**Excerpts From**

***MOSKOVITZ ON APPEAL***

**Advanced Insights From An Appellate Advocate Who Wins**

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by

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**Chapter 24: Seek "Top Court" Review?**

***The Problem***

Most jurisdictions have two levels of appellate courts: an intermediate appellate court, and what I'll call the "Top Court". In New York, the Top Court is called the Court of Appeals. In most other states, it's called the State Supreme Court. And, of course, the Toppest Court of all is the U.S. Supreme Court.

If you lost in the intermediate appellate court, you can then ask the Top Court to hear your case via a petition - called a "petition for certiorari", "petition for review", or something similar.

If the Top Court grants your petition, all they've done is agree to *hear* the case. You haven't *won* yet - you still have to convince the Court to rule for you on the merits.

In many jurisdictions, the Top Court denies over 90% of these petitions - sometime almost 99%. And, of course, many grants will end up as losses on the merits for the petitioner.

What's going on here? What competent lawyer in his right mind would spend his client's money preparing and filing *a complaint* *in a trial court* with less than a 10% chance of winning? Or prepare and file *an appeal* to the intermediate appellate court such a low payoff?

So why do so many of them do exactly that in the Top Court? Mostly because they don't understand how the Deciders on the Top Court see their job.

The lawyer thinks, "I file a complaint because I'm right on the facts and the law. And I file an appeal when I think the trial court got it wrong. Top Court? Same thing. The intermediate appellate court was wrong, and once I show this to the Top Court, they'll grant my petition, hear it on the merits, and give me my victory."

Doesn't work. The Top Court has a very different perspective: "Trial judges make mistakes, so we have an elaborate, expensive group of intermediate appellate courts - staffed by hard-working, intelligent judges and law clerks - to review trial court records and correct those mistakes. Occasionally those courts make mistakes too, but it's not the Top Court's job to correct them. *We are not a Court of Error Correction.* We have only five [or seven, or nine] judges, so we have time to handle no more than about 100 cases a year. We use those 100 cases *to clarify the law*. The law needs clarifying when different intermediate appellate courts have announced conflicting rules of law, or when some unresolved question of law affects a large segment of society or some industry or institution. If your case doesn't involve such a question, we won't hear your case *- even if we agree that you got screwed by the intermediate appellate court!* Our legal system isn't perfect. Live with it."

That's a hard message to hear, and the majority of lawyers who file petitions in the Top Court never hear it, don't really understand it, or refuse to believe it. Their petitions focus on the intermediate court's mistakes. They might have read the Top Court's warning to focus on "conflicts among intermediate appellate courts" and "important questions of law", but they don't get what it means. So they spend their client's money to join the 90% who get the unexplained "Petition denied" notice.

In this Chapter, I'll discuss how you might give the Top Court what it's looking for.

In most cases, however, you can't. You simply don't have the ammo. Without it, it's pretty hard to fake it and fool the Top Court. They're too smart for that, and they see too many petitions trying to do the same thing. If that's your situation, it's time to consider folding your cards and saving your client some bucks.

***Show "A Conflict"***

The Top Court first looks for a *direct, express* conflict in statements of *law* appearing in *reported* opinions of intermediate appellate courts.

Like this. One reported opinion says, "The rule of law on this issue in this jurisdiction shall be X". But your reported opinion says, "We refuse to follow that decision. The rule of law on that issue shall be Y, not X." When this happens (it's rare), the Top Court is very likely to say: "Our main job is to resolve these conflicts, so everyone follows a single rule of law. Petition granted."

That accounts for a large portion of the tiny number of petitions granted.

Attorneys try to squeeze their petitions into this category when it really doesn't fit. They attempt to show a "conflict" by arguing that the opinion in their case is *inconsistent* with another opinion. The two reported cases purport to use the same rule of law, but *apply* them differently. This rarely works. Most rival petitions argue the same thing, so why should the Top Court pick yours?

