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A new ground for review and transfer

The Judicial Council should adopt a new Rule of Court to allow the Supreme Court to send a case back to the Court of Appeal if it's shown that the lower appellate court decision was materially erroneous.

Guest Column by Cruz Reynoso and Stephen Greenberg

There's an age-old philosophical question, "If a tree falls in a forest and no one is around to hear it, does it make a sound?" It's time to pose an analogous — and much more practical — query: If a California Court of Appeal opinion presents no "important question of law" but arguably relies on a material factual or legal error, or an unbriefed issue, does it make a difference?

Unquestionably it does — to the losing party, and to a society counting on the courts of appeal to "discourage[] error and unfairness" in the trial courts. 1 CEB Appeals & Writs in Criminal Cases (3d ed. Cal CEB), Section 1.2, p. 1-4. And it might - to legal researchers who now freely access even unpublished opinions. But unless the California Court of Appeal agrees it has erred and grants rehearing, or the opinion meets Rule 8.500(b)'s very difficult standards for review, there's no procedure currently available to correct these serious errors.

Something's wrong with this picture. Civil and criminal litigants are entitled to only one appeal as of right; the appellate opinion is the courts' likely last word and shouldn't be an erroneous one. Because the appellate process must be meaningful (*People v. Howard*, 1 Cal. 4th 1132, 1165-66 (1992)), it should never end in a decision marred by obvious error or unfairness.

Accordingly, we suggest that the Judicial Council adopt a new Rule of Court — actually, a new subsection of 8.500. In addition to the existing grounds for full review (8.500(b)(1)-(3)), we'd like to see a formal ground for review and transfer: Essentially, if the Court of Appeal opinion was materially erroneous in some way, the Supreme Court may send the case back for reconsideration — and must do so, if the decision violated Government Code Section 68081. The rules already acknowledge the grant-and-transfer power (Rule 8.500(b)(4)); our suggested modification would provide guidance as to its use.

Current subdivision (b) (grounds for review) would continue as is, that lists the four bases upon which "[t]he Supreme Court may order review of a Court of Appeal decision":
(1) When necessary to secure uniformity of decision or to settle an important question law;
(2) When the Court of Appeal lacked jurisdiction;
(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or
(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

A new subdivision (presumably (c), with current (c)-(g) becoming (d)-(h)) would identify several "transfer" grounds — three discretionary, one mandatory:

(c) Grounds for transfer
(1) The Supreme Court may transfer the matter to the Court of Appeal based on grounds including, but not limited to, the following:
(A) When the Court of Appeal decision contains one or more material errors or omissions of fact, and the Court of Appeal failed to correct the alleged errors or omissions after a party called the Court of Appeal's attention to them in a petition for rehearing;

(B) When the Court of Appeal decision contains one or more material errors or omissions of law, and the Court of Appeal failed to correct the alleged errors or omissions after a party called the Court of Appeal's attention to them in a petition for rehearing;
(C) When the Court of Appeal decision contains one or more material mischaracterizations or omissions of briefed issues, and the Court of Appeal failed to correct the alleged mischaracterizations or omissions after a party called the Court of Appeal's attention to them in a petition for rehearing.
(2) The Supreme Court shall transfer the matter to the Court of Appeal when, in violation of Government Code Section 68081, the Court of Appeal decision is based upon an issue that was not proposed or briefed by any party to the proceeding, the court did not afford the parties an opportunity to present their views on the matter through supplemental briefing, and the court denied rehearing.

We see no practical burden, and much potential gain, from our proposal, for the following reasons:

For the Supreme Court
There should be little increase in the number of review petitions filed. But some presumably would include transfer requests, highlighting material defects in the Court of Appeal opinion. Of course, petitioning parties already provide those highlights (see current Rule 8.500(c)(2)), and they're likely to be noted in the court's conference memo. The salient difference under the proposed rule: In a limited number of cases, the court should consider whether, even if full review isn't warranted, an error-based transfer is appropriate. And if the court chooses that option, a one-sentence transfer order — ideally, including citations from or references to the petition — will effect an appropriate remand.

There's nothing particularly radical about such a procedure — which the court already employs, albeit very rarely and with no identified grounds.

In some cases, the Supreme Court will end up receiving subsequent review petitions, following transfers and reconsidered Court of Appeal opinions. But the court already will have examined the record and issues; the additional work should be relatively simple.

For the Court of Appeal
In what likely would be a small percentage of cases, the Court of Appeal will have to reconsider their opinions, based on petitions and transfer orders identifying material errors. More work, but it will be (a) confined to cases already briefed, analyzed and argued; and (b) focused on specific points and whether their reconsideration alters the results. And as a policy matter, the Court of Appeal will have the ultimate say in the incidence of grant-and-transfer orders: to the extent appellate opinions avoid material factual and legal errors or correct them upon rehearing, the new procedure won't be invoked.

For Litigating Parties
This is as straightforward as it gets: When an appellate opinion appears to be based on a material error or an unbriefed issue, the losing party should have meaningful recourse even if the case includes no review-worthy issue. And the party benefiting from the error is free to oppose a transfer petition. Rule 8.500(a)(2).

For Society and the Legal Profession
A "decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself." *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting). To the extent California allows an erroneous decision to be the last judicial word in a case, the legal system — and the respect it earns — is seriously diminished.

While the state offers two remedial options — petitions for rehearing and review — they're simply insufficient. Too many errors survive the former, and the latter isn't designed as a corrective procedure: The Supreme Court's purpose isn't error review. So the Court of Appeal, unlike its trial counterpart, isn't subject to full evaluation by a higher court.

Justice Cruz Reynoso notes: "I want to add my sense of personal frustration, and a sense of injustice to the losing party. When I served on the Court of Appeal, on a few occasions, I would dissent when, in my opinion, there was clear error of fact or law. Yet, because the case was not published, it did not meet the criteria for the Supreme Court to grant a hearing. I experienced the same sense of injustice when I sat on the Supreme Court and the memorandum prepared for the justices noted errors of law or fact but concluded that the case did not meet the criteria for granting a hearing."

With a modest modification to the Rules of Court, California can introduce more integrity and accountability into the appellate justice system.

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