STATE DEPUBLICATION RULE DRAWS CRITICISM FROM JUDGES, LAWYERS

San Francisco Daily Journal (Jan. 11, 2016)
By Kevin Lee

Former state Supreme Court Justice Joseph R. Grodin is one of many judges and attorneys who supports ending the practice of decertifying appeals court decisions once the high court grants review of a case.

A majority of judges and attorneys who responded to a request for public comment favor abolishing the state's 110-year-old practice of stripping precedential authority from appeals court opinions.

The state Supreme Court is scrutinizing the rule that requires appellate decisions to be decertified from publication in official reports once the high court agrees to grant review.

The practice of automatic depublication dates back to a 1905 appellate court opinion and was formally codified in 1964 in the California Rules of Court. Noel v. Smith, 2 Cal.App. 158.

The high court surprised the appellate law community in July when it invited public comments on a proposed rule that would require appellate opinions to be published and citable while under high court review.

"To have the court propose the rule itself was a bombshell to a lot of people," said Elliot L. Bien, an appellate practitioner in San Rafael and longtime advocate on the issue.

The high court set a deadline to implement changes on January 1 but pushed back its deadline to July 1 after receiving 48 pages of responses from 37 individuals and groups.

Joseph R. Grodin, a former justice who served with the state Supreme Court and the 1st District Court of Appeal, submitted a public comment stating appellate decisions are being relegated to a "jurisprudential black hole."

"It's kind of an antiquated view to just wipe off the slate as if the Court of Appeal opinion never existed," Grodin said in an interview. "The Court of Appeal worked hard on a case. If they produced an opinion that they thought was helpful, just to eliminate the Court of Appeal opinion doesn't serve a useful purpose."

Grodin is one of 26 public respondents who supported removing automatic depublication in some fashion. Eight respondents opposed any revision to the rule, while three respondents, including the state Solicitor General Edward C. DuMont, indicated no preference.

The administrative presiding justices for five of the six District Courts of Appeal all asked for their opinions to remain published while under high court review. Roger W. Boren, the administrative presiding justice for the 2nd District Court of Appeal, did not submit a comment.

The state Supreme Court has offered two proposals that explain how appellate opinions would be treated if automatic depublication was rescinded.

The first proposal allows appellate decisions to retain the same binding effect that they had prior to the state high court granting review. Observers say this practice is recognized by the federal courts and apparently all other states.

The second proposal allows appellate decisions to be cited for persuasiveness following the high court granting review. Such decisions would be treated as if they were rendered in another jurisdiction.

Bien said that automatically eliminating appellate rulings from official records oversimplifies case law.

"Judges and lawyers should be treated as big boys and girls. Any opinion is subject to uncertainty from statute, precedent and other review," Bien said. "The law is a dynamic system, and people ought to be able to live with some of the uncertainty."

Kyle S. Brodie, a San Bernardino Superior Court judge, submitted a public comment stating that removing appellate rulings from publication assists attorneys and bench officers in understanding what rulings remain citable authority.

"When the California Supreme Court grants review, it is making a statement that it intends to write its own map of California law," Brodie said in the comment. "It is best to eliminate the decision that, in the absence of a specific order, will inevitably [be] supplanted."

Brodie also noted that the high court already can order an appellate opinion to be published after it has granted review.

The judge could not be reached for comment.

The high court considered whether to halt automatic depublication four times from 1979 to 1988. It chose to retain the overall practice with moderate revisions.

In the most recent attempt, Bien submitted a letter on behalf of the State Bar, then-state Attorney General John Van de Kamp and other organizations asking the state Supreme Court to take action. Then-Chief Justice Malcolm M. Lucas, responded that there was "no pressing reason at this time" to change the rule.

Supporters of revoking automatic depublication note that the high court initiated an unprompted inquiry after discussion lay dormant for nearly three decades.

David J. de Jesus, a Reed Smith LLP counsel who contributed to a public comment from the Bar Association of San Francisco, said a number of factors have changed since automatic depublication was last considered.

He noted that the high court's newest justices □ Mariano-Florentino Cuellar, Leondra R. Kruger and Goodwin H. Liu □ each have federal court experience.

"We've had a bit of turnover from the Supreme Court over the last few years," de Jesus said. "The current bench may be used to the idea that is used in the federal court. There is not this institutional aversion to keeping an opinion published upon review."