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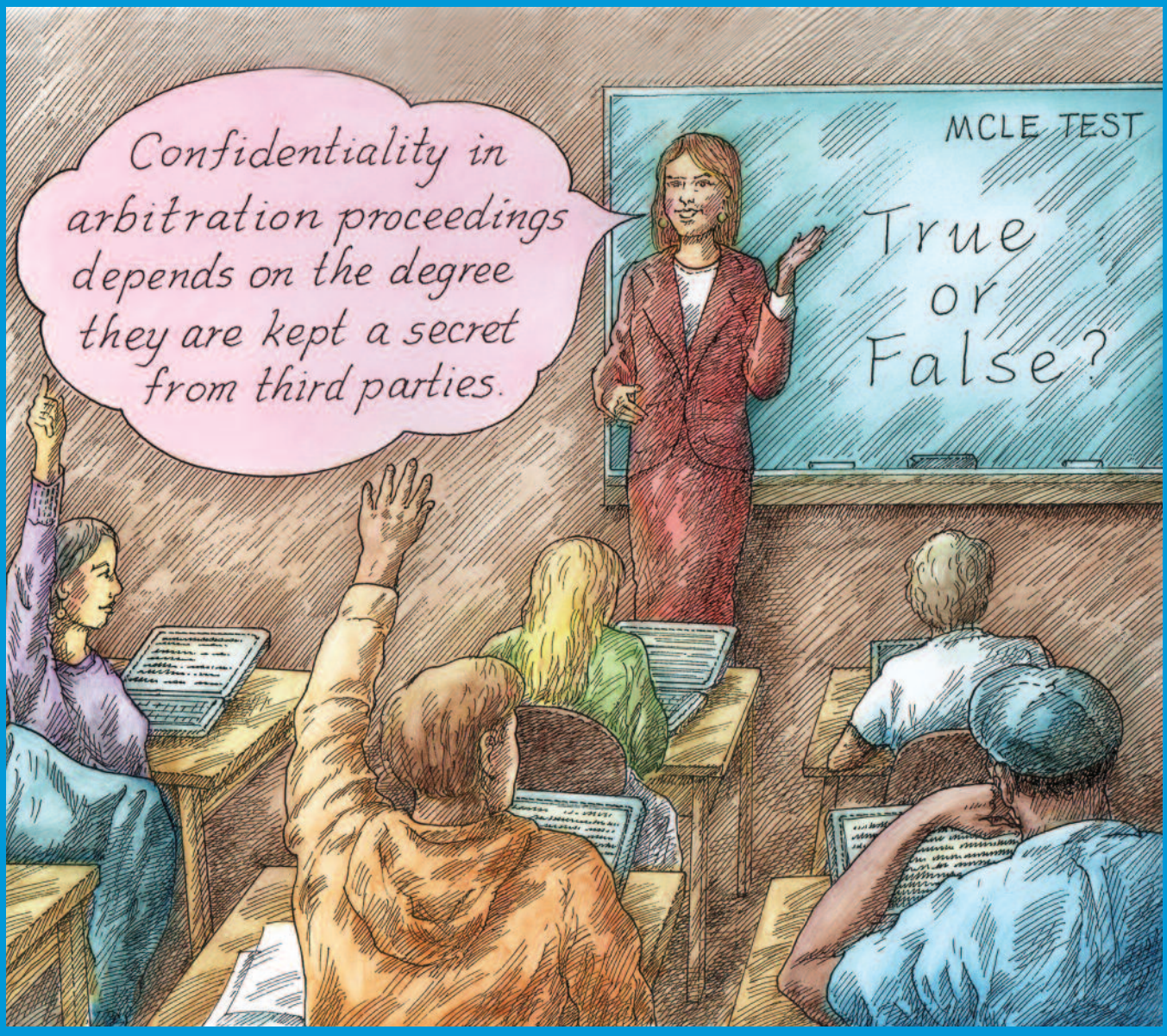

Briefing Issues Pending Before the California Supreme Court

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Even if your case never gets to the California Supreme Court, you might have to brief a legal issue pending before the Court. When the Court grants review, it is often because the issue is recurring and has generated a split of opinion. But a grant of review does not put all other cases with the same issue on hold. If you have a case in a lower court with the same issue, your case may be decided by the trial court or the Court of Appeal before the Supreme Court renders its opinion.

New court rules—California Rules of Court, rules 8.1105 and 8.1115(e)—now allow counsel to cite to cases taken on review. These new rules are welcome, and will foster more candid and open discussions about the pending issues. But they present challenges as well as opportunities for advocates.

