

AGENDA ITEM

DATE: February 19, 2014

TO: Members, Stakeholder Relations Committee

FROM: Saul Bercovitch, Office of General Counsel/Office of Governmental Affairs

SUBJECT: Possibility of Expedited Consideration of Section Requests to Publish or Depublish Court of Appeal Opinions

EXECUTIVE SUMMARY

At the November 2013 meeting of the Stakeholder Relations Committee, the Workers' Compensation Section sought approval to establish an Unpublished Cases Review Sub-Committee to review and selectively request certification for publication of Court of Appeal decisions originally designated as unpublished. State Bar Senior Management recommended against adopting that proposal, which would have completely bypassed the existing review and approval process set by the State Bar's Amicus Curiae Policy, and the proposal was not approved. As an alternative, the Stakeholder Relations Committee expressed interest in exploring the possibility of expedited Board consideration of Section requests to publish or depublish Court of Appeal opinions. Given the very tight timeline imposed by other existing rules, there does not appear to be a feasible way to provide for expedited consideration of Section requests to publish Court of Appeal opinions, beyond that which is already imposed by those other rules. Requests to depublish Court of Appeal opinions are governed by a different timeline. Given that timeline, there does not appear to be any need to change the State Bar's Amicus Curiae Policy, to provide for expedited review of requests to depublish Court of Appeal opinions.

BACKGROUND/DISCUSSION

At the November 2013 meeting of the Stakeholder Relations Committee, the Workers' Compensation Section sought approval to establish an Unpublished Cases Review Sub-Committee to review and selectively request certification for publication of Court of Appeal decisions originally designated as unpublished. State Bar Senior Management recommended against adopting that proposal. The proposal was not approved.

Publication or depublication of an opinion can have a significant impact on California law and policy because, under the California Rules of Court, unpublished opinions are generally not citable as precedent. The State Bar has an existing policy governing amicus curiae participation by the Sections, which has been interpreted as applying to

requests for publication of Court of Appeal opinions as well as requests for depublication of Court of Appeal opinions. If the Workers Compensation Section – or any other Section – wishes to request publication or depublication of a Court of Appeal opinion, the Section can do so, but only pursuant to the existing State Bar Amicus Curiae Policy.* Among other provisions, that policy requires that an application to participate in litigation be approved by the full Board of Trustees or the Board of Trustees Committee on Operations, authorized to act on behalf of the full Board between regular Board meetings.

The proposal by the Workers' Compensation Section would have completely bypassed this existing review and approval process set by the Amicus Curiae Policy. As an alternative to completely bypassing that policy, the Stakeholder Relations Committee expressed interest in exploring the possibility of expedited Board consideration of Section requests to publish or depublish Court of Appeal opinions.

The ability to provide for expedited consideration is significantly constrained by other existing rules. Under California Rules of Court, Rule 8.1120(a)(3), a request for publication must be delivered to the Court of Appeal within 20 days after the opinion is filed. Under the State Bar's open meeting rules, notice of a Board meeting must be given at least 10 days before the meeting, subject to certain provisions not applicable here. Given this very tight timeline, there does not appear to be a feasible way to provide for expedited consideration of Section requests to publish Court of Appeal opinions, beyond that which is already imposed by these other rules.

At the November 2013 meeting, the Workers' Compensation Section specifically addressed requests to publish Court of Appeal opinions. The issue of requests for depublication has also come up in the past from other Sections. With those requests, the timing situation is different. Under California Rules of Court, Rule 8.1125(a)(4), a request for depublication must be delivered to the California Supreme Court within 30 days after the decision is final in the Court of Appeal, which is generally 30 days after the opinion is filed. That provides a 60 day window in most circumstances. Given that timeline, there does not appear to be any need to change the State Bar's Amicus Curiae Policy, to provide for expedited review of requests to depublish Court of Appeal opinions.

CONCLUSION

Given the very tight timeline imposed by other existing rules, there does not appear to be a feasible way to provide for expedited consideration of Section requests to publish Court of Appeal opinions, beyond that which is already imposed by those other rules. Requests to depublish Court of Appeal opinions are governed by a different timeline. Given that timeline, there does not appear to be any need to change the State Bar's Amicus Curiae Policy, to provide for expedited review of requests to depublish Court of Appeal opinions.

* The Amicus Curiae Policy is attached to this Agenda Item. Article 1 of that policy applies to the State Bar itself and Article 2 (which is subject to Article 1) applies to the Sections.

AMICUS CURIAE PARTICIPATION

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Article 1 STATE BAR

Section 1 Application of Amicus Curiae Policy

This chapter applies to all requests for State Bar participation in litigation as an amicus curiae, except the requests by general counsel to support State Bar positions in pending or prospective litigation or to protect activities or proceedings conducted by the State Bar or requests made directly by a court for participation by the State Bar. A request for State Bar participation in litigation as an amicus curiae includes any request which would require that the State Bar file or submit any pleading, in letter or other form, with a court in a pending matter, whether in support of a party or otherwise, and whether on the merits, jurisdiction or otherwise.

