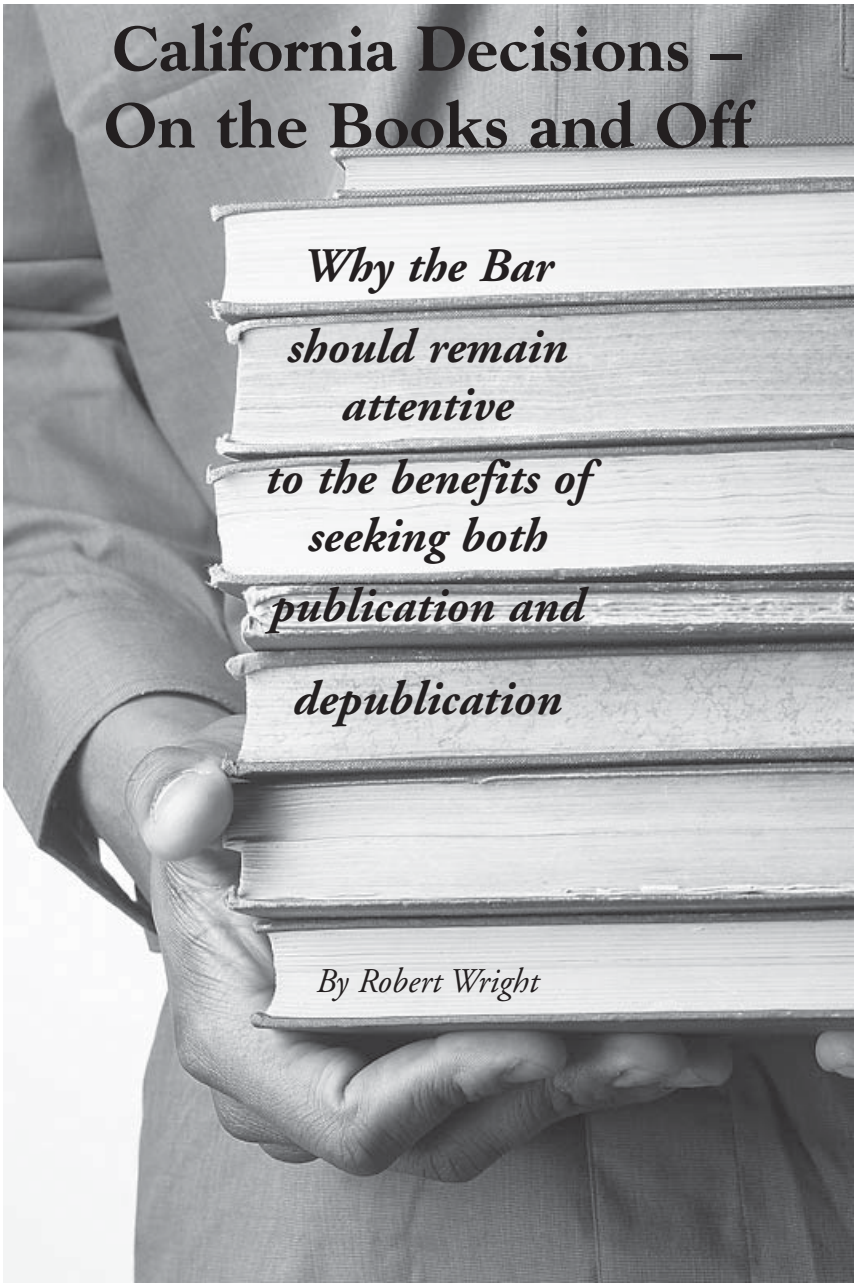
California Decisions – On the Books and Off



In California, only about one out of 10 Court of Appeal opinions are published in the official reporter, *California Appellate Reports*. The other nine out of 10 cannot be cited as precedent and do not shape California law. Yet the Bar may be unfamiliar with the procedures for requesting publication and depublication of Court of Appeal opinions, and unaware that changes in judicial perceptions and court rules have influenced the willingness of courts to order that opinions be published or depublished.

All Supreme Court opinions are published. (Cal. Rules of Court, rule 8.1105(a).) But Court of Appeal opinions are published only by order of the Court of Appeal or the Supreme Court. (Cal. Rules of Court, rule 8.1105(b).) Unless they are published, Court of Appeal opinions are not citable as precedent; they can be cited only for narrow purposes such as establishing the law of the case, res judicata, or collateral estoppel. (Cal. Rules of Court, rule 8.1115.)

