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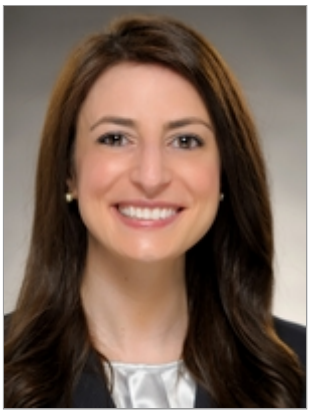
Calif. High Court Proposal Would End Depublication Practice

Law360, New York (September 22, 2015, 12:48 PM EDT) -- Under the current California Rules of Court, a published appellate opinion is automatically depublished when the Supreme Court grants review in the case, meaning the opinion can no longer be cited in other cases. (Cal. Rules of Court, Rules 8.1105(e)(1), 8.1115(a).) Under Rule 8.1105(e)(2), however, the court may order the opinion republished, in whole or in part, at any time after granting review.



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The court had only utilized this post-review publication power a handful of times (see, e.g., 420 Caregivers v. City of Los Angeles (2013) 303 P.3d 1186; Wickline v. State of California (1987) 741 P.2d 613) until recently, when it ordered post-review publication twice in less than a month. (Hilton v. Superior Court (2015) 354 P.3d 356; Rodriguez v. RWA Trucking Co. Inc. (2015) 352 P.3d 881.)

Interestingly, the recent increase in republication orders coincides with a proposed rule change that would essentially render obsolete the court's post-review publication power. On July 29, the Supreme Court released a proposal to amend Rule 8.1105(e)(1), which addresses changes in publication status of appellate opinions, to eliminate the automatic depublication of appellate opinions when the Supreme Court grants review. The proposed default rule would be the opposite: Unless the Supreme Court orders otherwise, a published court of appeal opinion would remain published after review is granted. The proposed new rule would also require that any such opinion be accompanied by a notation warning that the court has granted review.

The proposal notes that the court would retain its power under current Rule 8.1105(e)(2) to order that any published opinion, including an opinion that is pending review by the court, be depublished. If the court adopts the proposal, however, it would essentially render the post-review publication power a dead letter because the court's grant of review would no longer automatically depublish an appellate opinion in the first place. Following the grant of review, the court would no longer have to take the affirmative step of ordering republished a court of appeal opinion.

The proposal also seeks comment on whether to amend Rule 8.1115 to address the citation of published appellate opinions while they are under review and following decision on review. Proposed new subdivision 8.1115(e)(1) would permit citation of appellate opinions while they are under review by the Supreme Court, but would require any such citation to note the grant of review and any subsequent action by the Supreme Court. The proposal also includes two alternatives concerning the precedential effect of a published appellate opinion pending Supreme Court review.

Under one alternative, a court of appeal opinion would remain binding precedent on all California superior courts even while the case is pending review in the Supreme Court (Auto Equity Sales Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding ... upon all the superior courts of this state"]), although the Supreme Court could "otherwise order." Under this alternative, the court's reversal of the court of appeal would make vulnerable any superior court decisions based on the still-published court of appeal opinion.

Under the second alternative, a published court of appeal opinion would have "no binding or precedential effect" and could "be cited for persuasive value only" while it is under review by the Supreme Court. As under the first alternative, the court would retain the power to "otherwise order." The second alternative, like the first, could leave superior court decisions vulnerable to reversal, but under different circumstances — if the Supreme Court affirms the court of appeal decision under review and disapproves an older, conflicting court of appeal opinion, superior courts would have been bound to follow the older opinion because they would not have been allowed to choose to follow the persuasive-only opinion under review.

According to the proposal, the court is particularly interested in comments regarding which of these two options would be preferable if the court does revise the rules.

Finally, proposed new subdivision 8.1115(e)(2) would provide that after the Supreme Court's decision in the case, a published court of appeal opinion would have binding or precedential effect only to the extent it was not inconsistent with the Supreme Court's opinion. This subdivision also clarifies that the absence of discussion in a Supreme Court decision about an issue addressed in the court of appeal decision below does not constitute an expression of the Supreme Court's opinion concerning the court of appeal's analysis of that issue.

A statement by Chief Justice Tani G. Cantil-Sakauye reveals the court's proposal was motivated, at least in part, by ongoing pressure from court of appeal justices, the public and previously rejected rule proposals:

> Beginning in 1979, and three more times in the 1980s, various commissions, Court of Appeal justices, entities and bar groups asked this court to change its rule automatically depublishing Court of Appeal opinions upon grant of review by the Supreme Court. The court previously decided against such revisions, but upon reflection, and in view of renewed interest for change voiced by some Court of Appeal justices, the court determined that the time has come to consider whether to make changes.

Significantly, the proposed rule changes would also align California with all other state and federal jurisdictions, which retain published intermediate appellate court opinions even when such opinions have been accepted for review by a higher court.

The court is accepting public comments on the proposed rule changes through Oct. 9, 2015.

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