
REQUEST TO REFER TO JUDICIAL COUNCIL A PROPOSED RULE CHANGE
CONCERNING PUBLICATION OF COURT OF APPEAL OPINIONS

TO: THE HONORABLE MALCOLM M. LUCAS
CHIEF JUSTICE OF CALIFORNIA

FROM: THE STATE BAR OF CALIFORNIA
THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
THE CALIFORNIA JUDGES ASSOCIATION
THE BAR ASSOCIATION OF SAN FRANCISCO
THE SAN DIEGO COUNTY BAR ASSOCIATION

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I.

INTRODUCTION

The State Bar of California, the Attorney General, the California Judges Association and the undersigned local bar associations respectfully request that the Supreme Court, pursuant to its constitutional authority to amend the Rules of Court regarding publication of judicial opinions, direct the Judicial Council to study a proposed change in the rules concerning the publication of Court of Appeal opinions in those limited cases in which the California Supreme Court grants review. We request that the Judicial Council report its conclusions to the Supreme Court, and the Court act on the request, after all interested parties have been afforded an opportunity to comment on the proposed change.

Under the current Rules of Court, an opinion of a Court of Appeal can be certified for publication by that court, but the Supreme Court can reverse that publication decision in one of two ways. (1) If the Supreme Court decides not to review the merits of the decision, it can still issue an order directing that the opinion not be published. (2) If the Supreme Court does vote to review the case, the Court of Appeal's decision to publish the opinion is automatically countermanded unless the Supreme Court specifically orders otherwise.

On October 3, 1986, then Administrative Presiding Justice John T. Racanelli wrote to this Court on behalf of the Court of Appeal for the First Appellate District requesting that the Court amend Rule 976(d) of the California Rules of Court. The proposed amendment was that, when a Court of Appeal certifies an opinion for publication, it would remain published, notwithstanding the grant of review by this Court, if this Court issued an opinion of its own in the case. Under the proposal, the Court of Appeal opinion would have borne the notation "review granted," similar to the "cert. granted" notation in federal appellate practice. Justice Racanelli's letter included a lengthy statement of reasons in support of the proposal.

On October 17 and November 6, 1986, the Courts of Appeal for the Third and the Fifth Appellate District formally endorsed the proposed rule change. However, by lengthy explanatory letter dated November 26, 1986, Supreme Court Clerk Laurence P. Gill, on behalf of the Court, informed Justice Racanelli that the Supreme Court had decided against such a change. This decision occurred without consideration of the proposal by the Judicial Council. The request of the First Appellate District, and Mr. Gill's response for the Court, are annexed hereto as Exhibits A and B.

The undersigned hereby request that this Court, with Judicial Council input, reconsider the question whether Court of Appeal opinions certified by the Court of Appeal for publication should remain published when the Supreme Court grants review. We are not seeking any change in the Court's practice of using depublishation orders when a petition for review is denied.

However, the rationale which may support that practice does not apply when the Court grants review. We believe that the few efficiencies that may result from the automatic or presumptive depublication of Court of Appeal opinions in cases reviewed by the Supreme Court are substantially outweighed by its many detriments to the legal system.

II.

THE PROPOSED RULE

Rule 976(d) of the Rules of Court currently provides that:

"Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part."

The undersigned propose that the rule be amended to read as follows:

"A Court of Appeal opinion certified for publication shall remain published in the official reports if the Supreme Court grants review thereof, and a notation of grant of review shall immediately follow such Court of Appeal opinion and be included in the citation appearing at the top of each page. An opinion which remains published pursuant

to this rule shall not be accorded stare decisis effect, except upon special order of the Supreme Court."

This proposal differs from that of the First Appellate District made in 1986 in two respects. First, under the current proposal it is the determination to grant review that would insure publication. Under the earlier proposal, a Court of Appeal opinion would have been published only if the Supreme Court ultimately issued an opinion of its own in the case. That limitation had the drawback of creating a potentially lengthy period of uncertainty about the ultimate publication of a Court of Appeal opinion. The current proposal creates much less risk of error in citation. Further, if the Supreme Court vacated its order granting review, it would then be able to order the Court of Appeal opinion depublished.

The second difference in the current proposal is its addition of the last sentence concerning stare decisis effect. This is a direct response to some of the objections set forth in Mr. Gill's 1986 response letter.

III.

DISCUSSION

Pursuant to Rule 976(b) of the California Rules of Court, published opinions of the Courts of Appeal must and ordinarily do establish a new rule of law, or apply an existing rule to a new set of facts; or modify or criticize an existing rule; resolve or create an apparent conflict in the law; involve a legal issue of continuing public interest, or "make[] a

significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law." (Ibid.) Such opinions are therefore the ones that are researched and drafted with the greatest care. When the Court of Appeal's judgment concerning the importance of such a case is underscored by the Supreme Court's grant of review, depublication of the Court of Appeal's opinion represents a significant loss. It deprives the legal community and the public of a complete history of the case, and of the reasoning and conclusion of judges who thoughtfully considered the issues presented. Depublication thus diminishes the important educational function of intermediate appellate courts.

Moreover, at the stage of the grant of review, this Court may have had time for no more than an initial evaluation of the case. Under Rule 29(a) and established principles, this first evaluation is meant to be limited to the question of importance, not necessarily the merits. The current depublication rule is inappropriate, given this type of evaluation. Indeed, the Select Committee on Internal Procedures of the Supreme Court, finding that "A great many of the conference memoranda ... tended to be detailed analyses of the correctness of the Court of Appeal decisions," (Report of Feb. 16, 1988, p. 13) recommended that such memoranda focus instead on the Rule 29(a) criteria. Depublication practice should be tailored to that same philosophy.

