Study J-1406.1 August 10, 2020

Memorandum 2020-40

Statutes Made Obsolete by Trial Court Restructuring (Part 7): Precedential Value of Appellate Division Decisions

The Commission is responsible for reviewing the codes and recommending revisions to reflect the major trial court restructuring reforms that occurred around the turn of the century.[1] The Commission has been working on this huge assignment for years, steadily reducing its lengthy "to do" list.

One of the remaining projects on that list concerns the precedential value of an appellate division decision. This memorandum addresses that topic.

SOURCE OF THE PROJECT

In 2008, Alex Cerul (then a clerk at the Appellate Division of Santa Clara County Superior Court) contacted the Commission, raising questions about the precedential value of a decision rendered by the appellate division of a unified superior court. In particular, he asked whether such a decision is binding precedent for all of the superior courts, or only for the superior court that rendered the decision.[2]

Mr. Cerul pointed out that before the trial courts unified, the losing party in a municipal court case could appeal to the appellate department of the superior court, and a published decision of the appellate department would bind all of the municipal courts in the state. He queried whether the same general principle was applicable post-unification and whether that point should be clarified by statute.[3]

1. Gov't Code § 71674.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See First Supplement to Memorandum 2014-53, p. 18.
3. See *id.*

The staff added the matter to the Commission's then-lengthy trial court restructuring "to do" list, to address when time permitted. In so doing, we noted that the precedential value of court decisions may be governed by common law or court rule, rather than by statute.[4]

PRIOR CONSIDERATION OF THE ISSUE

Mr. Cerul was not the first to raise questions about the precedential value of a decision by the appellate division of a unified superior court. In reexamining the history of trial court unification, the staff found that the State Bar Committee on Appellate Courts ("CAC") raised the matter at least twice earlier: Once in the Legislature and once before the Commission.

Assembly Judiciary Committee Analysis of SCA 4

In June 1996, the Assembly Judiciary Committee heard SCA 4 (Lockyer), the ballot measure that revised the California Constitution to permit each county to unify its trial courts on approval by a majority of the county's superior court judges and a majority of its municipal court judges. Among other things, the bill analysis explained that CAC was concerned about whether an appellate division decision would have precedential effect:

> **Appellate Divisions.** The appellate divisions created by this bill are to operate in the same way as do the present appellate departments of superior courts. [T]he Committee on Appellate Courts of the State Bar … thinks it likely that the appellate decisions of un-unified superior courts would have precedential effect, whereas the decisions of appellate divisions of unified courts would not. Currently, the published opinions of superior court appellate departments are binding on inferior courts. This effect of establishing binding precedent known as "stare decisis" is a key element of the common law. In the absence of statute, published opinions of peers might have no precedential effect, because there would be no trial courts exercising inferior jurisdiction.[5]

The bill analysis thus suggested that the author "consider legislation to give published opinions of the appellate division of a unified superior court the same binding effect as the opinion of an appellate department of an un-unified superior court."[6]

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4. See *id.*
5. Assembly Committee on Judiciary Analysis of SCA 4 (June 19, 1996), p. 7 (point #7).
6. *Id.*

SCA 4 passed the Legislature and was approved by the voters at the statewide election in June 1998 (Proposition 220). It consisted solely of constitutional reforms; the implementing legislation was prepared separately, as discussed below.

Implementing Legislation for SCA 4

Many statutory revisions were necessary to implement the county-by-county unification approach of SCA 4. At the Legislature's request,[7] the Commission prepared the implementing legislation, which was enacted shortly after SCA 4.[8]

While the Commission was preparing the implementing legislation, CAC submitted a comment reiterating its concern that "the precedential value of the published opinions of the appellate departments of superior courts will be lost or eroded under SCA 4."[9] Citing the California Supreme Court's decision in *Auto Equity Sales, Inc. v. Superior Court*,[10] CAC explained that the doctrine of stare decisis requires tribunals exercising inferior jurisdiction to follow decisions of courts exercising superior jurisdiction. CAC thus concluded that "in our current system, the published opinions of appellate departments of superior courts are binding on all municipal courts."[11]

CAC warned, however, that if "all of the superior courts elected to unify, the opinions of appellate divisions would have no precedential effect, and there would seem to be no sufficient reason to continue to publish them."[12] CAC therefore "encourage[d] the Commission to study and propose implementing legislation clarifying the precedential effect of published decisions of appellate departments and divisions of superior courts after SCA 4."[13]

In presenting CAC's comments to the Commission, the staff pointed out that the law governing the precedential value of an appellate department decision was non-statutory and not totally clear-cut:

> At present, the requirements for publication of a judicial decision are set forth in court rules, rather than codified. See Cal. Rules of Court 976-979. Similarly, the precedential value of judicial decisions is addressed in case law, not by statute. Although a decision of the

7. See 1997 Cal. Stat. res. ch. 102.
8. See 1998 Cal. Stat. ch. 931; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51 (1998).
9. Memorandum 97-66, Exhibit p. 1.
10. 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (1962).
11. Memorandum 97-66, Exhibit p. 2.
12. *Id.*
13. *Id.*

