APPELLATE DEFENDERS, INC.
555 WEST BEECH STREET
SUITE 300
SAN DIEGO, CA 92101

(619) 696-0282
Fax: (619) 696-7789
ELAINE A. ALEXANDER **E-mail: eaa@adi-sandiego.com**
Executive Director

To: California Supreme Court, attn: Heather Anderson

From: Appellate Defenders, Inc., by Elaine Alexander, Executive Director, with Loleena Ansari, Howard Cohen, Cheryl Geyerman, Helen Irza, Staff Attorneys

Date: October 2, 2015

Re: Publication Status and Citation of Opinions When the Supreme Court Grants Review – Response to Invitation to Comment

Appellate Defenders, Inc., submits these comments on the proposed amendments to California Rules of Court, rules 8.1105 and 8.1115, which would change the rules on publication and citation of cases that have been granted review. ADI is the appointed counsel administrator for the Fourth Appellate District. It selects counsel for indigents on appeal in the district and oversees the representation provided. All counsel in its program have a stake in what constitutes citable and binding precedent.

Proposal that opinions remain citable after grant of review

ADI supports the proposal that cases would retain their publication status after a grant of review. There is considerable value to having an opinion freely citable for its persuasive value and reasoning. It is a way of facilitating the best and most informed decision-making possible while lower courts and litigants and the public wait the year or two or more for the Supreme Court to resolve the underlying issue. Well thought out intermediate court decisions will help the Supreme Court reach a sound conclusion, as well. Of course, ADI agrees a case's review-granted status must be noted prominently. On these points we seem to have the agreement of the other 49 states and the federal courts, according to the Invitation to Comment.

Binding effect of review-granted decisions

The second part of the proposal offers two alternatives. Alternative A would provide the review-granted opinion would retain the same precedential or binding force it had before the grant of review. Alternative B would allow the review-granted opinion to be cited freely, but the rule would give it no binding effect. It could be cited for persuasive value only.

Public policy

ADI supports Alternative B as a matter of public policy. As noted above, the *reasoning* of a review-granted case would be greatly helpful in the marketplace of ideas. To make its holding binding on trial courts as "the law," however, when it is inevitably destined not to be the last word on the subject, seems to have little utility. Why bind trial courts to follow a rule that may or may not end up being the law, rather than allowing them to decide what is the best position? Binding trial courts may build in error that would never have occurred had the courts been free to weigh the merits of the various positions. Normally the system reposes confidence in the good judgment of trial courts until higher courts have settled the law; it seems most sensible that the law should not override that judgment and force a result in advance of a decision as to what is in fact the right result.

Law as to what constitutes binding precedent

Alternative A also raises tricky legal issues that could muddy rather than clarify the whole situation. The assumption behind Alternative A is, apparently, that under current law a published Court of Appeal decision is in fact binding on trial courts, within the meaning of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, up until the time review is granted. If that were not the assumption, there would be no practical difference between A and B: in both situations, the review-granted decision would be citable but have no further effect.[1]

But ADI has doubts about this assumption. Although hardly definitive, the weight of authority appears to suggest that a published appellate court decision (including one of the Supreme Court), although citable, is not binding under *Auto Equity* until it is *final*.[2] A review-granted opinion is clearly not, and almost surely never will be, final.

---

[1]The provision is phrased as "the same binding or precedential effect that it had prior to the grant of review." If this is deliberately ambiguous because the court believes the law is unsettled, ADI would suggest a comment to the rule to that effect, because the proposed rule and the Invitation to Comment give no hint of such a doubt and indeed tend to leave the impression the court assumes opinions are binding when filed. The other commentators ADI has encountered have unanimously so construed the proposal.

[2]For purposes of this comment, "finality" refers to the conclusion of California appellate reviewability. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 34 [Court of Appeal opinion in writ case has "no effect" until final as to *both* Court of Appeal and Supreme Court].) It does not include federal or collateral review.

The law on this subject is surprisingly sparse and indirect and a bit contradictory. The closest case ADI has found is *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541. The Court of Appeal issued a published opinion holding a particular initiative defining a special circumstance never became effective because it was not duly approved by the electorate. The defendant committed the offense several weeks after that decision and was prosecuted under the initiative with a special circumstance allegation. A few days after the offense the Supreme Court granted review in the published case that found the initiative ineffective and ultimately upheld the law. The defendant claimed that under the law at the time of his act – meaning the Court of Appeal opinion invalidating the law – he committed no special circumstance and the application of later-announced law was an unforeseeable enlargement of criminal liability, a violation of due process akin to an ex post facto law. The Court of Appeal disagreed (pp. 1548, 1549):

> The case was not final when the crimes were committed . . . or when review was granted . . . , and thus our opinion never was the law. . . . ¶ [O]ur opinion in [the other case] was never final, and never had any precedential value . . . . Accordingly, it could not have been relied on by these defendants or anyone else.

To the extent *Clark* talks about *citing* a non-final opinion, it has been superseded by subsequently-enacted rule 8.1115(d): "A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." That rule explicitly makes a new opinion citable and also says parties "may rely" on it – i.e., point to it as good-faith justification for taking a certain position or action. But the rule does not address the question of the opinion's *binding* stare decisis effect one way or the other.

