or repetitious. The statement of

an issue will be deemed to comprise every subsidiary issue fairly included in it. Only the issues set forth in the petition and answer or fairly included in them need be considered by the court.

(3) The petition shall be as concise as possible, and shall address, in particular, why the cause is appropriate for review under the criteria stated in rule 29.

~~(2)~~(4) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of ~~its~~ filing.

~~(3)~~(5) The petition shall be a single document including a brief in support of the request for ~~hearing~~ review. All contentions in support of the petition shall be included ~~therein~~, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all ~~of his~~ contentions in opposition to the petition.

The answer of a party opposing review may request the court to consider additional issues if review is granted as to any or all issues raised in the petition. An answer stating additional issues shall conform to the requirements of paragraph (2).

No authorities or argument may be incorporated by reference from another document into the petition, ~~or into the answer, except that~~ or reply, but the petition, ~~or~~ answer or reply may incorporate by reference specified portions of a petition for ~~hearing~~ review, ~~or~~ answer or reply filed in the Supreme Court by another party in the same case, or filed in the Supreme Court in a connected case wherein a petition for ~~hearing~~ review is also pending or has been granted. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition, ~~or~~ answer or reply, ~~except where such~~ unless the annexed material is page-numbered consecutively with the body of the petition, ~~or~~ answer or reply and the total length, including the annexed material, does not

exceed the limit established in paragraph ~~(4)~~(6).

~~(4)~~(6) A petition or answer shall not exceed ~~40~~ 25 pages if printed or ~~50~~ 30 pages if typewritten or produced by other process of duplication, exclusive of the Court of Appeal opinion, index of contents and table of authorities, and any other indices. A reply shall not exceed 10 pages if printed or 15 pages if typewritten or produced by other process of duplication, exclusive of index of contents and table of authorities. There shall be no exhibits or appendices, however denominated, annexed ~~thereto~~ to it or filed ~~therewith~~ with it other than the opinion of the Court of Appeal and any annexed material permitted by paragraph ~~(3)~~(5), except ~~that, if it is of unusual significance,~~ an evidentiary exhibit or order of a lower court may be annexed if it is of unusual significance and does not exceed 10 pages. In all other instances, reference to evidentiary matters and lower court orders shall be by appropriate reference to the record, if they cannot be included in the body of the petition, ~~or~~ answer or reply without exceeding the length limitations ~~previously stated~~ provided in this rule. The Chief Justice may permit petitions, ~~or~~ answers or replies of greater length, or the inclusion of more annexed material, upon written application.

~~(e)~~(f) [Determination of petition] ~~A hearing in~~ Review by the Supreme Court, ~~after~~ of a decision ~~in the~~ of a Court of Appeal, may be granted by an order, signed by at least four judges ~~assenting thereto~~, and filed with the clerk. The denial of a ~~hearing~~ review may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition ~~for hearing~~ shall be deemed denied and the clerk shall enter a notation in the register to that effect.

~~(f)~~(g) [Oral argument] When a ~~hearing~~ review is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived, or ~~unless~~ the Court transfers

the cause to a Court of Appeal~~,~~, dismisses review as improvidently granted, orders the cause held pending decision of another cause, or issues a peremptory writ.

Committee comment:

As amended effective May 6, 1985, this rule makes substantial changes in the prior procedure for petitions for "hearing." The time limits are changed. In particular, the time within which the Supreme Court has jurisdiction to order review is now measured from the date of filing of the petition for review, and not from the date of finality of the Court of Appeal decision.

The following table compares the time schedule for handling a petition for hearing under prior practice with the schedule set out in amended rule 28 for a petition for review, using as an example a case in which each document is filed and served on the last permissible day:

	Under former rule	Under amended rule	
		On petition	On own motion
Finality in Court of Appeal	Day 0	Day 0	Day 0
Petition filed	Day 10	Day 10	- - - -
Answer filed	Day 20	Day 30	- - - -
Reply filed*	------	Day 40	- - - -
Time for court to act w/o extension	Day 30	Day 70	Day 30
Time for court to act with maximum extension	Day 90	Day 100	Day 90

* Allowed only if the answer presents additional issues; limited to those issues.

