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November 26, 1986

John T. Racanelli

Administrative Presiding Justice

State Building - Civic Center

San Francisco, CA 94102

Dear Justice Racanelli:

Your recent request on behalf of the justices of your court that rule 976(d) of the California Rules of Court be amended[1] for the reasons stated in your letter of October 3 was considered by the Supreme Court at its most recent administrative conference of Wednesday last.[2]

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1. The suggested amendment would require the publication in the bound volumes of the Official Reports of the underlying opinion of a Court of Appeal in those situations where the Supreme Court grants review to an advance-sheet-published opinion and then issues its own opinion. The proposed amendment provides that a notation of the grant of review would follow the Court of Appeal's opinion.

2. Your court's proposal was noted as having been concurred in by the justices of the Third District.

The court has asked me to advise that its analysis of the impact of the offered amendment on the theory and operation of the recently inaugurated appellate review procedures brought about by the passage of Proposition 32 caused the court to conclude that the better course is to make no change in rule 976(d).

A summary of the principal considerations that led to the court's disposition follow:

1. Proposition 32 was designed to provide the Supreme Court with the cause-disposition flexibility that it required to effectively deal with caseloads that were becoming increasingly more difficult to manage under the then-applicable "hearing granted" theory and procedures.

An important procedural plan selected to produce the desired cause-disposition flexibility is the use of the Supreme Court's ability to control an opinion's publication status. Under the California Rules of Court adopted to implement Proposition 32, if an opinion of a Court of Appeal (C/A) is ordered published in the Official Reports at any point in time it is a citable opinion and has precedential value. Conversely, if the opinion is not ordered published it may not be cited and has no precedential worth.[3/] By virtue of the new rules to implement Proposition 32, following the grant of review, unless otherwise ordered by the Supreme Court, the underlying C/A's opinion may not be

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3. Rule 977(b) provides for exceptions in rare situations that are not here applicable.

published and accordingly may not be cited or relied upon as authority. (Cal. Rules of Court, rules 976(d) and 977.) The C/A's opinion while not "killed" as was the case under the old "hearing granted" procedure is, nevertheless, decommissioned subject to being recommissioned by an order of the Supreme Court prescribing the publication of the C/A's opinion in whole or in part.

Consistent with the objectives of Proposition 32,[4] the foregoing publication-depublication system delivers a great deal of flexibility to the Supreme Court's review options, with the concomitant effect of conserving the court's limited time for application to its highest priorities.[5] Under the system, by a simple publication order, the Supreme Court can turn on or off the precedential-value lights for the entire C/A opinion or for only a segment of the opinion. This can be done for a limited period or permanently since the court can change its mind at any point during the course of review and presumably can order the entire opinion published or unpublished until the opinion appears in a bound volume.[6]

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4. Now California Constitution, article VI, section 12.

5. While the court has to this point been somewhat circumspect in its use of the many disposition options delivered by Proposition 32, the pressures of its workloads will likely result in their more frequent future use.

6. The Supreme Court has plenary power over the publication status of opinions. California Constitution, article VI, section 14, provides in relevant part: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate...."

While the system is a marvelously flexible device for the Supreme Court's purposes it is a quite complex system for the bench and bar to understand and deal with. In order to keep all parties advised of the publication, and therefore citation, status of a cause during the course of its appellate review, which in some situations can be an extensive period, a Cumulative Subsequent History Table has been developed which appears at the back of each advance pamphlet. That table's preface explains the system's operation. A lawyer can determine from the table which opinions appearing in advance-sheet form can or cannot be cited in most situations without a call to the clerk's office. No other state provides its bench and bar with such current and detailed information and assistance.

When the appellate review process is complete, a C/A's opinion that retains its "to-be-published" status or which is directed to be published by the Supreme Court appears in the bound volumes of the Official Reports. If a C/A opinion certified for publication loses its "to-be-published" status for whatever reason, it does not appear in a bound volume.

The point is, under the complex system described above, when a reader finds an opinion reported in a bound volume of the Official Reports he or she can be assured that it is final, that all modifications and corrections have been incorporated and that the opinion can be cited as authority subject only to later action by other courts or cases. Shepard's Citator or the various computer services advise of such later action. All opinions that have been superseded have been removed so they cannot confuse

or mislead.[7]

2. C/A opinions following the grant of review, when the Supreme Court has not ordered them published in whole or in part, are not the law and have no precedential value. To publish such material in the Official Reports appears to violate the standards for publication which specifically prescribe in rule 976(b) that "No opinion of a Court of Appeal... may be published unless the opinion" meets the described conditions which identify the opinion as worthy of publication. An opinion that is not the law and has no precedential value cannot qualify for publication under these standards.

3. The adoption of the amendment would cause significant confusion since the present system has educated the bench and bar to equate Official Report publication status with citability. Rule 977(a) provides that: "An opinion that is not ordered published shall not be cited or relied on...." Yet the adoption of the amendment would result in publication of a large number of opinions that are not citable, albeit with a caveat noted.

4. The adoption of the amendment would deprive the Supreme Court of an important part of the flexibility of disposition that Proposition 32 was designed to confer upon it.