> appellate department seems to be binding on municipal courts as CAC asserts, that is not entirely beyond dispute. *Cf.* People v. Love, 111 Cal. App. 3d Supp. 1, 13, 168 Cal. Rptr. 591 (1980) ("This decision, as are all published and final opinions of this Appellate Department of the Los Angeles Superior Court, is binding on all municipal courts located within the County of Los Angeles.") *with* Worthington v. Unemployment Insurance Appeals Bd., 64 Cal. App. 3d 384, 389, 134 Cal. Rptr. 507 (1976) ("The department charged with administration of the Unemployment Insurance Code throughout the entire state was not obliged to follow the *Miller* decision of the superior court, even of its appellate department of a single county, but was free to accept the ruling of the Attorney General."); *see also* 9 B. Witkin, California Procedure *Appeal* § 939 (4th ed. 1997) ("The relatively few opinions ordered published by appellate department judges … are of debatable strength as precedents.").[14]

We therefore suggested that "[i]nstead of codifying whether a decision of the appellate division of a unified superior court is binding on judges of the court, *it may be more appropriate to leave the matter to the development of case law and court rules*."[15]

The staff also noted that "[r]egardless of whether they have precedential effect, decisions of the appellate division of a unified superior court will have persuasive value."[16] Citing Witkin's treatise on California procedure, we explained that decisions of the then-existing appellate department (as opposed to the then-hypothetical appellate division) were frequently cited by higher courts, in part because they often addressed subjects that rarely reached the higher courts.[17] Given that well-established practice, we predicted that it was "unlikely that publication of appellate division decisions will cease following implementation of SCA 4, particularly because the standards for publication focus on a decision's potential for providing guidance, not on its precedential effect."[18] We cautioned, however, that although legislation on the precedential value of an appellate division decision "seems unnecessary for now, it should be considered if a problem does develop."[19]

The Commission followed the staff's advice: Neither the implementing legislation for SCA 4, nor the Commission's recommendation on that subject,

14. *Id.* at 2.
15. *Id.* (emphasis added).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 3.

included a provision on the precedential value of an appellate division decision.[20] To the best of the staff's knowledge, no bill on that subject has been introduced since SCA 4 was approved by the voters in 1998.

CURRENT STATUS

To follow-up on Alex Cerul's inquiry, the staff took a new look at the law in this area. We found that things are much as we predicted, with little change from the pre-unification situation.

Like decisions of the pre-unification appellate departments, decisions of the post-unification appellate divisions are occasionally published and relied on by other courts.[21] As Witkin puts it, the persuasive value of appellate division decisions "has been constantly recognized," in part because a "double selective process is involved in reporting them: The court first determines that the case is so substantial as to call for a written opinion, and then that the problem is important enough to justify certification for publication."[22]

The law is clear that although an appellate division decision has persuasive value, it is "not binding on higher reviewing courts."[23] Similarly, an appellate division decision from one county is not binding on an appellate division in another county,[24] which makes sense because it is a decision from a tribunal of

20. See 1998 Cal. Stat. ch. 931; *Trial Court Unification: Revision of Codes,* 28 Cal. L. Revision Comm'n Reports 51 (1998) (hereafter, "*TCU: Revision of Codes*").

21. See, e.g., Midland Funding LLC v. Romero, 5 Cal. App. 5th Supp. 1, 6, 210 Cal. Rptr. 3d 659 (2016) (explaining that two recently published appellate division decisions "are instructive here"); Puma Mgmt. Co. v. Brooks, 2012 WL 6213789 (unpublished appellate division decision explaining that case published in 2002 "is an appellate division opinion and is therefore not binding on this court, [but] we nevertheless find its holding consistent with controlling case law …."); see also Gateway Community Charters v. Spiess, 9 Cal. App. 5th 499, 504 & n.3, 215 Cal. Rptr. 3d 133 (2017) (relying on appellate *department* decision and explaining that "this case, though persuasive, is not binding precedent as it comes from the appellate *division* of a superior court." (emphasis added)); Velasquez v. Superior Court, 227 Cal. App. 4th 1471, 1477 n. 7, 174 Cal. Rptr. 3d 541 (2014) (relying on appellate *department* decision while explaining that "[a]ppellate *division* decisions have persuasive value, but they are of debatable strength as precedents and are not binding on higher reviewing courts." (emphasis added)).

22. 9 B. Witkin, California Procedure *Appeal* § 503 (5th ed. 2020).

23. *Velasquez*, 227 Cal. App. 4th at 1477 n. 7; see also Singh v. Superior Court, 140 Cal. App. 4th 387, 401 n. 12, 44 Cal. Rptr. 3d 348 (2006) (same).