Several new provisions are adapted from United States Supreme Court practice on petition for writ of certiorari.

(3/29/85)

Subdivision (e)(2) is adapted from United States Supreme Court rule 21.1, and requires a succinct statement of the issues presented for review.

Under subdivision (e)(5), the answer to the petition may present additional issues that the answering party wants reviewed only if the petition is granted. E.g., a civil defendant who was unsuccessful on a statute of limitations defense but successful on the merits might include in its answer to the petition for review a request that if review is granted, the Supreme Court also consider the statute of limitations issue. The answer may not be used as a substitute for an independent petition for review on issues the answering party wishes the Supreme Court to review regardless of its action on the original petition.

Subdivision (e)(2) also provides that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." The statement of issues is, therefore, far more than a means of persuading the Supreme Court to grant review: the statement also defines the scope of the issues to be considered on the merits if review is granted, unless the Supreme Court determines otherwise. The committee expects the Supreme Court to follow the practice of the United States Supreme Court under its rule 21.1, and decline (in most cases) to consider the merits of questions that were not set out in the petition for review or answer. However, the rule does not limit the Supreme Court's power to make exceptions.

The 1985 amendment limits petitions for review to a shorter length than was permitted for petitions for hearing. This is because a new brief on the merits is now expected (see new rule 29.3). A reply is now permitted, but only if the answer stated additional issues for review.

It has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. E.g., People v. Davis (1905) 147 Cal.

346, 350; People v. Triggs (1973) 8 Cal.3d 884, 890-91. Adoption of the new "review" procedure does not affect this legal doctrine, and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion. A specification of issues to be argued, in connection with a grant of review, will not be an expression of the opinion of the Supreme Court on the correctness of the resolution of other issues by the Court of Appeal or on the correctness of any discussion of them in the Court of Appeal opinion.

The Supreme Court may review Court of Appeal interlocutory orders and orders summarily denying writs within their original jurisdiction, as well as decisions on the merits resolving the ultimate outcome of the cause. Summary denials of writ petitions are, under rule 24, final immediately upon filing, allowing immediate filing of a petition in the Supreme Court; interlocutory orders of Courts of Appeal may also be deemed final forthwith.

Rule 29. Grounds for ~~hearing~~ review in Supreme Court

(a) [Grounds] ~~A hearing in~~ Review by the Supreme Court ~~after~~ of a decision ~~by~~ of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for ~~hearing~~ review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the

Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for ~~hearing~~ review without the necessity of filing a petition for rehearing.

[New] Rule 29.2. Issues on review; grant and hold

(a) [Decision on limited issues] On review of the decision of a Court of Appeal, the Supreme Court may review and decide any or all issues in the cause.

(b) [Specification of issues] After granting review of a decision of a Court of Appeal, the Supreme Court may specify the issues to be argued. Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them.

Notwithstanding its specification of issues, the Supreme Court may order argument on fewer or additional issues, or on the entire cause. The court shall give the parties reasonable notice of any specification of the issues to be argued and of any change in its specification of issues.

(c) [Grant and hold] After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of another cause pending before the court.

Committee comment:

Under subdivision (a) the Supreme Court may determine -- either immediately after granting review or at any time before completion of its opinion -- that only one or a limited number of issues in the cause require decision by the Supreme Court. Unless the court wishes to limit argument by an order issued under subdivision (b), no prior notice of the court's intention to decide the cause on less than all issues is required. The parties are not prejudiced as they have not been told to omit argument on any issue. If the Supreme Court decides only limited issues, other issues in the cause will be disposed of by the Court of Appeal as the Supreme Court directs.

(3/29/85)

If the Court of Appeal is not directed to take further action, the original Court of Appeal resolution of the other issues stands as between the parties. See rule 977 on the precedential value of the Court of Appeal opinion pending Supreme Court review and after decision by the Supreme Court.

