

AGENDA ITEM

Workers' Compensation Section Request to Publish Court of Appeal Decisions

DATE: October 31, 2013

TO: Members, Stakeholder Relations Committee

FROM: Workers' Compensation Section

SUBJECT: Workers' Compensation Section Request to Publish Court of Appeal Decisions

EXECUTIVE SUMMARY

The Workers' Compensation Section Executive Committee unanimously voted to seek approval to establish an Unpublished Cases Review Sub-Committee to review and selectively request certification for publication of Court of Appeal decisions originally designated as unpublished. The Executive Committee strongly believes that a committee functioning under State Bar auspices would be highly beneficial to all practitioners involved in compensation law. The State Bar would be seen as proactively and impartially augmenting the body of citable workers' compensation law, which ultimately protects the public.

Senior Management recommends against adopting this proposal. Publication/depublishment of an opinion can have a significant impact on California law and policy because unpublished opinions are generally not citable as precedent. The State Bar has an existing policy governing amicus curiae participation by the Sections, which has historically been interpreted as applying to requests for publication of Court of Appeal opinions as well as requests for depublishment of Court of Appeal opinions. This proposal would completely bypass the existing review and approval process established by the State Bar amicus curiae policy. If necessary, the amicus curiae policy could be clarified to specifically apply to requests for publication and depublishment.

BACKGROUND

The Workers' Compensation Section would like approval to establish an Unpublished Cases Review Sub-Committee to review and selectively request certification for publication of Court of Appeal decisions originally designated as unpublished. There is an obvious and acknowledged need for a greater number of published, and therefore citable, appellate decisions pertaining to workers' compensation law. Since 2004, two major statutory revisions have resulted in increased appellate litigation seeking to clarify complex, confusing, and often internally inconsistent Labor Code provisions. Ironically, since the first reform law, the ratio of unpublished to published appellate cases has

increased dramatically. During the decade preceding the first major revision, approximately 38% of appellate cases were originally designated as unpublished, with the remainder certified for publication. Since 2004, unpublished cases have ranged from a yearly low of 58% to a high of 70%. The scarcity of citable case law has lead practitioners to engage in inappropriate efforts to circumvent the prohibition against citing unpublished decisions, resulting in numerous cautions and even threats of sanctions by the judiciary.

DISCUSSION

The Workers' Compensation Section Executive Committee seeks to formally establish an Unpublished Cases Review Sub-Committee. The section believes this request can easily be distinguished from the filing of an amicus brief. The proposed subcommittee would act only after an appellate decision has been issued, not before.

The suggested sub-committee would consist of monthly rotating panels comprised of two retired judges, two attorneys representing injured workers, and two defense attorneys, all drawn from a group of statewide volunteers. Each monthly panel would seek to balance geographic representation from California as a whole. The panels would evaluate all unpublished appellate decisions issued following final decision by the Workers' Compensation Appeals Board. The proposed sub-committee would carefully review the case in light of all directives of the California Rules of Court Section 8.1105, "Publication of appellate opinions" before making any recommendations. A formal request to seek publication certification would be made only following a vote of 2/3 or more of panel members.

The standard form letter sent to the issuing Court of Appeal (with copies to all parties of record) would contain the following statement: "Consistent with its nonpartisan charter, the committee expresses no opinion as to whether the referenced case was correctly or incorrectly decided; rather, the committee believes that the case satisfies one or more of the criteria set forth in California Rules of Court, Rule 8.1105(c) and publication will serve to assist litigants when researching and applying the legal issues discussed in the case. This request for publication is made by a neutral and nonpartisan committee and is not intended to cause potential embarrassment of any party, but rather to advance the understanding of the case law in this complex area."

In order to ascertain the possible efficacy of such a subcommittee, an ad hoc group has functioned on a trial basis during the past year. The group, named The Unpublished Workers' Compensation Cases Review Committee, has carefully avoided making any claim of State Bar affiliation or approval during this period. To date, the group has evaluated almost a dozen cases, and has voted to request publication certification in four. Two requests were successful, one was rejected but is pending before the Supreme Court on further review, and one awaits Court of Appeal action.