(Source: Board of Governors' Resolution, May 1981, December 1997.)

Section 2 Authorization

State Bar participation in litigation as an amicus curiae is subject to authorization by the Board of Trustees following an affirmative recommendation by the appropriate board committee.

(Source: Board of Governors' Resolution, May 1981.)

Section 3 Appropriate Cases

The State Bar is a judicial branch agency and should not ordinarily take a partisan position in another's lawsuit. State Bar amicus curiae participation is thus extremely limited and necessarily involves issues basic to the State Bar as, for example, validity and interpretation of the State Bar Act or State Bar rules; validity and interpretation of State Bar sponsored legislation; or the validity and interpretation of legislation or acts of court that can seriously affect the administration of justice and attorney-client relationships. It is also recognized that the State Bar amicus curiae participation will have greater impact on the courts if used sparingly.

Additionally, amicus curiae participation is authorized only as follows:

- (a) At the appellate level, and generally only in the highest court where an issue is likely to be determined.
- (b) When one or more significant legal questions are involved and a State Bar amicus curiae pleading would constitute a significant contribution to the determination of those questions.
- (c) Where the position sought to be advanced is consistent with previous policy of the State Bar or is a matter of compelling public interest which the Board of Trustees then adopts as policy of the State Bar consistent with its due charge. Where the pleading amicus curiae would not support a previous policy of the State Bar, the Board of Trustees shall first determine whether the position sought to be advanced ought to be the policy of the State Bar; and the board

will make a determination of whether the policy position of the State Bar should be advanced in that particular case through a pleading amicus curiae.

- (d) The court may consider the opinion of the State Bar on the matter in question to be enlightening and persuasive.
- (e) The resolution of the issue before the particular court involved will have an impact upon the development of the law.
- (f) The filing of the pleading is feasible, including timing, availability of counsel and expenses.
- (g) The filing of any pleading on behalf of the State Bar will be in compliance with the governing rules of court.

(Source: Board of Governors' Resolution, May 1981.)

Section 4 *Application Procedures*

- (a) Any person or entity, including any component part of the State Bar, requesting State Bar participation as an amicus curiae in litigation shall file an application and three (3) copies thereof with the secretary in the San Francisco office of the State Bar. The secretary shall furnish the general counsel one (1) copy of the application and all accompanying documents for review, and shall furnish copies of the application to, and invite comment from State Bar entities which the secretary shall deem to have an appropriate interest, and which have not been previously furnished the application by the requestor.

When the application is calendared for board committee and, in turn, board consideration, it shall be an open agenda item unless general counsel certifies that the matters to be discussed will:

- (1) Fall within the categories of matters specified in the lettered subdivisions of § 6026.5 of the Business and Professions Code;
 - (2) Fall within the attorney-client privilege, or are otherwise privileged from disclosure; or
 - (3) Involve information received or held by the State Bar that is protected by the California constitutional guarantee of privacy.
- (b) In order to make a well-reasoned decision as to whether amicus curiae participation should be undertaken by the State Bar, the board committee having jurisdiction and, in turn, the Board of Trustees, should be fully informed by the requestor as to the following application:

- (1) The name of the case, including the name and location of the court in which the pleading would be filed.
- (2) The names of the parties and their counsel and the names of all the known or anticipated amicus curiae and their counsel.
- (3) The name, address and phone number of the person making the request, along with those of the person(s) or entity(ies) on whose behalf the request is being made, should be set forth.
- (4) A designation of whether the requestor is a party in the litigation should be made. If not a party, the nature of the relationship between the requestor applying and the parties of the litigation, as well as the requestor's substantive concern with the issues being litigated, should be stated. If not a party, the requestor must indicate whether the party on whose behalf the State Bar is to intervene knows and consents to the State Bar's being asked to participate as amicus curiae.
- (5) If the court in which the litigation is pending is not designated as either the United States or California Supreme Court, the requestor must state compelling reasons why the State Bar should join in at another stage of litigation in spite of its general policy to refrain from so doing.
- (6) A statement of the principle of law or legal points to be supported, with a full explanation of the requestor's reasons for believing that the case is an appropriate one for State Bar involvement and why there is a necessity for additional argument on the law or legal points specified.
- (7) A statement of the undisputed and disputed facts in the case, including present status of the litigation.
- (8) Statement or full disclosure of any professional or personal interest in the matter of any proponent of the application.
- (9) The briefing schedule, including the date by which the pleading must be filed and a copy of the applicable rule of court or procedure regarding the timing of the filings.
- (10) A statement relating significant contributions it is believed the State Bar might make by filing a pleading in the particular case.

Appropriate and relevant pleadings, court decisions and orders entered in the case should also be submitted along with the application. The requestor must supply the State Bar with the record of the case, including past opinions and pleadings, to the extent possible at the time the request is made. The

requestor will be charged with supplying the State Bar with additions to the record until a decision on whether to file the amicus curiae pleading is made.