Subdivision (b) may be used by the Supreme Court when its grant of review is intended to permit clarification of specified issues of importance, and permits the court to focus argument on these questions. The court is not limited by its preliminary specification of issues, however.

[New] Rule 29.3. Briefs on the merits in the Supreme Court

(a) [As matter of right] After the filing of an order granting review, the petitioner shall serve and file in the Supreme Court a brief on the merits, as follows:

(1) The number of copies of the brief filed in the Court of Appeal required by rule 44(b)(1)(ii), and a notice of intention to rely on that brief, within 15 days after the filing of the order; or

(2) a new brief on the merits, within 30 days after the filing of the order.

After the filing of the petitioner's notice of intention to rely on the brief filed in the Court of Appeal or new brief on the merits, or the expiration of time for filing a new brief, the opposing party shall serve and file in the Supreme Court a brief on the merits, as follows:

(1) The number of copies of the brief filed in the Court of Appeal required by rule 44(b)(1)(ii), and a notice of intention to rely on that brief, within 15 days after the filing of the petitioner's notice or brief, or expiration of the time for it; or

(2) a new brief on the merits, within

30 days after the filing of the petitioner's notice or brief, or expiration of the time for it.

Within 20 days after the filing of an opposing party's brief, the petitioner may file a reply brief.

The Supreme Court may, by order, designate which party is deemed to be the petitioner or otherwise direct the order in which briefs are to be filed.

When a party desires to present new authorities, newly enacted legislation, or other intervening matters, not available in time to have been included in the party's brief on the merits, the party may serve and file a supplemental brief no later than 10 days before oral argument. A supplemental brief shall be confined to the new matter and shall not exceed eight pages if printed or 10 pages if typewritten or produced by other process of duplication.

(b) [On request] The Supreme Court may request additional briefs on all or any issues, whether or not the parties have filed new briefs.

(c) [Form and content] The briefs provided for in this rule shall conform, as nearly as possible, to the requirements of rule 15. Unless otherwise ordered, the petitioner's and opposing party's briefs on the merits shall not exceed 40 pages if printed or 50 pages if typewritten or produced by other process of duplication, and a petitioner's reply brief shall not exceed 10 pages if printed or 15 pages if typewritten or produced by other process of duplication, excluding tables, indices and the quotation of issues required by this rule.

The petitioner's brief on the merits, at the beginning of the body, shall quote any order of the Supreme Court specifying the issues or, in the absence of an order specifying the issues, quote the statement of issues included in the petition for review and any additional issues stated in the answer to the petition. Unless otherwise ordered, briefs on the merits

shall be confined to those issues, and issues fairly included in them.

Committee comment:

This rule is adapted from United States Supreme Court rule 34.1(a) (statement of issues) and rule 35 (timing of briefs).

[New] Rule 29.4. Disposition of causes

(a) [Decision of cause on review] On review of a Court of Appeal decision, unless another disposition is ordered, the judgment of the Supreme Court shall be that the judgment of the Court of Appeal is affirmed, reversed, or modified as the Supreme Court may order.

(b) [Decision of limited issues and transfer for decision of others] In any cause, the Supreme Court may decide one or more issues and transfer the cause to a Court of Appeal for decision of any remaining issues in the cause.

(c) [Dismissal of review] The Supreme Court may dismiss review of a cause as improvidently granted and remand the cause to the Court of Appeal. The order of dismissal and remand shall be sent by the clerk to all parties and to the Court of Appeal. On filing of the order in the Court of Appeal, the decision of the Court of Appeal shall become final and the clerk of the Court of Appeal shall issue a remittitur forthwith.

(d) [Retransfer of cause not decided] After transferring to itself, before decision, a cause pending in a Court of Appeal, the Supreme Court may retransfer the cause to a Court of Appeal upon deciding that transfer was improvidently ordered.

(e) [Transfer with instructions] After granting review of a decision of a Court of Appeal, the Supreme Court may transfer the cause to a Court of Appeal with instructions to conduct such further proceedings as the Supreme Court deems necessary.