Depublication at the outset of review is also inconsistent with the settled doctrine that there is no inference that the Court of Appeal erred from the mere fact that review is granted. The current practice necessarily implies that the Court of Appeal opinion is necessarily incorrect, and does not merit continued publication or availability to the legal profession. Under settled doctrine, however, until and unless it is overruled, in toto or in part, the Court of Appeal opinion should be deemed presumptively correct. Whatever its ultimate fate, the opinion should remain available for the elucidation of the bench and bar. Any such opinion would certainly be cited with caution in the interim, as occurs in the federal appellate system and in all jurisdictions with an intermediate appellate system.

The grant of certiorari by the United States Supreme Court or by the highest court of all other states is not deemed to require the depublication of the opinion of an intermediate appellate court, no matter how the high court ultimately rules on the merits. When an intermediate appellate court has selected a particular opinion for publication because of its importance (see, e.g., Ninth Circuit Rule 36-2), its determination on that score is respected. The views it elects to publish are considered valuable enough in their own right to be preserved, even if the Supreme Court disagrees.

In responding to the earlier request of the First Appellate District, Mr. Gill's letter emphasized the view that all opinions that have been superseded should not appear in the Official Reports "so that they cannot confuse or mislead."

(Pages 4-5.) He suggested that the publication of "opinions having no precedential value" (page 7) would "seriously undermine the long-established and understood premise that publication equates with citability." (Page 9.)

We respectfully submit that this position is mistaken. First, so far as we are aware the retention of superseded opinions in other jurisdictions with intermediate appellate courts has not confused or misled the attorneys who practice there. Both the Attorney General and the undersigned state and local bar associations, which represent lawyers who must read and rely upon the Official Reports of California, are not concerned that the proposed rule will confuse or mislead California attorneys.

The position that "publication always equates with citability" is simply incorrect. The Official Reports of this State, like those of all states and of the federal system, are replete with opinions that, having been "superseded," are not citable as binding precedent. These include not only opinions of the California Supreme Court affirmed or reversed by the United States Supreme Court, or overruled by the California Supreme Court in a later case, but opinions of the Court of Appeal that were accepted for review by the United States Supreme Court after the California Supreme Court declined review.

Indeed, many of these opinions have served a significant educational function. For example, the Court of Appeal opinion in Rotary Club of Duarte v. Board of Directors (1986) 178 Cal.App.3d 1035, provides a considerably more detailed

exegesis of the Unruh Act and its application to private clubs in California than does the opinion of the United States Supreme Court in the same case. (Board of Directors of Rotary International v. Rotary Club of Duarte (1987) 95 L.Ed.2d 474, ___ U.S. ___.) Though it has no "precedential authority," in the sense that phrase is used in Mr. Gill's letter, the California Court of Appeal's opinion has great practical value to the legal profession and the interested public.

Similarly, as pointed out in the original request from the First Appellate District, understanding of United States Supreme Court opinions reversing or affirming decisions of the California Supreme Court is often improved by a reading of the opinion under review, which is always published. So too would understanding of a California Supreme Court opinion often be advanced by a reading of the Court of Appeal opinion it reverses or affirms. In addition, publication of the lower court opinion would permit citation to portions the Supreme Court or a dissenting or concurring member thereof may wish to discuss without lengthy quotation.

The precedential value of a Court of Appeal opinion, while certainly significant, is not the only value pertinent to its publication. A Court of Appeal opinion may "make a significant contribution to legal literature" or satisfy one or more of the other criteria for publication set forth in Rule 976(b) even if it has been reversed, and certainly if it has been affirmed. Further, even if an intermediate appellate opinion that has been reversed or affirmed is not citable as binding precedent, it is indisputably part of the process

through which precedent is developed. Whether its reasoning or result be affirmed or reversed, the lower court opinion is a precursory judicial analysis of the law and facts that represents an important part of the record of the case.

An analysis that has been rejected by the Supreme Court may for that reason be as valuable a guide for future decision as an analysis that has been approved, or as the superseding opinion of the high court.

An overruled Court of Appeal opinion may also serve a purpose similar to that of a dissenting opinion. The force of its reasoning may compel reconsideration of the point in future cases. (See, e.g., People v. Tenorio (1970) 3 Cal.3d 89, where Justice Peters, for a unanimous court, adopts Justice Schauer's dissent in People v. Sidener (1962) 58 Cal.2d 645.) Thus, the opinion can assist in the overall historical process of judicial decision-making.

In short, we believe that judicial opinions are significant both as precedent and as conscientious attempts to explain the relation of law to experience. Absent an extremely compelling reason, it is inimical to the fundamental idea of the judicial process to eliminate from public view an opinion believed by the justices who sign it to be worthy of publication. Since the reasons that support depublication in cases in which this Court declines review are inapplicable to cases in which review is granted, and because the benefits of publication of Court of Appeal opinions in the relatively few cases accepted for review far outweigh any burdens, we believe

Court of Appeal opinions certified for publication should not be presumptively or automatically depublished upon the grant of Supreme Court review.

IV.

CONCLUSION

For all the foregoing reasons, the undersigned respectfully request that the Judicial Council be directed to study the proposed rule change and report its conclusions to the Supreme Court after affording all interested parties an opportunity to comment.

THE STATE BAR OF CALIFORNIA

By: *P. Tony Andolini*
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THE SAN DIEGO COUNTY BAR ASSOCIATION

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