If the intermediate appellate court opinion in your case is *unpublished*, you have very little chance of showing a conflict that matters to the Top Court. If no one but the parties see it, who cares? It has no effect on "the law", so the Top Court is unlikely to grant review.

***Show "An Important Issue of Law"***

Every lawyer thinks his issue is important. It might be important to him, and it might be important to his client. It might even be important to academics. But that's not what the Top Court means by "important".

"Important" means that a significant segment of society or some institution *-* the police, school administrators, insurance companies, trial courts, etc. - needs guidance on some issue in your case. State officials might waste a lot of money putting on the ballot a measure that is challenged as unconstitutional. A new statute gives trial courts only vague guidance on when to send a case to arbitration. A planned new state highway system cannot go forward because the language of a bond issue is ambiguous.

If the issue in your case seems narrow, find a way to broaden it. Suppose your case involves the legality of the detention of a student by a high school official. Show the court that educators have expressed concern about the paucity of legal guidance on school detentions. If your case contains an issue involving the validity of a certain contractual provision, to show the court that the provision is commonly used in form contracts throughout the jurisdiction. If the validity of a local ordinance is at issue, show that other cities or counties have enacted similar ordinances.

Show importance not with law, but with facts. Tell the story of the need for resolution of this issue, and back it up with citations to news articles, declarations you attach, and whatever else you can lay your hands on. But you've been told that an appellate court does not look beyond the record, and these facts are not in the record. That rule applies to appeals, but not so clearly to original petitions. So go outside the record when you need to.

The most effective way to show importance is with *amicus* letters from *other* parties. An *amicus* letter is not an *amicus* brief. It should be a short letter (no more than a couple of pages) explaining the "real world" effect of the issue, rather than arguing why "the law" requires the issue to be resolved a certain way. (If and when the Top Court grants a hearing on the merits, you can then rustle up *amicus* briefs to argue the law.)

*Amicus* letters should come from institutions that are directly affected by the issue, and should explain in as much detail as possible why the lack of judicial guidance on the issue is hurting each institution. *How* the issue is resolved is less important than the need for some resolution - one way or the other.

The more *amicus* letters, the better. And the more prominent the institutions writing them, the better.

***Pique The Court's Interest.***

Even if the legal issues in your case are unlikely to be significant to anyone other than your client, there might be something fascinating about them.

Suppose, for example, that some aspect of your case resembles the famous "lifeboat" cases that most lawyers (and judges) read about in law school, where some stranded seamen dine on one of their brethren in order to survive. Such cases rarely occur, but many judges would just love to sink their intellectual teeth into one.

If part of your case involves baseball, movie stars, steamy sex, or another popular subject, emphasize it. The judge who reads your petition might want to tell his friends that he was one of the judges who decided "The Barry Bonds Case" or "The Case of the Horny Lawyer."

***Find Out Issues The Court Currently Cares About.***

If you know which panel of judges will review your petition, try to learn what issues that panel cares about. Look over recent decisions by the court in the area of law involved in your case.

You might also discuss your case with some practitioner who is familiar with the recent doings of the Top Court. He or she might suggest an approach that might catch the court's eye.

***Drafting The Petition***

Keep it short. Some law clerk will be reading a large batch of similar petitions. Most are long. Yours will get more attention if it's short.

Do not spend a lot of words explaining the procedural history of the case and the intermediate appellate court's opinion. All that will appear in the opinion, which you should attach. (Court rules often require this, but even if they don't, attach it.) The law clerk will usually read the opinion first, so there's no need to duplicate what the opinion already does.

Keep your criticism of the appellate court's reasoning to a minimum. Most petitions go on and on about how wrong the court was. Big mistake. *Keep your eye on the ball*. At this point, the ball is *not* *the merits*, but persuading the Top Court to *hear* the case. The fact that the intermediate court's reported opinion is wrong is relevant, because it might screw up the law. So discuss it, but keep it short.