Committee comment:

Subdivision (a) emphasizes the major change effected by the recent amendment of Constitution article VI, section

12: the usual judgment of the Supreme Court on review will be that the Court of Appeal judgment is affirmed, reversed or modified. (Under prior practice, the Court of Appeal judgment having been vacated and nullified by the grant of hearing, it was the trial court judgment that the Supreme Court affirmed, reversed or modified upon its decision of an appeal.)

Subdivision (b) clarifies the power of the Supreme Court to decide only those issues that it deems of major importance, and then transfer the cause to a Court of Appeal for final resolution. This is, in effect, a special form of transfer with instructions. The application of this procedure to a cause transferred to the Supreme Court before decision is obvious, where the Supreme Court resolves a key question of law, but the outcome of the cause may depend on a review of factual questions in the record. On review of a Court of Appeal decision, this procedure is most likely to be used when the original Court of Appeal opinion did not reach issues because it reversed on an overriding ground (e.g., statute of limitations) that the Supreme Court determines to be erroneous.

If the Supreme Court dismisses review as improvidently granted under subdivision (c) the cause is restored to the posture it had before the Supreme Court granted review: the decision of the Court of Appeal is final. If the Supreme Court wishes to reconfer jurisdiction on the Court of Appeal, it will do so by transfer under subdivision (b), (d), or (e).

[New] Rule 29.6. Errors in terminology to be disregarded; rule of construction

(a) [Errors in terminology] A petition to the Supreme Court for transfer, hearing or review shall be liberally construed as a request for the appropriate relief.

(b) [Construction of "hearing"] A reference in the statutes or rules of this state to "hearing" in the Supreme Court includes review by the Supreme Court of a Court of Appeal decision unless the context or circumstances indicate a contrary intent.

Committee comment:

Subdivision (a) of this rule follows the general policy of liberal construction for the purpose of granting or denying relief on the basis of the circumstances well pleaded rather than the technical form or prayer of the petition. It is added because of the anticipation that mistakes in terminology will occur before the new constitutional procedure is fully understood.

[New] Rule 29.9. Transitional provisions

Unless otherwise ordered by the Supreme Court:

(a) [Remittitur] If hearing is granted before May 6, 1985, the remittitur shall issue as provided in rule 25 as it existed before that date. If review is granted on or after May 6, 1985, the remittitur shall issue as provided in rule 25 as amended effective that date.

(b) [Transfer before decision] New rule 27.5 applies to all causes pending in the Courts of Appeal on and after May 6, 1985.

(c) [Whether hearing or review granted] If the Supreme Court grants hearing before May 6, 1985, the cause is before the Supreme Court on hearing for all purposes until its final disposition by the Supreme Court, unless otherwise provided in this rule, or by order of the Supreme Court.

Any timely petition for hearing pending on May 6, 1985 is deemed a petition for review without further action by the petitioner, and is subject to the rules and amendments adopted effective May 6, 1985. The court may direct a petitioner or opposing party to file a statement of issues conforming to rule 28(e)(2).

(d) [Time for ordering review] The Supreme Court may, within the time provided in rule 28 as amended effective May 6, 1985, order review of the decision of a Court of Appeal in any cause decided by a Court of Appeal before or after that date.

If this subdivision has the effect of expanding the

time within which the court may order review, no order is needed to effectuate that expansion of time.

This subdivision shall not reduce the amount of time to a period less than the time within which the court could have granted a hearing under rule 28 as it existed prior to May 6, 1985, and shall not shorten the time allowed under any valid extension of time ordered before that date.

(e) [Time for filing petition and answer] If the time for filing a petition for hearing expires before May 6, 1985, the Chief Justice may relieve a party from a default for failure to file a timely petition and extend the time, to allow the petition for review to be filed no more than 30 days after the decision of the Court of Appeal becomes final as to that court.

