DEALING WITH AN UNPUBLISHED VICTORY: ETHICS AND STRATEGY

by Elaine A. Alexander, Executive Director
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An exchange on a statewide list serve about seeking publication of an unpublished favorable opinion underscores a problem many attorneys may have not considered fully. It involves the tension between (a) the need of defendants in general to have the good decision usable as precedent by getting it published versus (b) the winning client's need to minimize the profile of the decision in order to insulate it as much as possible from Supreme Court review.

The list serve exchange was prompted by an unpublished appellate decision, favorably resolving an issue that had been plaguing defense counsel in many areas of the state. The decision became known to some trial attorneys in other counties, and they mused on the list serve about seeking publication under rule 8.1120(a),[1] so that their own clients could benefit from the decision.

Counsel for the victorious defendant asked they not do so. Counsel noted that publication greatly enhances the chances of rehearing or review, thus putting the win for the individual defendant at risk. One reason is that opposing institutional counsel, such as the Attorney General or the County Counsel, may be more motivated to seek rehearing or review if the decision will have widespread effects on the office's other cases. Another reason is that, even if the opponent does not petition for review, the Supreme Court regularly surveys recent decisions for issues that have broad implications, with a view to granting review on its own motion. It pays special attention to published opinions, since unpublished ones have no generalized effects beyond the particular case.

A grant of review naturally carries the possibility the high court may reach the opposite result, wiping out the win. Even if the client's position prevails in the end, review significantly delays the effects of the win – probably by a year or two or more. This can mean the denial of any meaningful relief at all if the client's immediate custody is at stake. At the least, review produces a prolonged period of uncertainty for the client.

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[1]Under the rule, the request is made by letter to the rendering court within 20 days after the opinion is filed. "Any person" may request it.

Dilemma for attorneys not involved in the victory

Normally it is at least clear that the winning attorney should protect his or her own client by not seeking publication.[2] But what about other attorneys with clients who would benefit from having the winning decision published? Appellate attorneys could cite it to considerable effect in their briefing. Trial counsel could not only cite it, but point to its effects under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 – namely, the rule that lower courts throughout the state must follow the decisions of higher courts. If the newly published favorable case is the only appellate decision on the point out there, it is binding on all trial courts, at least when final.[3] If there is at least one published decision on the same point going the other way, the new case creates a conflict, freeing trial courts from the binding effect of the unfavorable decision and allowing them to choose between higher courts' positions. (*Id.* at p. 456.) For these reasons, outside attorneys have a powerful incentive to seek publication. This puts them on a collision course with counsel for the victorious defendant, who seeks to preserve the victory by keeping it unpublished.

The outside attorneys now ask themselves: *May* I or *must* I or *should* I seek publication? Our analysis:

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[2]A remotely possible exception would be when the client appealed precisely in order to change the law. Counsel then may be bound to pursue the client's express wish for publication – and, very possibly, review. The client, after all, determines the ultimate objectives of the litigation. But that kind of public interest motivation is exceedingly rare in criminal and juvenile cases because of the enormous personal interests at stake.

[3]ADI recently submitted to the California Supreme Court comments on a proposed rule of court that would affect the citability and binding effect of review-granted decisions. ADI's comments noted the law, though not conclusively settled, seems to be that a published case is binding on lower courts under *Auto Equity* only after it becomes final; until then it is citable and can be used for persuasive purposes (rule 8.1115(d)), but is not binding. It is not yet known whether the Supreme Court agrees with this analysis.

ADI would be pleased to send counsel, on request to Elaine Alexander, eaa@adi-sandiego.com, a copy of ADI's comments, which cite a number of authorities on the subject. Please note that some of the authorities are unpublished; those may be cited in a public discussion of policy, such as an Invitation to Comment on proposed rules, but not in litigation. (See rule 8.1115(a).) ADI's analysis may be useful in postponing the effects of an *unfavorable* published opinion, but of course, if the new opinion *helps* clients, counsel will urge other courts to follow it, binding or not.

