Supreme Court of California

350 McAllister Street, San Francisco, California 94102-3688

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INVITATION TO COMMENT

SP15-05

Title
Publication of Appellate Opinions: Publication Status and Citation of Opinions When the Supreme Court Grants Review

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 8.1105 and 8.1115

Proposed by
Supreme Court of California

Action Requested
Review and submit comments by Friday, October 9, 2015

Proposed Effective Date
January 1, 2016

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Executive Summary and Origin

The California Supreme Court seeks comments on whether to: (1) amend the rule on publication of appellate opinions to eliminate the automatic depublication of opinions when the Supreme Court grants review; and (2) amend the rule on citation of opinions to address the citation of published appellate opinions while they are under review and following decision on review.

Background

The rules in title 8, division 5 of the California Rules of Court, which govern the publication and citation of appellate opinions, are adopted exclusively by the Supreme Court under section 14 of article VI of the California Constitution. Rule 8.1105(e), which is among the rules in this division, addresses changes in the publication status of opinions. This subdivision currently provides that an opinion is no longer considered published if the Supreme Court grants review of that decision. Under rule 8.1115, which addresses citation of opinions, with very limited exception, an unpublished opinion must not be cited or relied on by a court or a party in any other action. Thus, currently, when the Supreme Court grants review of a decision, that decision may no longer be cited or relied on.

The practice of treating decisions under review by the Supreme Court as being depublished began more than a century ago, shortly after the California Constitution was amended to create the Court of Appeal in 1905. In 1964, the Supreme Court memorialized this practice in the California Rules of Court as part of a broader revision of the rules relating to publication. This rule, originally adopted as rule 976(d), has been amended several times and renumbered, but its treatment of published opinions as being automatically depublished if the Supreme Court grants review has remained unchanged.

California appears to be unique in its treatment of appellate opinions when review by the state's highest court has been granted. All other state and federal court systems with intermediate appellate courts retain in the bound volumes, and in corresponding online reports of decisions, all published intermediate appellate court opinions even when such opinions have been accepted for review by a higher court. Information obtained by the court indicates that other jurisdictions permit citation to these opinions with appropriate notation as to their review status.

Prior Proposals

Between 1979 and 1988, the Supreme Court received four suggestions for modifying the provision in former rule 976(d) (now rule 8.1105(e)), providing for automatic depublication of a published Court of Appeal opinion when the Supreme Court grants review.

In 1979, the Chief Justice's Advisory Committee for an Effective Publication Rule appointed by Chief Justice Bird recommended, among other things, that rule 976(d) be amended to end the automatic depublication of opinions upon grant of review by the Supreme Court.[1] This proposal was circulated for public comment, but the court did not adopt this change when it ultimately amended the rules on publication in 1982.

In March 1985, another committee appointed by the Chief Justice, the Judicial Council Advisory Committee to Implement Proposition 32, made a similar recommendation. The voters had recently enacted Proposition 32, which amended the California Constitution to permit the Supreme Court to select the specific issue or issues that it would consider on review, and this committee was asked to develop the rules needed to implement this change.[2] Among other things, the committee recommended amending rule 976 to eliminate the practice of automatic depublication of the Court of Appeal opinion upon grant of review. The committee reasoned that although this practice might have been logical when the Supreme Court's review was a de novo

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[1] This report, and the other reports cited in this paragraph, as well as corresponding documents, can be accessed at the link for this invitation to comment, under the "Supreme Court" heading at: http://www.courts.ca.gov/policyadmin-invitationstocomment.htm.

[2] Before this constitutional amendment, whenever the Supreme Court exercised its discretion to grant "hearing" concerning a matter resolved by the Court of Appeal, review proceeded de novo from the trial court's judgment, as if there had been no intermediate Court of Appeal decision.

review of the trial court decision, the constitutional amendment had changed that landscape. The report also recommended corresponding changes to the rule regarding citation of opinions to provide that, while review was pending, the Court of Appeal decision could be cited, but would have no binding or precedential effect. In addition, the report recommended that this rule state: "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." Ultimately, however, the Supreme Court did not adopt these changes. Instead, the court adopted an amendment to rule 976 recognizing the court's authority to selectively publish all or part of a Court of Appeal opinion pending review or after decision on review (this is now the second sentence in rule 8.1105(e)(2)).

