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The Rule of Four in California

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Foreword: The Rule of Four
in California

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“Will it sell in Peoria?” may be an appropriate query in the political and public relations world, but to the appellate judiciary it is the reaction of a major law review that has significant impact, sometimes not unlike that of Clive Barnes on a Broadway opening. Thus it is with more than casual anticipation that the justices of the California Supreme Court await the annual California Law Review critique of their production.

A number of notable decisions were rendered during the past year, but no more and no less than in other busy years of the highest court in the nation’s most populous state. Perhaps I should be calloused after having completed a decade on the court, but I never cease to be amazed at the constant volume and variety of public and private problems that wend their way up the judicial process to the apex of the pyramid.

There is a concomitant to that amazement: a gnawing concern that each year in the selection process—the granting or denying of petitions for hearing—the court may pass up issues of significance to California jurisprudence. Such omission is likely to result, I suggest, because the Supreme Court of California rigidly adheres to a “rule of four” in passing upon petitions for hearing.

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The procedure through which petitions for hearing are granted by the California Supreme Court is similar to the certiorari procedure in the United States Supreme Court. In both instances the court is the final arbiter of its own selection process.\(^1\) If that selection process is too burdensome, if the quota of affirmative votes required for the granting of petitions for hearing is too high, the ineluctable result will be a denial of hearing in a number of cases that might contain issues of merit. How large that number is can never be determined. That there will be some seems inevitable.

The current practice in the California Supreme Court is controlled by Rule 28(e), Rules of Court, which provides in relevant part: "A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk." The rule could be easily changed, and I believe it should be, by reducing the number from four to three.

The current rule requires the votes of four justices out of seven to grant a petition, or 57 percent of the court, a clear majority. The United States Supreme Court requires four votes out of nine, or a fraction over 44 percent of its membership, a mere minority. Were the California rule changed to reduce the four vote figure to three, the ratio would be 43 percent, thus more in consonance with the High Court practice.

There appears to be no known historical basis for Rule 28(e). There is, however, a well-considered and firmly established rationale for the United States Supreme Court policy of deference to a minority. The reasons for that policy appear to be relevant to California.

Through unbroken tradition it has become established as a rule in the United States Supreme Court that the affirmative votes of only four justices are necessary to grant a petition for a writ of certiorari.\(^2\) The same practice is followed in determining whether an appeal "should be fully briefed and argued orally."\(^3\) This rule is generally followed even when only eight instead of the full complement of nine justices participate in the consideration of a petition.\(^4\) Where, however, only six or seven justices are eligible or available, the rule is sometimes relaxed to permit the granting of certiorari on the vote of only three justices.\(^5\) Three out of seven would appear particularly significant to California.

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1. Both choose their own cases, a circumstance that prompted Chief Justice Traynor to often declare that "all our wounds are self-inflicted."
4. R. Stern & E. Gressman, supra note 2, at 208.
5. Id. This practice has been confirmed by Justice Douglas in his autobiography. W. Douglas, Go East, Young Man 378 (1974).
The origin and early history of the United States Supreme Court's rule of four is not known.

What evidence there is suggests strongly that the rule was developed by the Court itself, and that it probably came into existence about the time the Court first received discretionary authority, that is, shortly following the Courts of Appeals Act of 1891. We do know that many of the rules which today govern the Court's certiorari jurisdiction have their origins in the period before 1925, and were evolved by the Court as it passed on petitions brought under the earlier legislation. There is no reason to believe that the rule of four did not develop along with these others in much the same manner.6

The rule of four appears to have developed as a procedural aid to the exercise of sound judicial discretion. The rule first became a matter of public knowledge in the 1924 Congressional hearings leading to the Judiciary Act of 1925. Justice Van Devanter presented the rule to Congress as a guarantee that any issue of consequence upon which the Court was closely divided would be resolved in favor of the Court's assumption of jurisdiction and consideration of the case on the merits.