Instead, focus the petition on the two key factors discussed above: conflicts and importance. And put them *up front*. Lead with a two-page (no longer) "Introduction" that tells the law clerk: "This is the kind of case you guys have been looking for. Take it!"

***Don't Fret If Your Petition Is Denied.***

If you follow these suggestions and still your petition is denied, don't blame yourself (or me). Following these suggestions will, at most, put you into that small group of petitions that had a chance of being granted. You might do a great job, but your petition may be denied for reasons well beyond your control (such as the court's workload). So don't feel bad if this happens — you have plenty of company.

If you are one of the lucky few, you might salvage your client's case — and the result might be a landmark decision which emblazons your name in legal history.

**\* \* \* \***

**Sample #6**

***Spear v. Ryan***

A Petition for Review by a State Supreme Court

**The Concept Behind This Petition**

Spear lost a lawsuit based on a contract that provided attorneys fees to the prevailing party. The defendant was represented by counsel paid by his insurance company. The trial court awarded an hourly rate based on the "reasonable" rate charged by litigators generally - even though this was almost triple what the insurance company actually paid the law firm. The intermediate appellate court affirmed, holding that trial judges could choose whether to apply the rates used by insurance counsel or by general litigators.

I prepared the following petition for review to the state's supreme court. For reasons I'm not at liberty to explain, it wasn't filed. I’m including it here because it illustrates some of the suggestions I made in this book regarding how to construct a petition for Top Court review of an appellate court decision.

In this case, the Top Court had a history of granting slightly more than 1% of the petitions. *Very* tough to get into this tiny group.

And I lacked a key asset: an *express conflict* among reported intermediate court opinions. I did not do what most petitions do: try to manufacture a conflict by arguing that the intermediate court opinion was somehow inconsistent with other cases. The law clerk who would see such an effort would think, "Just another lawyer trying to pull the wool over my eyes. That's not what we mean by 'conflict'. Denied."

My only hope was to show that this case involved "an important issue of law." How? By showing that this *reported* decision was not only wrong, but would lead to chaos in the trial courts, with lawyers "shopping" for judges that favored one method over the other - resulting in huge disparities in awards for similar work.

Note that while I criticized the reasoning of the intermediate court, my main argument was Issue #3: the chaos point. Here, I did not ask the Court to rule in my favor, but instead argued: "*How* you resolve this issue is less important than *resolving* it - one way or the other." This was my main hope for getting my foot in the door.

After filing the petition, my next task would be to think of organizations or individuals that might send impressive *amicus* letter to the Top Court, asking it to grant review. Ethically, I could not write the letters, but I could tell *amicus*: "Don't bother discussing the law. Just tell the Court how the Court of Appeal opinion will cause serious practical problems in the trial courts."

What sorts of organizations or individuals should I have contacted?

**What to Watch For When Reading This Petition**

It's very short. Top Court law clerks are inundated with these petitions, so I'll get more attention if I make their job a bit easier. I've attached the intermediate court opinion, which the clerk will probably read first. Since that opinion lays out the facts and basic legal principles, there's no need for me to repeat them at any length.

The petition focuses on policy, not law. The Top Court is not bound by much law - not even their own precedents - because they *make* the law, when they want to. My job is to make them want to.

My beer bottle analogy is simple and easy to understand. I try to think if there's any way it's distinguishable from the present case. There isn't, I believe, so I use it.

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

No. \_\_\_\_\_\_\_\_\_\_\_\_

**Spear v. Ryan**

PETITION FOR REVIEW

From the Superior Court of Alameda County

Case No. RG 10518323

Honorable George C. Hernandez, Jr., Judge

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**ISSUES FOR REVIEW**

1. When awarding attorneys fees under Civil Code §1717, the trial court must determine the "fair market value" hourly rate. In making this determination for insurance defense counsel's fees, must the trial court consider the fact that hourly rates charged in the *multi*-case insurance defense market are much lower than the hourly rates charged in the *single*-case general litigation market?