In October 1986, Administrative Presiding Justice Racanelli of the Court of Appeal, First Appellate District, wrote a letter to Chief Justice Bird indicating that all of the justices of that court had voted to request that the Supreme Court revise rule 976 to provide for continued publication of a Court of Appeal opinion if the Supreme Court grants review and issues an opinion in the case. The Administrative Presiding Justices of the Third and Fifth Appellate Districts subsequently joined in that request. The Supreme Court considered this request, but declined to modify the rule.

In May 1988, the State Bar of California, the California Attorney General, the California Judges Association, the Bar Association of San Francisco, and the San Diego Bar Association jointly requested that the Supreme Court ask the Judicial Council to study and make recommendations on proposed amendments to rule 976(d). The proponents would have provided that a Court of Appeal opinion certified for publication would remain published if the Supreme Court granted review but that it would not be accorded *stare decisis* effect except on order of the Supreme Court. Again, the court considered the request but declined to modify the rule at that time.

This Possible Rule Change

Recently, some Court of Appeal justices have expressed a renewed interest in changing the rule calling for automatic depublication of published Court of Appeal opinions when the Supreme Court grants review. Given this interest, the court has reviewed the prior proposals to amend this rule and has decided to seek public comments on the following possible amendments.

Rule 8.1105

The possible amendments to rule 8.1105 would eliminate the historic practice of automatically depublishing a published Court of Appeal opinion when the Supreme Court grants review. Instead, under the possible rule, unless the Supreme Court orders otherwise, such opinions would remain published. However, the possible amendments to rule 8.1105 would require that any such opinion, whether published electronically or in hard copy, be accompanied by a notation advising that review by the Supreme Court has been granted. As under current rule 8.1105, the Supreme Court would retain the authority under (e)(2) to order that a published opinion, including a published opinion that is pending review by the Supreme Court, be depublished.

Rule 8.1115

The Supreme Court is also seeking comments on possible amendments that would add a new subdivision (e) to rule 8.1115, addressing citation of such opinions both while they are under review by the Supreme Court and after decision on review.

Citation while decision is under review

Possible new subdivision (e)(1) would permit citation of opinions while review is pending, but would require any such citation to note the grant of review and any subsequent action by the Supreme Court. Because Court of Appeal opinions as to which review is pending have not previously been published or citable, the Supreme Court anticipates that, were it to revise the rule, there may be questions regarding the extent to which such opinions may be relied on. To address these potential questions, the amendments also would specifically address the potential binding or precedential effect and/or persuasive value of such decisions while review is pending.[3] The court is considering two possible alternatives in this regard:

- Alternative A would provide that, unless otherwise ordered by the court, while review is pending, the entire Court of Appeal decision would continue to have the same binding or precedential effect that it had prior to the grant of review. This approach is consistent with the normal rule set out in *Auto Equity Sales, supra*, 57 Cal.2d 450, 455, and recognizes that the published opinions of the Courts of Appeal apply to all superior courts of this state. This also appears to be the approach of other states, by rule or practice, with respect to published opinions while review is pending in a higher court. However, this rule would also specifically provide that the Supreme Court can "otherwise order" that the opinion not have this effect while review is pending. For example, the court could order that, while review is pending, specified parts of the published Court of Appeal opinion have no binding or precedential effect, and have only potential persuasive value.