Justice Frankfurter, who was known for his advocacy of judicial restraint, explicated his views on what he termed "deference to a minority view" in his dissent in Rogers v. Missouri Pacific Railroad Co.:

The "rule of four" is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance.7

The traditional rule of four exploded into controversy in 1957 over the issue of whether the five justices who had voted against hearing the case could subsequently vote to dismiss certiorari as having been improvidently granted, or otherwise refuse to decide the case on the merits. A majority of seven concurred in the opinion of Justice Harlan that observance of the rule of four requires the Court to decide the case on the merits; were it otherwise, he said, "the Court would stultify its own rule."8

Most recently Justice Douglas referred to the high court practice in his concurring opinion in Harris v. Pennsylvania Railroad Co.:

There is a record of cases in which even fewer justices produced a grant of certiorari. Chief Justice Hughes wrote in 1937: "Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote." Letter to Senator Wheeler, March 23, 1937, 81 Cong. Rec. 2814 (1937).
The practice of the Court in allowing four out of nine votes to control the certiorari docket is well established and of long duration. Without it, the vast discretion which Congress allowed us in granting or denying certiorari might not be tolerable. Every member of the Court has known instances where he has strongly protested the action of the minority in bringing a case or type of case here for adjudication. He may then feel that there are more important and pressing matters to which the Court should give its attention. That is, however, a price we pay for keeping our promise to Congress to let the vote of four Justices bring up any case here on certiorari.9

Statistics of the United States Supreme Court, like those of the California Supreme Court, reveal that the vast majority of petitions for review are denied. Conscious of a possible misinterpretation of such figures, Justice Burton wrote an article in 1947 pointing out:

Without further explanation, such a high percentage might suggest a possible abuse of its own discretion, by the Court, in unduly restricting access to it. However, a unique practice of the Court, fully explained to Congress, has provided an excellent safeguard against such a possibility. This safeguard is the practice of the Court to grant any such petition upon the favorable vote of a substantial minority—that is, four out of nine—of the members of the Court rather than to require the favorable vote of a majority. Unless at least a substantial minority of the Court believes that the case should be heard, it seems clear that it should not be. On the other hand, if a substantial minority of the members of the Court feels that it should be heard, the Court, as a whole, hears it and passes upon the issue it presents.10

The constantly rising number of petitions filed with the California Supreme Court results in an increasingly high percentage of petitions for hearing being denied. This suggests that there may develop in California an apprehension similar to that expressed by Justice Burton. The public and the bar, looking solely to statistics, may wonder one day whether the California court is abusing its discretion by summarily denying petitions without adequate consideration or by unduly conserving judicial energies. Justice Burton believed the “safeguard against such a possibility” was to have petitions granted upon favorable vote of a substantial minority. A similar safeguard is indicated here.

It may be argued that it would be futile to grant a petition if only three members of the court so voted, for a contrary decision would be preordained; thus the result would be a waste of judicial resources. Not only can this not be demonstrated empirically, there is a strong in-

dication that no indelible relationship exists between votes to grant petitions for hearing and votes on the ultimate decision.

If one takes volumes 7, 8, and 9 of the third series of California Reports, the last three bound volumes, and compares the voting on petitions to grant a hearing with the concurrences in the published decisions, the following significant results emerge:

Of the cases with a bare four votes to grant, 22 finally developed into unanimous decisions, three were decided by a vote of 6-1, and six by a vote of 5-2. Of the cases with five votes to grant, 36 final opinions were unanimous. Of the cases with six votes to grant, 22 became unanimous. Conversely, four cases with all seven votes to grant were ultimately decided by a 6-1 margin, one with seven grant votes became a 5-2 decision and another a 4-3 decision; seven cases with six votes to grant were decided 5-2 and another ended up 4-3; seven cases with five votes to grant became 4-3 decisions.

Thus the argument that only those voting to grant a petition will reach the decisional result sought by the petitioner improperly implies an intransigence by members of the court and an insensitivity to persuasive arguments in briefs, in oral argument and in the draft memoranda and proposed opinion of their colleagues. In actuality the record reveals that the justices do not close their minds immediately after the roll call on petitions for hearing.