2. If attorney and client agreed to an hourly rate in an arms-length transaction, should the court presume that the agreed rate is the "fair market value" rate?

3. Should each trial judge in California have the discretion to choose whether to award insurance defense counsel an hourly rate based on (1) the insurance defense market, or (2) the general litigation market?

**THE FACTS**

Plaintiff sued Defendants for legal malpractice and lost. Defendants then moved for an award of attorneys fees, based on an attorneys fee provision in the retainer agreement between Plaintiff and Defendants.

Defendants asked the trial court to set the hourly rate not at the amount their insurance carrier actually paid their insurance defense attorneys, but at the much higher rate charged by general litigation attorneys. Plaintiff presented evidence that the insurance defense market was quite different from the general litigation market. The trial court ruled that this did not matter, and accepted Defendants' claim. This increased the total award from the $284,000 actually paid by the insurance carrier to almost triple that amount: $843,245.

**THE COURT OF APPEAL OPINION**

In a published decision, the Court of Appeal affirmed, holding that trial court judges in California have the discretion to base their awards to insurance defense firms on either the general litigation market or the insurance defense market, whichever each judge happens to prefer. See Slip Opinion (attached).

**WHY THIS PETITION SHOULD BE GRANTED**

1. **Guidance Is Needed Regarding How To Set The Hourly Rate for Insurance Defense Counsel.**
2. **The "Fair Market Value" in the Multi-Case Insurance Defense Market Is Different From the "Fair Market Value" in the Single-Case General Litigation Market.**

The Court of Appeal recognized that the fees actually charged (the "lodestar") may be adjusted "to fix a fee at the fair market value for the particular action." Slip Opinion at 6. The Court then assumed that there is a single "market" for all civil litigators, and that insurance defense firms belong to this broad market.

The Court was mistaken. The insurance defense market is quite different from the general litigation market.

Most litigators in the general litigation market handle individual cases. They rarely receive more than a few cases from a given client. But this is not the business plan of insurance defense firms. These firms bargain with insurance companies to receive a large and reliable supply of cases - by offering lower hourly rates.

They have made a business decision: getting a consistent volume of cases at lower hourly rates will be more profitable than picking up individual cases at higher hourly rates. While most litigators spend unbillable hours marketing their firms - and sometimes just waiting for new cases - insurance defense firms have steady billable hours. There is no evidence that the income per working hour for these lawyers is any lower than that of other litigators.

Suppose a single bottle of beer sells for $5, but a six-pack of the same beer sells for $24. What is the "fair market value" of a bottle: $5 or $4? The answer depends on *which market* the beer is sold in: the single bottle market or the six-pack market. While most litigation lawyers sell their services one bottle at a time, insurance defense firms sell their services by the six-pack. The beer merchant finds selling by the six-pack profitable, and that's why he freely enters into that market-based transaction. He makes less profit on each bottle, but greater overall profits because he sells a greater volume. Same with insurance defense firms.

If someone offered the beer seller *$5* for each bottle *when sold as a six-pack*, he would be delighted but surprised: that's not what he expected or bargained for in the six-pack market. Same with the insurance defense firm.

Note that in the above example, the single bottle of beer itself does not vary. Physically, it has the same quality and quantity in both markets - and yet its value varies depending on which market it is sold in. And so it is with litigation. We can assume that a litigator will use the same skill and energy whether she handles only single cases or gets them in bulk from insurance carriers. Nevertheless, when skill and energy is applied in one market, it calls for a fair value different from that provided by the other market.

Therefore, both the trial court and the Court of Appeal erred by failing to consider the *actual* market for insurance defense counsel services when determining "fair market value." Awarding one hourly rate when both lawyer and client bargained a lower hourly rate does not serve the main purpose of an attorneys fee award: to make the winning party whole.

1. **The Rate Incurred Should Be Presumed to be the "Fair Market Value" Rate.**

No matter which market is considered the proper one, the *actual* hourly rate agreed to by insurance defense counsel and the insurance company should be *rebuttably presumed* to be the "fair market value."