Assume for example, that a C/A opinion had two important issues

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7. West's California Reporter users are some times misled by the publication of these superseded opinions despite the fact that they usually carry notations similar to the one proposed by the First District.

that the Supreme Court determined on review were incorrectly decided. Assume, as well, that the Supreme Court recognized that the C/A's disposition of issue 1 required its full analysis but that the C/A's disposition of issue 2 did not, since it was clearly contra to approved and settled law already well defined by other published opinions. If the Supreme Court knew that the C/A's opinion would remain published it might feel compelled to address issue 2 in a more complete manner than it would otherwise since its failure to react might be interpreted as at least acquiescence in or at worst approval of the C/A's erroneous disposition of issue 2. Over time the court could consume significant segments of its limited time in unnecessarily addressing such problems.

5. The letter of request makes the suggestion that the continuing availability of the C/A's opinions "will often facilitate fuller comprehension of the meaning and implications of the ultimate judicial decisions ...." Whether the C/A's opinion ought to become a tool to better analyze and interpret the Supreme Court's opinion is a consideration of some consequence. The acceptance of this view would require diligent courts and attorneys to read two opinions, one of which under our practice is not the law, to divine the proper interpretation of the one opinion which is the law.

6. The letter of request suggests that nonpublication tends to demean the function of the intermediate courts and may discourage "painstaking research and writing" in cases that the Supreme Court is likely to take over. When the hearing-granted theory and procedures were operative, and that was for over 80 years, all underlying opinions fell with

the grant of a hearing because they were no longer the law. That philosophy prevails under the new system on the grant of review except as to those opinions or portions thereof that the Supreme Court orders published. The number of decisions involved is not great as the First District's letter points out. The vast majority of the opinions the C/As author for publication remain published.

It was not perceived that the importance of the function of the C/As is diminished by the use of an appellate publication procedure that results in the nonpublication of opinions having no precedential value. The quality of the opinions of California's C/As has been exceptional and is expected to remain so, especially in those areas where the law requires the studied analysis of both appellate levels.

7. The letter of request observes that it would be convenient to have the C/A's opinion published so that its language and reasoning could be tapped by reference. While the assistance factor is obvious, that practice creates two problems: (1) the Supreme Court would encourage the breach of its own rules that specify the C/A's opinion is not the law and ought not to be cited and (2) such a procedure requires the reader to consult two sources, i.e., the Supreme Court's opinion and the C/A's opinion published in another volume to complete a single cause's analysis. Under the new publication rules the court is in a better position to obviate the first problem by ordering the necessary portions of the C/A's opinion published to suit its needs. The second problem can be minimized by paraphrasing, or, outright adoption of the material portions of the C/A's opinion.

8. The requesting letter encourages the adoption of its proposal

on the basis that, in the "federal system and virtually all other jurisdictions with a multitiered appellate structure," once-published opinions are allowed to remain published.

In the federal system and in most of the state jurisdictions the lower court's opinion remains the law until it is overruled. The grant of certiorari, for example, does not vacate the lower federal court's opinion, which remains citable during the review. (See State of California v. Superior Court (1984) 150 Cal.App.3d 848, 859, fn. 9.) If only part of the opinion is overruled the balance lives on. Under the dissimilar California law and procedures the publication practices of foreign jurisdictions may not be a helpful analogy. The grant of review here requires that the opinion not be published, and accordingly, it is not citable law during or after review unless the Supreme Court otherwise directs.

Attorneys from other jurisdictions are left with perplexing research problems that the California attorneys need not address during the period of review or after. In many situations in other jurisdictions the lawyer seeking to follow the higher court's action after review is completed must examine not only the higher court's opinion but also the lower court's opinion to determine what the law of the cause is as a totality without, in many instances, the benefit of the higher court's guidance. Here, if the Supreme Court wants the lower court's opinion to live on, it signals that message by ordering the opinion or pertinent parts published.

Many of these jurisdictions do not have readily available current Cumulative Subsequent History Tables to aid their bench and bars' research

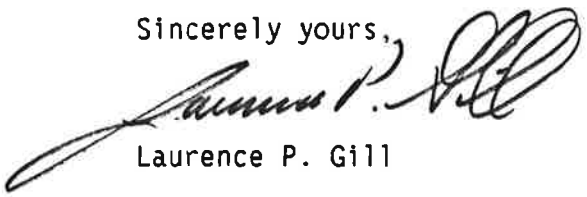
efforts. In many regards, considering the volume of opinions published in California, our system of publication as presently structured under our theory and practice is a superior one and emulation of federal publication practices might not be the better course.

9. The adoption of the letter's proposal would have a monetary price tag in that the present contract for the publication of the Official Reports specifies the number of opinion pages each bound volume shall contain and charges subscribers for the number of bound volumes produced. If the underlying C/A opinions were to be published, the subscriber would be billed for that amount of noncitable material.

10. The adoption of so major a change in practice as is proposed here would seriously undermine the long-established and understood premise that "publication equates with citability."

The court thanks the justices of the First Appellate District for the expression of their concerns and hopes the foregoing will assist in understanding its determination.

Sincerely yours,



Laurence P. Gill

Clerk of the Court

cc: Robert K. Puglia
Presiding Justice