Changing Rule 28(e) to require only three votes to grant a hearing would also solve another little-noted problem experienced by the court. When one justice is absent for deliberations because of illness or vacation, a pro tempore justice is designated to sit, usually an appellate court member. It seems questionable to permit a 3-3 deadlock on a matter of importance to be broken by a mere temporary designee who bears no permanent responsibility for his decision. The elimination of that type of Russian-roulette result would be a fortuitous by-product of reducing the required grant vote to three.

Few other jurisdictions are comparable to California in practice, in court structure, and in volume of litigation. Therefore comparison with most other states would prove little. However, the contrast of California Rule 28(e) with the practice in New York is revealing. Section 5601 of New York Civil Practice Law and Rules contains four full paragraphs enumerating circumstances in which an appeal to the Court of Appeals (New York's highest appellate tribunal) is a matter of right.

Subdivision (a) of section 5601 provides:

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11. Some cases with multiple opinions, e.g., Thompson v. Mellon, 9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973), are difficult to categorize and thus have generally been omitted from this compilation. Automatic appeals, state bar matters and incidental others have also been omitted.

An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs reversal of the judgment or order appealed from or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.18

Were such a rule in effect in California, the supreme court's role would be greatly expanded.

Finally, it may be contended that the supreme court will be inundated with work if petitions are granted upon only three favorable votes. A check of the court minutes for the past several years reveals that between 30 and 40 petitions per year are denied with three votes to grant. If all had been granted, the additional burden would have been five more cases per judge per year. This would not have been onerous, particularly when related to the court's generally diminishing quantitative output.

In 1941, the supreme court filed 255 majority opinions. This dipped to a low of 127 in 1949. In 1967 the court filed 199 opinions and 193 in 1971. But for 1972 and for 1973, only 140 majority opinions went into the books, and in 1974 the number was 187. Even adding the volitional opinions (64 dissenting and 10 concurring) in 1974 the totals do not indicate a court bursting at the seams.

Currently there is a heated debate in federal circles over burdens on the United States Supreme Court. Chief Justice Burger and Professor Paul Freund maintain that the work load is becoming intolerable14 while the late Chief Justice Warren,15 Justices Brennan16 and Douglas,17 and others18 insist that a proposed new court structure is not necessary.

13. Id.

   The workload of the Supreme Court continues its inexorable rise, reaching 4,187 cases docketed during the term commencing October, 1973. The Court has not yet allowed a backlog to develop, though increasing hard work has been the main response to its increasing caseload. There is no doubt about how much longer the Court can stave off a backlog without some alterations in its case processing method.

17. Justice Douglas felt impelled to write into court opinions his belief that the
I do not propose a comparable debate on the California Supreme Court's work load; unquestionably it is heavy. The state's increased population inevitably inspires more litigation, which requires more trial courts, which necessitate more intermediate appellate courts, which produce more opinions, which result in more petitions for hearing. Thus the most difficult task of the supreme court becomes that of selectivity in the granting or denying of petitions. The selection process is thorough and therefore time consuming. As a result of this work load there is certain to be resistance to any proposal to add more cases for hearing and written opinion.

It is true that courts, composed of human beings with physical endurance limitations, can do only so much. They become an immovable object. But it is also true that few more egregious injustices exist in a constitutional society than that of aggrieved persons with no conclusive forum available to determine rights. They can become an irresistible force.

Whatever the dynamics in the law of physics, in this instance, as between the two, the irresistible force should prevail.

High Court is not handling an extraordinarily heavy caseload. Most recently he dissented from denial of certiorari in Bailey v. Weinberger with the added comment that "the number of cases we take to review on the merits is well below the tolerable limit. . . ." 95 S. Ct. 190 (1974).


19. According to Seth Hufstedler, 1974 president of the State Bar of California, "California has made remarkable progress . . . . Appellate courts have greatly increased their output by more effective use of time, increased staff, better administration." Hufstedler, President's Message, 49 CAL. ST. B.J. 422 (1974).