In the normal arms-length market for insurance defense firm services, both law firm and insurance carrier are careful bargainers, exploring their options with other firms and clients, with each party negotiating to maximize what they receive and minimize what they pay. Usually, therefore, the bargained-for rate *will be* the fair market rate - because it was set in a fair market transaction.

There will be occasional exceptions. An insurance defense lawyer might represent his brother-in-law at a reduced rate. Where this or something similar happens, the trial court should have the discretion to treat the presumption as rebutted and award a higher amount. But there is no evidence of any such unusual circumstance in the present case. (And we are aware of no reported California case increasing an agreed-upon rate.)

Adopting such a presumption would further the goal of simplicity. This Court has stressed that, "It . . . is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1098.

The law provides a similar presumption in other settings, such as sales of real property, sales under the Commercial Code, and property taxation. In each of these situations, the law sets a rebuttable presumption that the fair market value of the item is the price paid in the most recent arms-length sale. This method is simple, easy to administer, and generally quite accurate. It should be applied here.

1. **Guidance Is Needed Regarding Whether Each Judge May Choose Which Market To Consider.**

The Court of Appeal ruled that the trial court "could view the relevant 'market' to be that of insurance defense litigation and litigators, rather than general civil litigation." Slip Opinion at 12. Or not: "we emphasize that such determinations lie within the broad discretion of the trial court." *Ibid.*

Thus, the Court of Appeal authorized every trial judge in the State[[1]](#footnote-1) to choose whether to apply the general litigation market or the insurance defense market. This could result in awards varying by 300% or more, depending on each judge's inclinations.

This, we submit, was improper. The question of which market applies is an important policy question that will have consequences throughout the state and throughout the insurance industry. It should be decided by an appellate court, not by each trial court. Trial courts apply policies, but normally do not establish them. Based on policy considerations (some of which we have discussed in this Petition), there should be one rule that applies to every judge in every court. This Court has recognized "the legislative purpose 'to establish uniform treatment of fee recoveries in actions on contracts containing attorneys fee provisions.'" *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at 1094-1095. The Court of Appeal's opinion does just the opposite.

In addition, leaving the decision to each trial judge invites judge-shopping. The Court of Appeal opinion encourages insurance defense attorneys to steer their cases to those judges choosing the general litigation judges, and their opponents to angle for the insurance defense market judges.

This is reason enough for this Court to grant review in this case.

**CONCLUSION**

Lawyers who litigate contingent fee and public interest cases get no money from their clients, so they must find ways to support their practices through other sources - sometimes during years of litigation. And they usually front the costs of the litigation. And they run the risk of getting nothing at the end if they lose.

Insurance defense firms face none of these difficulties. They face no cash flow problems: they negotiate with carriers to receive what they believe to be a fair hourly fee, and every month they get a check reflecting that bargain, plus their litigation costs. They face no risk: if they lose a case, they do not have to give the money back to the carrier. Thus, when they win, there is no need to compensate them for the financing costs and risks incurred by contingent fee and public interest attorneys. An award of their actual attorneys fees (or close to it) will make their clients whole. We can think of no sound reason why the Legislature that enacted Civil Code §1717 would have wanted them to receive a greater award - one that would simply enrich the winner at the expense of the loser.

In the present case, the trial court awarded attorneys fees almost three times the amount actually incurred. Legislatures have *expressly* allowed treble damage awards in RICO and antitrust cases - to punish wrongdoers. But there is no indication that §1717 had any similar purpose.

Review should be granted so this Court may clarify these important issues for all California trial courts and counsel.

Date:

Respectfully submitted,

Myron Moskovitz

Attorney for Petitioner

1. The Court of Appeal's published decision in this case applies throughout the State. ***Auto Equity Sales, Inc. v. Superior Court* (1962)** 57 Cal.2d 450, 455. [↑](#footnote-ref-1)