24. See, e.g., People v. Gray, 199 Cal. App. 4th Supp. 10, 14, 131 Cal. Rptr. 3d 220 (2011) (appellate division refusing to follow published decision of another appellate division); see also People v. Cole, 165 Cal. App. 4th Supp. 1, 17 n. 13, (2008) (appellate division refusing to follow published decision of appellate *department* of another county because "superior court appellate *division* cases are not binding authority." (emphasis added)).

equal jurisdiction.[25] An appellate division presumably also is free to overrule itself.[26]

The impact of a published appellate division decision on a superior court judge is not quite as clear. While a superior judge sitting in the same county as the appellate division that rendered the decision must follow its guidance as a reviewing tribunal,[27] one could argue that a superior court judge sitting in another county is not bound by the decision because it was rendered by judges of equal rank (superior court judge), not judges of a higher rank.

That would be a weak argument, however, given the history of trial court unification. As CAC pointed out, the California Supreme Court's pre-unification decision in *Auto Equity* established that "[c]ourts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction."[28] From that rule, it follows that a municipal court, as a court of lower jurisdiction, would be required to follow a published decision rendered by the appellate department of a superior court, regardless of where the superior court was located. Although *Auto Equity* did not involve such a fact situation,[29] its implications for that context are clear and straightforward.

In its report on implementation of SCA 4, the Commission explained that "[t]he appellate division is similar to the existing appellate department, but is intended to have greater autonomy *so that it can exercise a true review function in a unified superior court*."[30] In other words, the appellate division was intended to be like a reviewing court, with comparable authority over a decision made by a superior court judge sitting alone.

The Commission's report further explained that the objective of the implementing legislation was "to preserve existing rights and procedures despite unification, *with no disparity of treatment between a party appearing in municipal court and a similarly situated party appearing in superior court as a result of unification*

25. See generally People v. Williams, 26 Cal. App. 4th Supp. 1, 10, 31 Cal. Rptr. 2d 769 (1994) (pre-unification decision in which appellate department explains that published decision of another appellate department is a "decision from a court of equal jurisdiction" and thus "is not binding on this court.").

26. See generally Fentress v. Van Etta Motors, 157 Cal. App. 2d Supp. 863, 865, 323 P.2d 227 (1958) (pre-unification decision overruling prior decision by same appellate department); Witkin, *supra* note 22, at § 503.

27. See generally Cal. Const. art. VI, § 4; Code Civ. Proc. § 77 & Comment.

28. *Auto Equity,* 57 Cal. 2d at 455.

29. The issue in *Auto Equity* was whether an appellate department of a superior court was required to follow a court of appeal decision. The California Supreme Court determined that the appellate department was required to do so.

30. *TCU: Revision of Codes, supra* note 20, at 74 (emphasis added).

of the municipal and superior courts in the county."[31] Taken together with the preceding point, it follows that a superior court judge in a unified superior court is bound by an appellate division decision from any county, just like a municipal court judge was bound by an appellate department decision from any county under the doctrine of *Auto Equity*. Otherwise, there could have been disparity of treatment between a party appearing in municipal court and a similarly situated party appearing in superior court as a result of unification.

Because the Legislature relied on the Commission's report in enacting the implementing legislation for SCA 4, the statements just discussed are legislative history, persuasive in determining the legislative intent underlying the implementation of that constitutional measure.[32] In all likelihood, courts would view the binding effect of an appellate division decision in the manner discussed above.[33]

There are, however, recent authorities saying that appellate division decisions "are of debatable strength as precedents,"[34] just as there were pre-unification authorities (including a California Supreme Court case) saying that "decisions of the appellate department … are 'of debatable strength as precedents ….'"[35] None of those sources encourage the Legislature to provide statutory guidance on the matter.

STAFF RECOMMENDATION

As discussed above, the Commission considered the possibility of addressing the precedential value of an appellate division decision in 1997, but decided that a statute on that point was unnecessary. In general, the Commission does not second-guess itself without good reason.[36]

The precedential value of an appellate division decision lies within the core functioning of the judicial system. If necessary, the Judicial Council could address it by court rule or propose legislation on the matter, or the courts could resolve it in an appropriate case. **There does not seem to be any need for the**

31. *Id.* at 60 (emphasis added).
32. See *2019-2020 Annual Report*, 46 Cal. L. Revision Comm'n Reports 711, 729-34 (2019).
33. In the recent case of *DeLisi v. Lam*, for instance, the court of appeal said in dictum that "[p]ublished decisions of the superior court appellate division have precedential value." 39 Cal. App. 5th 663, 682, 252 Cal. Rptr. 3d 336 (2019).
34. *Velasquez*, 227 Cal. App. 4th at 1477 n. 7; see also 9 B. Witkin, California Procedure *Appeal* § 503 (5th ed. 2020).
35. Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 782 n.9, 647 P.2d 122, 183 Cal. Rptr. 846 (1982), *quoting* 6 B. Witkin, California Procedure *Appeal* § 691, p. 4584 (2d ed. 1971).
36. See generally CLRC Handbook Rule 70.

Commission to get involved, particularly because there is no evidence of pressing problems in the area.

Does the Commission agree with this perspective? Comments from knowledgeable sources would be helpful.

Respectfully submitted,

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