Binding precedent, pending review
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Under the current California Rules of Court, a published Court of Appeal 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.

On July 29, 2015, the California Supreme Court released a proposal to amend Rule 8.1105(e)(1), which addresses changes in the publication status of appellate opinions, to eliminate the automatic depublication of appellate opinions when the Supreme Court grants review. The proposed new default rule would be the opposite of the status quo: Unless the Supreme Court orders otherwise, a published Court of Appeal opinion would remain published after review is granted. The proposal notes that the Supreme 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.

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 the 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.

Alternative A would provide that, unless otherwise ordered by the Supreme Court, a Court of Appeal opinion would remain binding precedent on all California superior courts while the case is pending review in the Supreme Court. Auto Equity Sales Inc. v. Superior Court, 57 Cal. 2d 450, 455 (1962) ("Decisions of every division of the District Courts of Appeal are binding ... upon all the superior courts of this state."). Under this alternative, the Supreme Court's reversal of the Court of Appeal would make vulnerable any interim superior court decisions that had relied on the still-published Court of Appeal opinion.

Alternative B would provide that a published Court of Appeal opinion would have "no binding or precedential effect" and could "be cited for persuasive value only" while under Supreme Court review. As with the first alternative, the Supreme Court would retain the power to order otherwise. The second alternative, also like the first, could leave superior court decisions vulnerable to reversal, but under different circumstances - where a superior court has followed the binding older decision rather than the persuasive-only decision under review, and the Supreme Court subsequently affirms the persuasive-only decision and disapproves the older, conflicting decision.

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 subsequent 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 lower court's analysis of that issue.

These proposed rule changes have generated such a significant response from the legal community - a total of 37 public comments from judges, practitioners and organizations - that the Supreme Court recently extended the proposed effective date of any new rules from Jan. 1 to July 1. Of the 37 public comments, which are available on the Supreme Court's website, 23 support the proposal, three support the proposal if modified, and nine oppose any amendments. California's solicitor general and the California Judges Association also commented on the proposal without indicating support or opposition.

Many comments supporting the proposed amendments emphasize that because so few appellate opinions are published in the first place, those that are selected for publication typically involve significant research and thorough analysis of a new or important issue and should therefore remain published and citable until the Supreme Court renders its final decision. Proponents also argue that the proposed changes will preserve rulings on issues included in published appellate opinions that are not considered in the Supreme Court opinion. Many supporting comments also emphasize that the new rule would align California with all other state and federal jurisdictions, which retain published intermediate appellate opinions even when such opinions have been accepted for review by a higher court.

Interestingly, the main point of disagreement among the 26 supporters

is the choice between proposed alternatives A and B, governing the precedential value of appellate decisions while review is pending. The supporters were almost evenly split between the two alternatives, with 11 commentators favoring alternative A and nine favoring alternative B.

The comments opposing the publication rule changes focus on potential practical hurdles. For example, they argue that allowing decisions to remain published while review is pending would create unnecessary confusion and uncertainty for the bench and bar and would make trial court determinations vulnerable to reversal. Some comments also argue the new rule would create more work for the Supreme Court during its review granting process, because the justices would have to determine not only whether review should be granted, but also whether to depublish or add another qualifier to the appellate opinion while review is pending.

The Supreme Court now has some additional time to scrutinize the existing depublication rules, weigh the potential benefits and burdens of the proposed new rules, and consider the significant public commentary on the proposal. By July we will know the fate of California's long-standing depublication practice.

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