ADI has encountered no authority or commentary suggesting rule 8.1115(d) was intended to, or did, confer a binding stare decisis effect where it did not exist before. To the contrary, in an unpublished 2013 case,[3] *People v. Samuels* (2013, G045624) 2013 WL 2605430, the court rejected the defendant's argument, based on rule 8.1115(d), that the state was obligated to release him as soon as a favorable appellate opinion was published. The court noted: "A published appellate decision can be cited immediately, but it is subject to being modified or vacated by the issuing court either on its own motion or by granting a petition for rehearing within the 30–day period after the decision is filed . . . . Nor is a decision final for all purposes until at least 60 days after it is issued because 'the Supreme Court may, on its own motion, order review of a Court of Appeal

---

[3]Rule 8.1115(a) prohibits citation of unpublished authorities by a "court" or "party" in "any other action." As ADI construes it, this rule does not extend to participation in public discussions of proposed policy, wholly outside the context of litigation.

decision within 30 days after the decision is final in that court.'" It upheld the state's decision to wait until the favorable opinion was final. (See also *People v. Reynolds* (2006, E036242) 42 Cal.Rptr.3d 761, unpublished [no error when trial court failed to follow non-final published Court of Appeal decision, which was later granted review and decided against defendant by retroactive Supreme Court decision].)

The case closest to going the other way ADI has found is *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093. The Court of Appeal issued a published opinion disapproving of a trial judge's handling of peremptory challenges in a certain situation. Before that opinion became final, the same issue came up in the same judge's courtroom. She opined the opinion was not binding on her because not final and repeated the same behavior already condemned. The Court of Appeal issued a peremptory writ:

> [The judge's] refusal to follow [the published precedent] on the ground it was not final, was brave but foolish. *It was also legally wrong*. [Quoting rule 977(d), the predecessor to rule 8.1115(d).] ¶ Except in extraordinary circumstances, a trial judge should follow an opinion of the Court of Appeal that speaks to conditions or practices in the judge's courtroom, even though the opinion is not final, until the opinion is depublished or review is granted.

(141 Cal.App.4th at p. 1098, emphasis added.) Although the court offered the opinion the trial judge's action was "legally wrong," the ultimate holding was that the trial judge abused her discretion. And the *Jonathon M.* court immediately followed the "legally wrong" statement with a qualifying explanation of the highly fact-specific rule it intended to apply ("a trial judge should follow an opinion of the Court of Appeal that speaks to conditions or practices in the judge's courtroom"), which was "laser- targeted" at this judge. (*Ibid.*)

Most of the remaining precedents ADI has found are merely suggestive and lacking in any discussion of the problem at issue here. Nevertheless they tend to support the theory that court decisions must be final to be binding. Examples include (with all emphasis added): In *In re Edgerly* (1982) 131 Cal.App.3d 88, 91, the Supreme Court denied a petition without prejudice to raising claim in Court of Appeal upon the *finality* of a Supreme Court precedent; the Court of Appeal cited California Rules of Court, rule [currently 8.532(b)] on finality of Supreme Court decisions and opined, "The deference required of inferior state courts to decisions of the state Supreme Court [under *Auto Equity*] is necessarily governed by that rule." (*Id.* at p. 91, fn. 1.) *Barber v. Superior Court* (1991) 234 Cal.App.3d 1076, 1082, said: "[O]ur [previously published] decision never became *final* and is without any precedential value or binding force." *People v. Love* (1980) 111 Cal.App.Supp.3d 1, 13, noted all "published and *final* opinions" of the

appellate division are binding on municipal courts of the jurisdiction. The Supreme Court often defers action on a case pending the finality of a controlling precedent. (E.g., *People v. Hernandez*, S227457 ["briefing deferred pending *finality* of decision in People v. Prunty, S210234"].)

Unpublished cases (see fn. 3) say the same thing. For example, again with all emphasis added, *People v. Whittington* (2005, C045516) 2005 WL 2008662, footnote 3, unpublished, said in applying a new Supreme Court decision: "Although this decision is not yet *final*, it reflects the high court's position"; likewise, as to the same Supreme Court decision, *People v. Lawson* (2005, C047237) 2005 WL 1663525, *2, unpublished, noted: "*If and when it becomes final*, we must follow the holding . . . , which is binding on us."

If an appellate decision not yet final has no binding precedential effect, a rule like Alternative A – that a review-granted case retains the same precedential status as before the grant of review – does very little. That is essentially the result required by Alternative B, which states the rule much more directly and clearly and does not require litigants and lower courts to guess what the prior precedential effect was or do the obscure research cited in this comment.

If Alternative A is construed to *confer* binding force on an opinion that did not have it before, it would be a very odd rule indeed. It would give review-granted opinions a *higher* status than non-final opinions still standing. Such an anomalous provision would be hard to defend as either policy or law.

Conflict with existing published case

On a separate topic: Both Alternatives A and B raise the question what is sufficient to counteract an existing contrary precedent within the meaning of this *Auto Equity* provision:

> [T]he rule under discussion [that an appellate decision is binding on trial courts throughout the state] has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.

(*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 456.) Even if it is insufficient to bind trial courts in its own right, does a non-final published opinion create a conflict, removing the precedential binding effect of a contrary opinion? Would both of the alternative proposals for review-granted cases answer the question the same way? ADI raises these questions but can offer no answer.

Summary

In summary, ADI supports the proposal that review-granted opinions be citable. As to precedential effect, Alternative B represents sound policy and leaves far fewer legal questions to be sorted through than Alternative A, although neither approach answers everything completely. We therefore support Alternative B.

We appreciate the opportunity to comment and thank the Supreme Court for considering these thoughts.