- Alternative B would provide that, unless otherwise ordered by the court, an opinion has no binding or precedential effect while it is under review. This approach would, while review is pending, place the *entire* Court of Appeal opinion in the same category as a decision rendered in another jurisdiction: it might have persuasive value, but would not have binding or precedential effect. As under Alternative A, however, the court would retain the power to

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[3] Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, "[d]ecisions of every division of the District Courts of Appeal are binding upon all the . . . superior courts of this state." (*Id*., at p. 450.) In other words, the superior courts *must* follow such decisions. The nature of this binding effect changes when there are conflicting published Court of Appeal opinions: in that circumstance, the superior court is still bound, but it "can and must make a choice between the conflicting decisions." (*Id*., at p. 456). However, no published Court of Appeal decision is binding on any other Court of Appeal (e.g., *In re Marriage of Hayden* (1981) 124 Cal.App.3d 72, 77, fn. 1; *Froyd v. Cook* (E.D.Cal. 1988) 681 F.Supp. 669, 672, fn. 9, and cases cited) or on the Supreme Court. Nonetheless, a published Court of Appeal decision has *precedential* effect with respect to the issues decided in that Court of Appeal decision — the Court of Appeal and Supreme Court will treat the decision as authority on the issue unless and until the Court of Appeal overrules its decision or the Supreme Court disapproves that decision.

"otherwise order." For example, the court could order that, while review is pending, specified parts of the published Court of Appeal opinion have binding or precedential effect.

The court would particularly appreciate comments discussing which of these options would be preferable if the court were to exercise its authority to revise the rules, as well as comments addressing the underlying question of whether the court should change its existing publication practice.

Citation after decision on review

Possible new subdivision (e)(2) would provide that after decision on review by the Supreme Court, a published opinion has binding or precedential effect only to the extent it is not inconsistent with the decision of the Supreme Court or is disapproved by that court. This subdivision would also clarify that the absence of discussion in a Supreme Court decision about an issue addressed in the prior Court of Appeal decision does not constitute an expression of the Supreme Court's opinion concerning the correctness of the result of the decision on that issue, or of any law stated in the Court of Appeal decision with respect to any such issue.

Rules 8.1105 and 8.1115 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Title 8. Appellate Rules

Division 5. Publication of Appellate Opinions

Rule 8.1105. Publication of appellate opinions

(a) - (d) * * *

(e) Changes in publication status

(1) Unless otherwise ordered under (2)~~,~~:

(A) An opinion is no longer considered published if the ~~Supreme Court grants review or the~~ rendering court grants rehearing.

(B) Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court's certification of the opinion for full or partial publication under rule 8.1105(b) or rule 8.1110, but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of ~~an~~ any opinion, in whole or in part, at any time after granting review.

(f) * * *

Advisory Committee Comment

Subdivision (e). This subdivision specifically provides that the Supreme Court can order that an opinion certified for publication, including an opinion under review by that court, not be published.

Rule 8.1115. Citation of opinions

(a) - (d) * * *

(e) When review of published opinion has been granted

(1) *While review is pending*

Alternative A

Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court, a published opinion of a Court of Appeal in the matter continues to be citable and to have the same binding or precedential effect that it had prior to the grant of review, but any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

Alternative B

Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court, a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

(2) *After decision on review*

(A) After decision on review by the Supreme Court, a published opinion of a Court of Appeal in the matter is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.

(B) The fact that a Supreme Court decision does not discuss an issue addressed in the prior Court of Appeal decision does not constitute an expression of the Supreme Court's opinion concerning the correctness of the result of the decision on that issue or of any law stated in the Court of Appeal decision with respect to any such issue.

Advisory Committee Comment

~~A footnote to a previous version of this rule stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. This footnote has been deleted because it was not part of the rule itself and the event it describes rarely occurs in practice.~~

Subdivision (e). This subdivision specifically provides that the Supreme Court can order that an opinion under review by that court have an effect other than the normal effect otherwise specified under this rule. For example, the court could order that, while review is pending, specified parts of the published Court of Appeal opinion [{Alternative A} have no binding or precedential effect, and have only potential persuasive value.][[{Alternative B}have binding or precedential effect].