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What the Dickens is the law?

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Under California Rules of Court, rule 8.1125(c), the Supreme Court has discretionary power to depublish an opinion at any time. Depublication's impact upon the precedential value of appellate decisions can be likened to that of eraser on whiteboard. The depublished opinion is "of no more effect ... as precedent to be followed ... than if [it] had not been written." *Knouse v. Nimocks*, 8 Cal .2d 482, 484 (1937). But if one thing in law is certain, it is that there are no absolutes. And a recent appellate decision demonstrates that like invisible ink, what depublication has erased is not always entirely gone. The decision also grapples with some surreal statutorily driven gyrations, similar to the kind that caused Charles Dickens to frequently wonder what the law is.

In *Farmers Insurance Exchange v. Superior Court*, 218 Cal. App. 4th 96, 105 (2013), the Court of Appeal held that depublication can constitute "a change in the law" sufficient to warrant reconsideration under Code of Civil Procedure Section 1008. And in the unusual circumstances presented by *Farmers*, depublication necessarily triggered reconsideration. But while *Farmers* held that depublication gave the defendant another crack at defeating a class certification motion, the dicta really makes *Farmers* fascinating reading.

In *Farmers*, the trial court granted a motion for class certification based on a single appellate court opinion: *Harris v. Superior Court*. Shortly after class certification was granted, the state Supreme Court, exercising its awesome discretion, denied review and

depublished *Harris*. But unfortunately for the defendant, the 10-day period to seek reconsideration under Section 1008(a) had lapsed. So the defendant's counsel did what any zealous lawyer might do, read Section 1008(c) a few lines below and filed *a motion* for the trial court - on its *own motion* - to reconsider.

That's right, a party motion to get the trial court, on its own motion, to reconsider. (Hmnnn, Mr. Dickens, hovering backstage, begins to fiddle with his buttons.) Section 1008 provides for parties to move for reconsideration under subdivision (a). Subdivision (c) states, "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so *on its own motion* and enter a different order." Emphasis added.

As its language so clearly suggests, Section 1008(c) is not for the parties, it's for the court. In essence, Section 1008(c) purportedly "allows" a trial court to reconsider a prior order if *the court* determines that "there has been a change of law" that warrants reconsideration. Think about that one. Such statutory language means the drafters of Section 1008(c) "understood" the premise to be that but for this act of legislative inspiration, a trial judge (and the parties!) were stuck with the trial court's decision, change of law be damned. Yet as the Court of Appeal noted in *Farmers*, trial courts possess "inherent authority to reconsider ... interim rulings." (Dickens' pacing quickens.)

In light of 1008(a)'s plain application to a party, and 1008(c)'s clear application to the courts, it's no surprise that it's a no-no to *move* the court to, "on its own motion," reconsider its prior ruling via subdivision (c). For when a party cannot utilize 1008(a), "the party should not 'file a written *motion* to reconsider'" under Section 1008(c). *Farmers*, 218 Cal. App. 4th at 102 n.10, quoting *Le Francois v. Goel*, 35 Cal. 4th 1094, 1108 (2005). A party can, however, "communicat[e] the view to a court that it should reconsider a prior ruling." *Le Francois*, 35 Cal. 4th at 1108. Imagine the attorney exchanges this inspires: "You can't move the trial court to, on its own motion, reconsider!" "What do you know! I'm not moving, I am *communicating a view!*"

This "communication" business may be particularly tricky if there is no case management conference close at hand, since a written "communication" may look an awful lot like - ahem - a motion. And even if there is a reason to gather in the courtroom, any oral communication may sound an awful lot like *moving* for reconsideration. How about a placard at the back of the courtroom - like the limo drivers hold in airport baggage areas? Or those freeway overpass posters strategically placed on the judge's route home? Or if the client has enough funds, a biplane puling a banner around the courthouse skies: Reconsider, Your Honor! (Mr. Dickens is fulminating backstage now.)

Grappling with statutory conundrums in *Farmers* was not just the appellate court's or the defendant's challenge, but the plaintiffs', too. Remember, for them, there is no longer any *Harris*. It has gone up in smoke with the mighty stroke of a high court pen. And so plaintiffs vigorously opposed the defendant's improper reconsideration motion using - you guessed it - *Harris*. "[P]laintiffs argued that, in any event, the *Harris* opinion was well reasoned." *Farmers*, 218 Cal. App. 4th at 103. As *Farmers* stated, "Plaintiffs ... [argued below] that while *Harris* 'is no longer published, its analysis and careful reasoning ... are still the most relevant and detailed of any Court of Appeal.'" Such reliance on the depublished *Harris*, the appellate court noted, violated the Rules of Court. However, because the discussion before the trial court was in fact the effect of depublication of *Harris*, "the parties were necessarily permitted to cite to *Harris* in their arguments, although in *technical violation* of ... rule 8.1115(a)."

The revival continued in the Court of Appeal where "the parties ... also briefed, at great length, the merits of the depublished *Harris*, on the theory that the trial court may have adopted the rationale of *Harris* as its own." But there had been no such reliance, and at any rate, "If depublication means anything, it means this court has no cause to *ever* agree or disagree with *Harris*. *Harris* simply does not exist." Yet, the appellate court confided, "This court may, at some point in the future, be presented with a trial court order using a similar course of reasoning as that adopted by the appellate court in *Harris*."

At this point, gesticulating wildly, Dickens bursts onto the stage. His head is spinning with thoughts of motions to induce court motions, "communicating" but not moving courts to move, permissible technical violations versus plain old technical violations, and the living dead: the citable depublished case! He begins to "communicate a view," his exhortation about what the law *is* rises to his lips! But luckily, a vigilant stage hand drops the curtain, sparing the audience such blasphemy, the theater lights come back on, and we're back in the present. The thorny, statutory, perplexing Code of Civil Procedure and Rules of Court present. And so we get to say what the law is - the "A" word is - "amusing." Unless, of course, your key precedent just got depublished or the time to file a motion to reconsider has expired.

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