(f) [Form of petition and answer] Until August 1, 1985, any petition for review or answer that does not conform to rule 28(e) as added effective May 6, 1985, but that conforms to rule 28(d) as it existed before that date, shall be accepted for filing as a matter of course. The court may direct a petitioner or opposing party to file a statement of issues conforming to rule 28(e)(2).

(g) [Briefs on the merits] New rule 29.3 is applicable to all causes in which review is ordered on or after May 6, 1985. If proceedings in the Supreme Court were initiated by a petition for hearing, a party may serve and file notice of intention to rely on the petition for hearing or answer in lieu of a new brief on the merits or the Court of Appeal brief.

Rule 44. Form and filing of papers

(a) * * *

(b) [Number of copies] When a brief, paper, or document, other than the record, is filed in a reviewing court the following number of copies shall be filed:

(1) If filed in the Supreme Court:

(i) An original and 14 copies of a petition for ~~hearing~~ review or other petition, or an answer, opposition or other

response to any such petition.

(ii) An original and 10 copies of a brief in a cause pending in that court.

(iii) An original and 7 copies of a notice of motion, motion, or opposition or other response to a motion.

(iv) An original and one copy of any other document or paper.

(2) If filed in a Court of Appeal:

(i) An original and 3 copies of a petition or an answer, opposition or other response to a petition.

(ii) An original and 3 copies of a brief with, in civil actions, proof of delivery of 7 copies to the Supreme Court.

(iii) An original and 3 copies of a notice of motion, motion, or opposition or other response to a motion.

(iv) An original and one copy of any other document or paper.

(c) So far as practicable, the covers of briefs and petitions should be in the following colors:

Appellant's opening brief (rule 16(a))	green
Respondent's brief (rule 16(a))	yellow
Appellant's reply brief (rule 16(a))	tan
Amicus curiae brief	gray
Petition for ~~hearing or~~ rehearing	orange
Answers to petition for ~~hearing or~~ rehearing	blue
Petition for original writ or answer (opposition) to writ petition	red
Petition for review (rule 28(b))	white
Answer to petition for review (rule 28(c))	blue
Reply to answer (rule 28(d))	white
Petitioner's brief on the merits (rule 29.3(a))	white
Answer brief on the merits (rule 29.3(a))	blue
Reply brief on the merits	white

A brief or petition not conforming to this subdivision shall be accepted for filing; but in case of repeated violations by an attorney or party, the court may proceed as provided in rule 18.

(3/29/85)

Rule 45. Extension and shortening of time

(a)-(b) * * *

(c) [Extension of time] The time for filing a notice of appeal, filing a petition for Supreme Court review of a Court of Appeal decision or the granting or denial of a rehearing in the Court of Appeal shall not be extended. The time for the granting or denial of a ~~hearing in the~~ Supreme Court review of a ~~after~~ decision ~~by~~ of a Court of Appeal shall only be extended as provided in subdivision (a) of rule 28. The time for the granting or denial of a rehearing in the Supreme Court shall only be extended as provided in subdivision (a) of rule 24. The time for ordering a case transferred from the superior court to the Court of Appeal as provided in rule 62 shall not be extended, and the time for a superior court to certify the transfer of a case to the Court of Appeal shall not be extended except as provided in subdivision (d) of rule 63. The Chief Justice or Presiding Justice, for good cause shown, may extend the time for doing any other act required or permitted under these rules. ~~and~~ The Chief Justice or Presiding Justice may relieve a party from a default for failure to file a timely petition for ~~hearing or~~ review or rehearing ~~or an answer thereto~~ if the time within which the court ~~must act on the petition~~ could order review or rehearing on its own motion has not expired. An application for extension of time shall be made as provided in rule 43.

(d)-(e) * * *

Committee comment:

Extensions of time for petitions for hearing under former rule 28 were acceptable because the time within which the Supreme Court could order hearing ran from finality in the Court of Appeal; the extension did not affect that time. As rule 28 is amended effective May 6, 1985, time for the Supreme Court to act runs from the filing of the petition. An extension of that time would extend the time for the Supreme Court

(3/29/85)

to act. Rule 45(c) is therefore amended to prohibit those extensions, and restrict grants of relief from default, assuring a clear time limit on the Supreme Court's jurisdiction to grant review.

