

JUNE 16, 2016 – ADI NEWS ALERT

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New rule 8.1115(e) keeps review-granted opinions published and citable for persuasive force

The [Supreme Court has announced](#)² that it has amended the California Rules of Court to eliminate the practice of automatically “depublishing” published Court of Appeal decisions when the Supreme Court grants review. Under [amended rule 8.1115\(e\)](#),³ effective July 1, 2016, a review-granted published opinion remains citable for its persuasive force unless the Supreme Court orders otherwise. Of course, counsel must note the review-granted status of the cited opinion prominently each time it is cited, as well as any subsequent action taken by the Supreme Court. (Rule 8.1115(e)(1), eff. Jul. 1, 2016.)

The new rule also provides that during the review period a published Court of Appeal opinion will have no binding precedential effect under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. It may be cited for its persuasive force only. (Rule 8.1115(e)(1).)

After the review period, the Court of Appeal opinion is citable and has whatever binding precedential effect it would have had without the grant of review, to the extent it is not inconsistent with the Supreme Court decision. (Rule 8.1115(e)(2), eff. Jul. 1, 2016.) The Supreme Court may order otherwise.

¹As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

²<http://newsroom.courts.ca.gov/news/supreme-court-eliminates-automatic-depublication>

³[http://www.adi-sandiego.com/pdf_forms/Rule_8.1115\(e\)_et_al_on_publication_of_review-granted_opinions.pdf](http://www.adi-sandiego.com/pdf_forms/Rule_8.1115(e)_et_al_on_publication_of_review-granted_opinions.pdf)

Reviewed-granted unpublished cases are not affected by the rule and remain uncitable and non-binding for stare decisis at all times.

California stare decisis

To give context to these provisions, we first remind counsel of how stare decisis operates in California.⁴ The subject is treated at much greater length, with supporting authorities, in the [ADI Manual, chapter 7](#),⁵ at § 7.5 et seq.

In *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450, a superior court appellate division declined to follow a published decision of a higher court, the Court of Appeal in a different district. The Supreme Court held the appellate division acted without jurisdiction (*id.* at p. 455):

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

Geographical reach: The rule of top-down binding effect operates statewide. Lower courts are bound by any Court of Appeal decision, no matter where the lower court and the Court of Appeal are located. All courts throughout the state are bound by the California Supreme Court. And all California courts, including the state Supreme Court, are bound by the United States Supreme Court on questions of federal law.

Conflicts among Courts of Appeal: With respect to Court of Appeal decisions, the rule applies only when there are no conflicting Court of Appeal decisions. When appellate court decisions are conflicting, lower courts must choose between them. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 456.) For pragmatic reasons a trial court will usually choose any position taken by its own Court of Appeal, but it is not legally bound to do so.

⁴Federal rules operate differently, as may many state rules.

⁵[http://www.adi-sandiego.com/panel/manual/Chapter 7 Decisions and later.pdf](http://www.adi-sandiego.com/panel/manual/Chapter_7_Decisions_and_later.pdf)

Vertical versus horizontal stare decisis: Binding effect under *Auto Equity* involves “vertical” stare decisis – higher courts binding lower ones. Unlike many federal circuit courts, there is no “horizontal” stare decisis in California. Courts of Appeal are free to disregard one another, different panels of the same court may disagree with one another, and courts may depart from their own precedents. Nevertheless, as a matter of prudence and policy, in the interests of consistency and foreseeability, courts tend to observe non-binding horizontal stare decisis – that, is, they follow their own rulings and those of other courts of equal rank in the absence of good reasons to do otherwise, especially those courts in the same geographical region. But this is a matter of sound discretion, not power.

When *Auto Equity* binding vertical stare decisis takes effect

[ADI’s comment](#) on the then-proposed rule during the [public comment period](#)⁶ last fall noted a wrinkle on these principles. Although the law is not definitive, the weight of authority suggests the binding effects of *Auto Equity* vertical stare decisis apply only after an appellate decision (including one of the Supreme Court) becomes *final*. Until then, the opinion is subject to modification, withdrawal, review, etc. It is citable under rule 8.1115(d) immediately on filing, but apparently has no vertical binding effect until the case is final for state appellate purposes – i.e., the last time for the state Supreme Court to act has concluded. (Federal review and collateral review, including writs, are not included for this purpose.) ADI’s comment on rule 8.1115(e) explored the huge implications of delayed binding precedential effect. The Supreme Court’s ultimate decision – to make a review-granted opinion persuasive but not binding during the review period – accommodates this reality.

Under the new rule, in review-granted cases, a published Court of Appeal opinion will have no binding effect until California Supreme Court jurisdiction ends but will remain published and citable during the review period.

When the review period is over, the opinion will be superseded by the Supreme Court’s opinion as to matters on which the Supreme Court has chosen to speak. It otherwise will remain published and citable, to the extent it is not inconsistent with the Supreme Court decision. As to topics in the Court of Appeal opinion not touched by the Supreme Court, the opinion is persuasive as long as the Supreme Court has jurisdiction and becomes binding on trial courts when California appellate jurisdiction over the case ends if no other Court of Appeal opinion conflicts with it.

⁶Public comments received are published in full on the court website at <http://www.courts.ca.gov/documents/supreme-court-Comments-to-Proposed-Depublication-Rule.pdf>. ADI’s comment is first, courtesy of the alphabet.

Second edition of ADI Manual includes dependency materials

The second edition of ADI's Appellate Practice Manual is now posted. It is called an "edition" rather than simple periodic "revision" because it is not merely a update but is an expansion of scope. The Manual now includes dependency materials. Besides numerous citations to dependency cases, statutes, and rules and discussion of differences between dependency and criminal or delinquency law where applicable, this edition includes:

- Expanded treatment of *Sade C.* filings in chapters 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel" (§ 1.24 et seq.), and 4, "On the Hunt: Issue Spotting and Selection" (§ 4.73 et seq.).
- Entirely new section on appealable dependency orders and judgments in chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started" (§ 2.124 et seq.).
- New appendix with checklist of common dependency issues in chapter 4, "On the Hunt: Issue Spotting and Selection" (§ 4.163 et seq.).
- Treatment of non-appealing minor's briefs in chapter 5, "Effective Written Advocacy: Briefing" (§ 5.63 et seq.).
- Discussion of dependency statutory writs under rules 8.450-8.456 in chapter 8, "Putting on the Writs: California Extraordinary Remedies" (§ 8.83B).

Making the Manual of universal applicability to our panel has been a long-held goal. We finally found sufficient space for the big effort needed to make it a reality. We hope dependency and indeed all attorneys will find this major new feature useful in their practice. Dependency staff attorneys Laura Furness and Michelle Peña (now a panel attorney!) deserve huge kudos for their efforts and contributions.

Quin Denvir remembered for his leading role in appellate defense

Quin Denvir, Sacramento attorney, died on June 3. He headed the State Public Defender from 1976-1984. ADI was funded by that agency during part of that period. In his role as State Public Defender he chose me to succeed Perry Langford as ADI executive director, and so I owe him my special gratitude. He was a founder of CCAP, and that project has a [special tribute to him](http://www.capcentral.org/resources/enews_source_docs/Quin_Denvir_tribute.pdf)⁷ on its website.

⁷http://www.capcentral.org/resources/enews_source_docs/Quin_Denvir_tribute.pdf