RESOLUTION 07-02-2014 (as amended)

DIGEST
Rules of Court: Tentative Rulings Before Oral Argument On Appeal
Amends California Rules of Court, rule 8.256, to provide written tentative opinions before oral argument with indication if it is unanimous, and to otherwise require issuance of a focus letter.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 03-05-2006, which was disapproved and Resolution 07-04-2000, which was approved in principle.

Reasons:
This resolution amends California Rules of Court, rule 8.256, to provide written tentative opinions before oral argument with indication if it is unanimous, and to otherwise require issuance of a focus letter. This resolution should be approved in principle because it makes oral argument more meaningful by allowing counsel to focus oral argument on matters significant to the court's reasoning.

At present only the Fourth District, Division Two issues written tentative opinions. Some appellate divisions have recently implemented formal and informal practices of announcing oral tentatives. (E.g., Second Dist., Div. 8.) Some panels send focus letters in advance of argument.

The value of oral argument is debated. (See *People v. Pena* (2004) 32 Cal.4th 389, 402, fn. 7.) While courts acknowledge it is "the chance to make a difference in result" (*Moles v. Regents of Univ. of Calif.* (1982) 32 Cal.3d 867, 872), it rarely changes the outcome.

Appellate tentative opinions are also the subject of debate. (*Pena, supra*, at pp. 399-400.) Those in favor argue that they "enable counsel at oral argument to assist the court in avoiding errors in the court's ultimate opinion" and they assist in identifying issues that may have been overlooked or not adequately addressed. (*Id.*, p. 400, citing in part to Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California* (1995) 36 Santa Clara L.Rev. 1, 23–24.) Arguments against include the fact that not all appellate panels arrive at agreed upon tentative opinions before oral argument (see OCBA and SDCBA Counter Argument to Res. 03-05-2006) and concerns that justices might become invested in the tentative and less likely to change an incorrect decision (Ibid.; and see *Pena, supra*, 32 Cal.3d at pp. 399-400).

Despite the controversy over tentative rulings, this resolution is a good idea because informed counsel are more likely to provide the court with effective oral advocacy, thereby aiding in the decision making process. Further, in those appeals with marginal merit, a well reasoned tentative opinion will benefit the court and parties by giving the parties an opportunity to avoid the expense of an oral argument which is unlikely to change the result.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 8.256 to read as follows:
Rule 8.256

(a) Frequency and location of argument

(1) Each Court of Appeal and division must hold a session at least once each quarter.

(2) A Court of Appeal may hold sessions at places in its district other than the court's permanent location.

(3) Subject to approval by the Chair of the Judicial Council, a Court of Appeal may hold a session in another district to hear a cause transferred to it from that district.

(b) Notice of tentative opinion; request to focus on issues; argument

Promptly after the Court has written its tentative opinion ~~T~~the Court of Appeal clerk shall ~~must~~ send a copy of the tentative opinion to the parties, and notify all parties who have not otherwise waived the right to request oral argument that they may request oral argument. The clerk shall also notify the parties whether the Court's opinion is unanimous. When oral argument is requested the clerk shall provide notice of the time and place of oral argument to all parties at least 20 days before the argument date. If the Court is unable to reach a decision without the benefit of oral argument the clerk shall send a letter identifying the specific issues of interest to the Court and upon which the attorneys should focus their argument. The presiding justice may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

(c) Conduct of argument

Unless the court provides otherwise by local rule or order:

(1) The appellant, petitioner, or moving party has the right to open and close. If there are two or more such parties, the court must set the sequence of argument.

(2) Each side is allowed 30 minutes for argument. If multiple parties are represented by separate counsel, or if an amicus curiae-on written request-is granted permission to argue, the court may apportion or expand the time.

(3)Only one counsel may argue for each separately represented party.

(d) When the cause is submitted

(1) A cause is submitted when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court.

(2) If the Supreme Court transfers a cause to the Court of Appeal and supplemental briefs may be filed under rule 8.200(b), the cause is submitted when the last such brief is or could be timely filed. The Court of Appeal may order the cause submitted at an earlier time if the parties so stipulate.