(3/29/85)

Senate Constitutional Amendment No. 29

RESOLUTION CHAPTER 64

Senate Constitutional Amendment No. 29—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 12 of Article VI thereof, relating to the courts.

[Filed with Secretary of State June 28, 1984.]

LEGISLATIVE COUNSEL'S DIGEST

SCA 29, Watson. Supreme Court: transfer of causes.

(1) The Constitution presently provides that the Supreme Court may, before a decision becomes final, transfer to itself a cause in a court of appeal.

This measure would revise the above provision to authorize such a transfer only before a decision. In addition, the measure would authorize the Supreme Court to review the decision of a court of appeal in any cause. These provisions would not apply to an appeal involving a judgment of death.

(2) The Constitution also presently authorizes, before decision, the transfer of a cause by the Supreme Court from itself to a court of appeal or from one court of appeal or division to another.

This measure would retain this provision but would specify that it does not apply to an appeal involving a judgment of death.

(3) The Constitution presently provides for the adoption of rules of court, not inconsistent with statute, by the Judicial Council.

This measure would require the Judicial Council to provide, by rules of court, for the time and procedure for transfer or review of a cause, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted. These rules would not apply to an appeal involving a judgment of death.

(4) The changes made by this measure would take effect 6 months after the date on which it is approved by the electorate.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1983–84 Regular Session, commencing on the sixth day of December, 1982, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the State of California be amended, as follows:

First—That Section 12 of Article VI thereof is amended to read:

SEC. 12. (a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has

94 80

jurisdiction.

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

(d) This section shall not apply to an appeal involving a judgment of death.

Second—That the amendment to Section 12 of Article VI shall take effect six months after the date on which it is approved by the electorate.

o

JUDICIAL COUNCIL ADVISORY COMMITTEE TO IMPLEMENT PROP. 32

Hon. Allen E. Broussard, Chairperson
Associate Justice
California Supreme Court

Hon. Joseph R. Grodin
Associate Justice
California Supreme Court

Hon. John K. Van de Kamp
Attorney General
Department of Justice

Hon. James R. Browning
Chief Judge
United States Court of Appeals
Ninth Judicial Circuit

Hon. George A. Brown
Presiding Justice
Court of Appeal
Fifth Appellate District

Hon. Robert Feinerman
Presiding Justice
Court of Appeal
Second Appellate District, Division Five

Hon. Mildred L. Lillie
Presiding Justice
Court of Appeal
Second Appellate District, Division Seven

Hon. Robert K. Puglia
Presiding Justice
Court of Appeal
Third Appellate District

Hon. Steven J. Stone
Presiding Justice
Court of Appeal
Second Appellate District, Division Six

Hon. John K. Trotter, Jr.
Presiding Justice
Court of Appeal
Fourth Appellate District, Division Three

Hon. Arleigh M. Woods
Presiding Justice
Court of Appeal
Second Appellate District, Division Four

Hon. Earl Johnson, Jr.
Associate Justice
Court of Appeal
Second Appellate District, Division Seven

Hon. Don R. Work
Associate Justice
Court of Appeal
Fourth Appellate District, Division One

Hon. Jack E. Goertzen
Judge of the Superior Court
Los Angeles County

Mr. Stephen Adams
Attorney

Dean Florian Bartosic
University of California
School of Law

Ms. Victoria De Goff
Attorney

Mrs. Victoria Gibson
Attorney

Mr. Ellis J. Horvitz
Attorney

Mr. Charles Marson
Attorney

Mr. Anthony Murray
Attorney

Mr. Arthur E. Schwimmer
Attorney

Mr. Bernard E. Witkin
Attorney

Mr. Ralph J. Gampell
Director
Administrative Office of the Courts

Mr. Robert Formichi
Reporter of Decisions
California Supreme Court