There are tactical considerations to keep in mind when your case presents a pending issue. This article focuses on what to do when you are in the Court of Appeal. You should first consider whether it makes sense to seek a stay until the Supreme Court resolves the issue. You may prefer to avoid staking the outcome of your case on the ultimate Supreme Court decision and move forward with your case in the Court of Appeal. If you do move forward, you must decide how to brief the issue and address any split among the Courts of Appeal. Finally, if the Court of Appeal in your case rules against your client, you should consider whether to file a petition for a grant-and-hold in the Supreme Court pending the outcome of the lead case.

__ Rule Changes Open __ the Discussion About the Law

Historically, under the old version of Rule 8.1105 in effect until July 2016, the Supreme Court's grant of review automatically depublished the underlying Court of Appeal decision and any subsequent grant-and-hold cases. This created the proverbial elephant in the room: the parties and lower courts had common knowledge of the depublished decisions but could not cite to them, thus precluding a discussion about the reasoning or facts in these "ghost" decisions by direct reference. As a result, litigants and the lower courts could not openly discuss the decisions and the wisdom or frailties of their reasoning.

At the same time, however, litigants and the courts could still discuss any published decisions on the issue that had not been taken on review. This pool of remaining published decisions often created an artificially narrow range of perspectives because the cases pending before the Supreme Court necessarily went unmentioned. For instance, if the Courts of Appeal issued five decisions interpreting a Labor Code provision, and the Supreme Court granted review of two, only the three remaining decisions could be discussed in the lower courts; but they might represent only one side of a split on how to interpret the provision.

Beyond the narrowed—and sometimes lopsided—discussion of cases, there were other problems with the old, automatic depublication rule. It prohibited citation to any portion of the Court of Appeal decision, not just the portion that discussed the particular issue taken on review. This wholesale depublication could leave litigants and the superior courts without citable guidance on issues wholly unrelated to the issue on review. The Court of Appeal's reasoning and analysis of the other issues, and the time spent by the Court of Appeal on those other issues, were lost to litigants and the bench, stunting the development of the law.

Meanwhile, in federal court, litigants and lower courts cited and discussed federal decisions taken on review by the United States Supreme Court without event. Other states permitted citation to decisions by their courts taken on review as well.

For more than three decades the drawbacks of the automatic depublication rule spawned various proposals to allow citation to cases taken on review. The reasons for these proposals, captured in a 1988 letter to Chief Justice Malcom Lucas, included the following: First, the automatic depublication rule deprived the legal community and the public of a complete history of the case under review. This history is often crucial to a full understanding of the ultimate decision by the California Supreme Court or the United States Supreme Court. Second, the rule implied that the Court of Appeal opinion was necessarily incorrect and thus ran counter to the presumption that, unless overruled, the underlying opinion is deemed correct. Third, the rule failed to recognize that an overruled opinion may function like a dissenting opinion, with the force of its rea-

soning causing reconsideration of the issue in a future case. And fourth, the Court of Appeal's discussion of the issue, whether or not overruled, serves an educational role for the legal community.

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The arguments for retaining the automatic depublication rule boiled down to the view that permitting superseded decisions to remain published might lead to confusion and incorrect citations to outdated law. In response to that concern, Justice John Racanelli, a leading proponent of changing the automatic depublication rule when he served as Administrative Presiding Justice of the First District Court of Appeal, once wryly commented, the "Rules of Court should not … be fashioned for the purpose of accommodating the inadequacies of incompetent counsel; if they were, a massive re-writing of the present rules would be required."

Nowadays, given the easy online access to any Court of Appeal opinion, whether certified for publication or not, every skilled advocate knows that consulting unpublished opinions is going to be a useful point of reference in most cases; some might even say mandatory in all cases. Since this body of "shadow law" will be consulted anyway (certainly the Court of Appeal will be familiar with it), attorneys must always be capable of keeping in mind the basic difference between published and unpublished cases. And anyone who can do that can also be expected to avoid, by careful citation practice, whatever confusion might come about by having cases pending in the Supreme Court on the books and available for open discussion.

Our Supreme Court now agrees. The longstanding efforts to change the automatic depublication rule finally bore fruit in 2016 with changes to the applicable Rules of Court.

Under the new version of Rule 8.1105(e), a Court of Appeal decision remains published and, therefore, citable while review is pending, unless the Supreme Court specifically orders depublication. Be aware, however, that though citable, the pending case may be cited only for its "persuasive value"; the decision will have "no binding or precedential effect."