The section believes a request for certification will not in any way affect or impede further appellate litigation by the parties to a case. A successful request for rehearing to

the Court of Appeal would nullify the original decision issued, and a successful Petition for Hearing by the Supreme Court would automatically render the opinion non-citable, regardless of whether it had previously been certified or non-certified for publication.

ISSUE

Representatives of the Workers' Compensation Section have discussed this proposal with State Bar Senior Management. Senior Management recommends against adopting this proposal. Publication/depublishment 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. That policy has historically been interpreted as applying to requests for publication of Court of Appeal opinions as well as requests for depublishment of Court of Appeal opinions.

If the Workers Compensation Section – or any other Section – wishes to request publication or depublishment of a Court of Appeal opinion, the Section can do so, but only pursuant to the existing State Bar policy. Among other provisions, that policy requires that an application to participate in litigation be sent to the Board of Trustees Committee on Operations, 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. The Board of Trustees Committee on Operations is authorized by the Board of Trustees to act on its behalf on litigation matters in between regular meetings of the Board, and may approve the Section application. The current proposal by the Workers' Compensation Section would completely bypass this existing review and approval process.

Questions have been raised before about the applicability of the amicus curiae policy to a request to publish or depublish a Court of Appeal opinion. That policy does not specifically refer to such requests. The overarching State Bar policy broadly covers any request that would require the filing or submission of “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” but other parts of the policy refer only to submission of a “brief” by a Section. To the extent the current policy is viewed as ambiguous, Senior Management recommends that it be clarified to specifically apply to a request for publication of a Court of Appeal opinion, depublishment of a Court of Appeal opinion, or any other Section involvement or participation in litigation.

CONCLUSION

The Workers' Compensation Section is seeking approval to establish an Unpublished Cases Review Sub-Committee to review and selectively request for certification, publication of Court of Appeal decisions originally designated as unpublished. The proposed subcommittee would act only after an appellate decision has been issued, not before.

The Workers' Compensation Section leadership strongly believe that a committee functioning under State Bar auspices will be highly beneficial to all practitioners involved in compensation law. Further, they believe the State Bar will be seen as proactively and impartially augmenting the body of citable workers' compensation law in order to protect the public.

Senior Management recommends against adopting this proposal. Publication/depublishment of an opinion can have a significant impact on California law and policy. The State Bar has an existing policy governing amicus curiae participation by the Sections. That policy has historically been interpreted as applying to requests for publication of Court of Appeal opinions as well as requests for depublishment of Court of Appeal opinions. To the extent the current policy is viewed as ambiguous, Senior Management recommends that it be clarified to specifically apply to a request for publication of a Court of Appeal opinion, depublishment of a Court of Appeal opinion, or any other Section involvement or participation in litigation.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

None.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

The Workers' Compensation Section Executive Committee requests the approval of the Board of Trustees to establish an Unpublished Cases Review Sub-Committee to review and selectively request for certification, publication of Court of Appeal decisions originally designated as unpublished. The Workers' Compensation Unpublished Cases Review Sub-Committee would act only after an appellate decision has been issued, not before.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Stakeholder Relations Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Stakeholder Relations Committee recommends that the Board approve the request of the Workers' Compensation Section Executive Committee to establish an Unpublished Cases Review Sub-Committee to review

and selectively request for certification, publication of Court of Appeal decisions originally designated as unpublished; and it is

FURTHER RESOLVED, The Workers' Compensation Unpublished Cases Review Sub-Committee would act only after an appellate decision has been issued, not before.

ALTERNATIVE RECOMMENDATION

To the extent the current State Bar amicus curiae policy is viewed as ambiguous, Senior Management recommends that the policy be clarified to specifically apply to a request for publication of a Court of Appeal opinion, depublication of a Court of Appeal opinion, or any other Section involvement or participation in litigation.

ALTERNATIVE PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Stakeholder Relations Committee agree with the above alternative recommendation, the following resolution would be appropriate:

RESOLVED, that the Stakeholder Relations Committee recommends that the State Bar's amicus curiae policy be clarified to specifically apply to a request for publication of a Court of Appeal opinion, depublication of a Court of Appeal opinion, or any other Section involvement or participation in litigation, with proposed amending language to be developed by State Bar staff for approval by the Board of Trustees.