(e) Vacating submission

(1) Except as provided in (2), the court may vacate submission only by an order stating its reasons and setting a timetable for resubmission.

(2) If a cause is submitted under (d)(2), an order setting oral argument vacates submission and the cause is resubmitted when the court has heard oral argument or approved its waiver.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Appeals are long and expensive processes for litigants. Zealous advocates, having expended so much of their clients' money on litigating the appeal and wanting to leave no stone unturned to ensure victory, rarely decline the opportunity to request oral argument. But once they get there they often have no idea what is on the justices' minds, or which way they are leaning, even though the justices have always prepared a tentative opinion in advance of the argument. It is well known to appellate practitioners that the justices, having committed by the

time of argument to a particular position, are often not inclined to steer counsel to discussion of issues that might require the court to rewrite its opinion. What is more, some considerable time has always elapsed between the completion of briefing and oral argument, and counsel are forced to review the entire record so that they can be prepared to answer any possible question posed to them even though most of the record may have no bearing on the court's ultimate decision. In large multi-issue cases, where oral argument often occurs many months or even years after the conclusion of briefing, this can be hugely expensive to the client.

Thanks to the Fourth DCA's two-decade experiment with issuing tentative rulings the empirical evidence now demonstrates the superiority of the tentative ruling system for appeals. The evidence shows that a court with a tentative ruling system changes its mind more than a court that hides the ball. A tentative ruling system results in more meaningful oral arguments that address the issues that concern the justices. It results in better decisions, because the parties have the opportunity to challenge the court's ruling in advance, and force it to correct any errors. It saves the clients money, because attorneys will no longer spend days reviewing unnecessary material that is not crucial to the court's ruling. And it surely results in better published law.

Our appellate court system should be about reaching the correct result, and nothing else. A tentative ruling system will result in a better judicial product, which in turn will make for more satisfied "customers," the parties seeking justice in our court system.

The Solution: The current rule does not require District Courts of Appeal (DCAs) to issue tentative rulings or opinions in advance of oral argument, or provide any information whatsoever to the parties as to their likely disposition of the case. Each DCA is free to make its own rules on this subject, but only the Fourth DCA, Division Two, has adopted a practice of issuing their tentative opinions to the parties in advance of oral argument.

This resolution would require all DCAs to either issue their tentative memoranda of opinion or a "focus letter" a week before oral argument, to alert the parties to the basis for the court's likely ruling and/or the issues the parties should address at oral argument.

LEGISLATIVE HISTORY
Not known.

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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COMMENTS TO RESOLUTION 07-02-2014

SAN DIEGO COUNTY BAR ASSOCIATION

DISAPPROVE: The California front-ended process is nearly unique in the nation and is driven by the state constitutional and statutory requirement for judges to decide matters within 90 days of submission. In federal appellate courts and virtually all other states, the court does not conference on appeals until after oral argument. In effect, argument is the beginning of the court's conference—the first time the judges learn about their colleagues' views of an appeal. The California process of preparing a tentative opinion and conferencing on it is criticized by judges and appellate lawyers in the federal system and other states. There is absolutely no doubt that it devalues argument.

Second, at least divisions 1 and 3 of the Fourth Appellate District do not conference on appeals before argument. Making disclosure of tentative opinions mandatory would force those courts to change their practices, to the detriment of lawyers and parties.

Third, forcing disclosure of tentative opinions will force courts that conference but do not release opinions to upgrade their tentatives, which now are often very rough and sometimes are equivocal about the proposed result. This would further ossify the tentative result and devalue argument.

Fourth, releasing a tentative opinion tends to freeze the result because judges are reluctant to change their work product after it is in the public domain. One reason is the psychology of admitting one has erred. But judges rightly fear that the press and the blogosphere will criticize them for issuing a tentative and then changing their minds.

Finally, there are better alternatives for helping counsel focus preparation and argument. The oral argument focus letter is the best of these, and its use should be encouraged.