- (c) Only requests that are timely submitted to the State Bar will be considered. The requestor must approach the State Bar for its support as soon as possible after the record or pleadings are filed in the court in which the litigation is then pending. If the application submitted is complete, the matter will be placed on the next available board committee and Board of Trustees agenda, provided that independent evaluation and analysis of the record has been completed by the State Bar and agenda deadlines can be met. If the time to respond to the request is insufficient to allow the State Bar to make an independent evaluation of the record and the strengths and weaknesses of the position which it is being encouraged to take, the State Bar may refuse to consider the request in the first instance.
- (d) The requestor should understand that the State Bar may invite comment from appropriate State Bar committees and sections and interested parties, including opposing parties in the litigation, prior to final board action; that the State Bar is not precluded from taking any position on the issues presented by the litigation, even one or more which might be contrary to the one of the requestor; and that approval by the State Bar Board of Trustees is required for amicus curiae filings and would be conditioned on the board's decision to become, or even remain, involved.

(Source: Board of Governors' Resolution, May 1981, December 1997.)

Section 5 Appearance and Approval by Office of General Counsel

Normally, if amicus curiae is authorized, the appearance shall be made by general counsel or under general counsel's direction. In other instances, the pleading will only be filed following the approval of general counsel as to form and consistency with State Bar positions, policies, practices, rules and regulations.

(Source: Board of Governors' Resolution, May 1981.)

Article 2 STATE BAR SECTIONS

Section 1 Amicus Curiae Participation by Sections

Subject to the requirements in article 1 of this chapter, a State Bar Section may submit a brief and participate as amicus curiae in the Section's own name upon approval by the Board of Trustees if:

- (a) The Court has requested participation by the Section or the State Bar, which has then referred the matter to the Section; or
- (b) The special knowledge, training, experience or technical expertise of the Section would assist the court in deciding the matter and the Section's amicus curiae brief would bring to the attention of the Court relevant matter not already raised or adequately addressed. Sections should avoid advancing matters that burden the Court.

As a sub-entity of the State Bar, a judicial branch agency, the matter presented by a Section should be neutral in its content and tone. Partisan advocacy is disfavored and should be avoided.

Section 2 Avoiding Inconsistent Positions; Request by Executive Committees; Conflict of Interest

A request under this chapter should avoid the presentation of matters that are inconsistent with policies of the State Bar or with positions of other Sections or State Bar committees. The Executive Committee of a Section authorizing the request should seek consensus among its members.

- (a) A Section's request under this chapter must be authorized by the Section's Executive Committee. Only requests submitted to the Board by the Section's Executive Committee are eligible for consideration.
- (b) A member of an Executive Committee who or whose law firm is a party or is representing a party in the underlying litigation is disqualified from voting in the Executive Committee's decision to request amicus curiae participation.

Section 3 Disclaimer

Unless otherwise directed, the application and amicus curiae briefs of any Section authorized by the Board must include language explaining that (1) the position is only that of the Section and has not been adopted by either the Board of Trustees or the overall membership of the State Bar of California; (2) membership in State Bar Sections is voluntary; and (3) funding of Section activities, including amicus curiae participation, is obtained entirely from voluntary sources pursuant to California Business and Professions Code section 6031.5 and do not involve the expenditure of mandatory bar dues.

(Source: Board of Governors' Resolution, July 2003.)

Section 4 *Side Letter for Sections Amicus Participation*

- (a) A Proponent would identify an issue for a possible Amicus brief (“Project”) and prepare an Abstract of the position to be taken. The Proponent would also prepare a complete Application describing how the Project would meet the Amicus Policy. The Application should follow where applicable the provisions of section 4b of article 1 of the State Bar’s general amicus policy; however, the Application need include only a copy of the final decision or order that is the subject of appeal and such other documents as may be necessary to support the Application
- (b) The Executive Committee of the Proponent’s Section will review the Abstract in light of the Amicus Policy and make a determination about whether the Project should be forwarded for further action.
- (c) If the Executive Committee so recommends, the Application would be forwarded simultaneously to the Board of Trustees Committee on Operations (BOPS), to the relevant State Bar Committees and to the Executive Committee Chairs of the other Sections. Any Executive Committee of any Section or any State Bar Committee may comment on the Application to the BOPS.
- (d) BOPS will review the Application and any comments of Sections and Committees. The Proponent and any commenting Section or Committee may informally work together to resolve the comments.
- (e) BOPS is authorized by the Board of Trustees to act on its behalf on litigation matters in between regular meetings of the Board. If BOPS approves the Application (which may occur despite unresolved comments), the Proponent will then draft the Brief.
- (f) The Chair of BOPS and the General Counsel or her designee will review the final draft, work with the Proponent if necessary, and permit the Proponent to file the Amicus Brief in the name of the Section of the State Bar of California.

(Source: Board of Governors’ Resolution, March 2004 (see attachment to agenda item).)