

Supreme Court asks for input on court rule proposal

Measure would prevent appellate decisions from being depublished during high court review

By America Hernandez

The state's highest court announced Wednesday it is seeking public comment on a possible amendment to the California Rules of Court that would no longer automatically depublish a Court of Appeal opinion once the Supreme Court granted review of the case.

The proposed change offers two possible rule modifications. The first would allow Court of Appeal opinions to remain published and citable when granted Supreme Court review, and require the opinions to be prominently labeled in print and online with a notice that the case is being reviewed by the high court.

The alternative would be to have appellate opinions be temporarily nonbinding on lower courts while undergoing Supreme Court review. Attorneys could cite the case for persuasiveness, but not for precedential value.

The move would bring the state in line with the rest of the country, where appellate decisions remain binding precedent until a higher court rules otherwise. Comments on the proposed change will be accepted through Sept. 25.

"This proposal is a vast, significant change," said Mary-Christine Sungaila, an appellate partner at Haynes and Boone LLP in Costa Mesa. "The Supreme Court has the power to order that something remain published after granting review now, but the fact is they very rarely use it."

In both proposals, the lower opinion would still be citable afterward when it does not conflict with the higher court's final ruling.

The Supreme Court would also retain its right to order all or a portion of an opinion depublished at its discretion.

"It's a tricky call because there are two types of decisions: those that deal with conflicts in the law and those that don't, like first impression issues," said David S. Ettinger, partner at appellate firm Horvitz & Levy LLP in Encino. "If it's just a first impression issue and the Court of Appeal decision remains binding during review, then you could have the situation where dozens of superior court rulings are made based on an opinion that might get reversed." Ettinger said.

But the alternative rule, in which opinions are temporarily nonbinding while under review, would be equally problematic in conflict-of-law situations, he said.

"Suppose you have a situation where a Court of Appeal is creating a conflict in the law by expressly disagreeing with an earlier published decision," Ettinger said. "If you don't make the new opinion binding, then superior courts would be bound to follow the earlier decision, which the Supreme Court might end up disapproving."

Kenneth J. Schmier, attorney and co-founder of the Committee on the Rule of Law, which seeks to end the ban on citing nonpublished cases in state court, said he welcomed the willingness to consider changes.

"Our case law represents intelligent, disciplined discussion on what the law should be; why would we want to delete the opinion of the lower court?" Schmier said. "We have the opinion of the Supreme Court which binds the state, but we need to preserve for the future what the different logic was in the appellate court should it one day want to be revived."

Schmier maintained that the limited scope of the proposed change ignores the larger issue of prohibiting attorneys from citing nonpublished cases, which make up more than 90 percent of all decisions statewide.

Nonpublished cases have no precedential value, and thus various parties often lobby the Supreme Court to depublish appellate decisions they find unfavorable, arguing the results would have detrimental effects statewide.

According to a statement released by the Supreme Court, the justices agreed to consider changing the automatic depublishing rule on July 22, the same day it denied requests from Gov. Jerry Brown and Attorney General Kamala Harris to depublish a high-profile 4th District Court of Appeal decision that struck down arbitrary tiered water rates as unconstitutional.

"Together with the recent 2006 expansion of the rules for publishing decisions, this change would effectively increase the amount of published, citable cases without directly addressing the 'nonpub rule,'" said Sungaila, referring to the ban on citing nonpublished cases. "While that prohibition remains, this creates different avenues so that more cases will get published and stay published."

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