— How to Address the Issue —

Now that you can talk about decisions on review, how should you handle them in your own case? The first step is being aware that an issue in your case is on review. Your

research may lead you to the cases taken up by the Supreme Court, but you can always consult the Supreme Court's website, which has a "Pending Issues Summary" for its civil and criminal dockets. (See California Courts>Supreme Court>Case Info>Pending Issues Summary.)

Once you have identified the pending case, you should (1) decide whether it makes sense to seek a stay of your case until the Supreme Court renders its decision; (2) plan how to brief the issue, if your case goes forward; and (3) consider a grant-and-hold petition if the Court of Appeal rules against your client on the issue.

— 1. Whether to Seek a Stay —

As soon as you learn of the case on review, decide whether to seek a stay. This calculus will depend in large part on whether the issue on review is wholly dispositive of your case. For example, it might make sense to seek a stay if your appeal depends on a threshold issue of jurisdiction or preemption governed by the case on review.

But be aware of the potential pitfalls of convincing the Court of Appeal that the outcome of the Supreme Court case will govern your case entirely. Having persuaded the Court on this point, it will be difficult (if not disingenuous) to later argue that your client should still win if the Supreme Court decides against your client's position. It may be better to go forward with the issue in the Court of Appeal and argue any alternative grounds for prevailing, freeing your case from whatever the Supreme Court decides.

From the Court of Appeal's perspective, there may be good reason to proceed with the case even if the pending issue is arguably central to your case. Among other things, a decision in your case may enhance the body of decisions that the Supreme Court will ultimately consider in rendering its opinion. For instance, the fact pattern of your case may add nuance to the issue that has not been discussed in the split of opinions or the pending case, or your case may allow the Justices on your panel to add a new analysis to the existing discussion.

'A frank discussion of the pending issue is both to your advantage and your professional responsibility. You have an obligation to tell the Court of Appeal when there is a wrinkle in the law, even if that wrinkle cuts against your case.'

If you opt to seek a stay, no specific rules govern the process. Your request could be styled as either an application under rule 8.50 or a motion under rule 8.54. Each District has its own preference between the two, so consider consulting with the clerk's

office. In general, though, a motion is the better choice if your request relies on facts outside the record or an argument longer than two pages.

— 2. What to Say —

If your case goes forward, there are several points to keep in mind while briefing the pending issue. Overall, consider how the Supreme Court outcome will and will not affect your case. Present the Court of Appeal with any alternative theories on which your client might win regardless of the outcome in the Supreme Court. If the Court of Appeal can decide your case on grounds that avoid the issue entirely, highlight this opportunity in your briefing. Similarly, where appropriate, explain how the facts of your case are distinguishable from the pending case so that the Supreme Court's resolution will not necessarily control your case. And to state the obvious—unless there are compelling tactical reasons to roll the dice—you will generally want to avoid staking your case on an expected outcome in the Supreme Court case.

Most likely, there will be a split of opinion among the Courts of Appeal that you'll need to discuss. If your District or Division has not yet decided the issue, present the different viewpoints and explain why the one you are advocating is the better view. Or explain why the facts of your case fit under one line of cases rather than the other. If your court has already decided the issue, explain why subsequent cases bolster, or call into question, that prior ruling. Or explain why the facts of your case warrant the same or a different result.

A frank discussion of the pending issue is both to your advantage and your professional responsibility. You have an obligation to tell the Court of Appeal when there is a wrinkle in the law, even if that wrinkle cuts against your case. At the same time, informing the Justices of the case on review and any split among the Courts of Appeal helps establish your credibility. Further, discussing the pending issue allows you to participate in the conversation about the evolving law, and perhaps shape its direction.

If review of the issue is granted after briefing in your case is complete, notify the court and opposing counsel with a new authorities letter under rule 8.254. If you think additional briefing is warranted, ask the court for permission to submit a supplemental brief.

— 3. What Next? —

If the Court of Appeal rules against you on the pending issue, consider filing a petition for review in the Supreme Court and asking for a grant-and-hold pending the outcome of the lead case. (Note that the Supreme Court is now routinely using the grant-and-hold procedure for criminal cases that raise the same issue.)

— Conclusion —

Briefing an issue pending before the Supreme Court can be a delicate matter. You know a decision is coming at some point, but you can't possibly know or predict its outcome. In the absence of the Supreme Court's final word on the issue, you must navigate the uncertainty as best you can for your client. At least the rule changes make your job easier: you can actually talk about the case or cases pending on review. And, for attorneys and Justices alike—these authors agree—joining the conversation about an evolving legal issue is part of the fun of appellate law.

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