First, as to the question "*May* I seek publication?": Asking for publication of someone else's case to aid one's own client is not unethical, the effects on the probability of review notwithstanding. Attorneys have no ethical duties to clients not their own, beyond the general duty owed to all counsel, litigants, courts, and the public to act according to the Rules of Professional Conduct. Defendants often have conflicting interests – as in the example encountered here. That is why we give them independent counsel, whose first and undivided loyalty is to the individual client. It is not unethical to act on behalf of your own client, effects on someone else's client notwithstanding. In fact, it could be unethical *not* to act. We cannot possibly be "one team" of defense attorneys when the community of our clients have conflicting interests.

On the other hand, as to the question "*Must* I seek publication?": We do not think it is unethical to refrain from seeking publication, even though it may benefit your own clients. Actions outside the context of litigation, such as requests for publication or depublication, are not, in our opinion, within the scope of appointed counsel's mandatory ethical duties.[4] You can be completely loyal to and effective on behalf of your client without engaging in such extracurricular activity.

Thus we are in the territory of "*Should* I seek publication?" This is a question of what may be useful or not useful to do, not what you ethically "must" or "must not" do. Here, the interests of clients other than your own, or defendants in general, can properly be weighed, although, unlike your own client's interests in handling his or her case, they need not be decisive. Attorneys should consider the practical realities, weighing the magnitude and likelihood of risks and benefits of all courses of action. When an attorney has done so reasonably and in good faith, other counsel should respect the decision reached.

Protecting your own wins

Although the proper course of conduct for outside attorneys may be decided through the balancing process described above, winning counsel's actions continue to be bound by the ethical duty of loyalty to the individual client. Counsel needs to protect the client's favorable decision while it is still "vulnerable" – that is, as long as opposing counsel can seek review or the Supreme Court can grant review on its own motion. (Rules 8.500(e), 8.512(c).)

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[4]Counsel are appointed by the Court of Appeal to handle the *appeal*. Their duties are limited by scope of the appeal and potentially such related proceedings as writs flowing from them. Appointed counsel are not the defendant's all-purpose attorney, on retainer for anything that might come up.

Shh . . .

Here we give the most counter-intuitive advice you are ever likely to get: When you get a big appellate win in an unpublished opinion, KEEP QUIET! There is a totally natural tendency to get the word out, especially when many defendants across the state are losing on that very point. But "sharing the good news" inevitably creates the kind of dilemma described here.

Although you would not seek publication yourself, advertising the decision is a virtual invitation to other attorneys to do so, precisely because their own clients may well benefit from the decision and they do not have the same ethical constraints with respect to your client that you do – indeed they will feel the opposite pull. For your victorious client's sake, keep the win under your hat as best you can until the case is final for California review purposes.

If the word gets out . . .

Of course, all appellate opinions are public, even unpublished ones, and so diligent searchers may be able to find your winning decision, even if you have not advertised it. If this happens and your victory becomes known to another attorney who is considering a request for publication, the balancing approach outlined above for outside counsel would apply.

You might respectfully ask the outside attorney not to do so, pointing out the huge stakes for your client and demonstrating how the balancing process comes out in favor of not requesting publication. That *might* carry the day, but be prepared for the attorney to decide to submit the request. If so, accept the decision graciously. You may well do the same thing some day when the shoe is on the other foot, and you have clients who would benefit from publication of another attorney's win.

It might also be useful to file opposition to the publication request,[5] but that can be very tricky, since opposition itself tends to raise the profile of the case and formulating a credible argument against publication is difficult. "I don't want the Supreme Court to get its hands on my victory" probably will not cut it with the court. Careful consultation with the ADI staff attorney is called for here. Together we may be able to formulate a credible argument for the non-publication-worthiness of the opinion. Regardless, hang tough – the odds are significantly against a grant of review, even with a published decision.

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[5]Opposition is not expressly authorized by the rule 8.1120. But counsel may ask leave of court to file it nonetheless. There is no harm in trying.