The rules limiting the publication and citation of judicial opinions have long been controversial. A common criticism is that "unpublished and uncitable opinions . . . are creating an *invisible shadow body of law*." (Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediancy for Overloaded Appellate Courts Justify the Means of Secrecy?* (1998-1999) 50 S. C. Law Rev. 235, 247, emphasis added.) But the contrary argument is that nonpublication can be an efficient tool for preventing the citation of potentially misleading opinions and that depublication of opinions thus "performs a useful—perhaps even vital—function in California's judicial system today." (Richland, *Depublish or Perish: Why Depublication Is Good for the California Judicial System* (August-September 1990) Los Angeles Lawyer.)

Perhaps in recognition of this controversy, the California Rules of Court were amended about three years ago to encourage the publication of more Court of Appeal opinions. Prior to April 2007, there was a presumption *against* publication. At that time, Rule 8.1105 of the California Rules of Court stated that "*[n]o* opinion of a Court of Appeal . . . may be certified for publication" unless it met certain criteria. (Emphasis added.) The April 2007 amendments changed the presumption by providing that "[a]n opinion of a Court of Appeal . . . *should* be certified for publication . . . if the opinion" satisfied the publication criteria. (Emphasis added.)

The April 2007 amendments also expanded the criteria for publication. Under those expanded criteria, a Court of Appeal opinion should be published if it satisfies any of a number of flexible tests: if it establishes a new rule of law; applies an existing rule of law to a significantly different set of facts; modifies, explains, or criticizes an existing rule of law; advances a new interpretation of a statute; addresses or creates a conflict in the law; involves a legal issue of continuing public interest; contributes significantly to legal literature; reaffirms a principle of law not recently applied in a reported decision; or is accompanied by a concurring or dissenting opinion and publication would contribute significantly to the development of law. (Cal. Rules of Court, rule 8.1105(c).)

These amendments have increased the percentage of Court of Appeal opinions that get published. Starting with the 1996-1997 court year (court years begin each September 1), the California Judicial Council has tracked the publication of Court of Appeal opinions. Since the April 2007 amendments, the percentage of all published Court of Appeal opinions has *increased by more than one quarter* and the percentage of published opinions in civil cases has increased *by close to one half.* Thus, for the court years 1996-1997 to 2005-2006, the percentage of published opinions averaged 7 percent, but increased to 9 percent over the court years 2006-2007 to 2008-2009. And in civil cases, the percentage for the same periods increased from 12.7 percent to 18.3 percent. Statistics for 2010 are not yet available, but are unlikely to show any change in this increased rate of publication.

Given the Court of Appeal's greater willingness to publish its opinions, litigants should consider requesting publication in cases where the Court of Appeal does not initially order publication. Any person may submit a letter to the Court of Appeal explaining why its opinion satisfies the standards for publication and requesting that the opinion be published. (Cal. Rules of Court, rule 8.1120.) The letter must be submitted within 20 days of the opinion's filing. (Cal. Rules of court, rule 8.1120(a)(3).) And the Court of Appeal has until 30 days after the opinion's filing to grant a publication request. (Cal. Rules of Court, rules 8.264(b)(1), 8.1120(b)(1).) Based on anecdotal evidence, the Court of Appeal appears receptive to such requests, at least where the requests are reasoned and show why the opinion in question meets the criteria for publication.

Publication can have a downside for the prevailing party; in some cases it may increase the likelihood that the Supreme Court will grant review. The Supreme Court grants review "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The publication of a Court of Appeal opinion may suggest that the case raises important questions of law satisfying the review criteria. And where a Court of Appeal opinion conflicts with another decision, publication of the opinion may prompt the Supreme Court to grant review to secure uniformity of deci-

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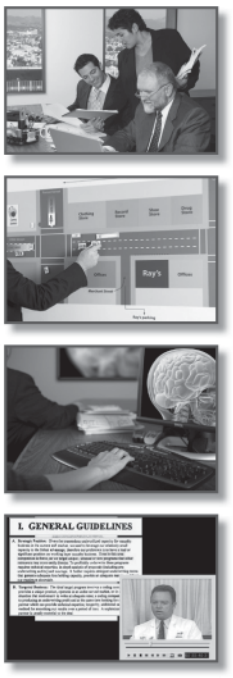
sion. Of course, the publication of a Court of Appeal opinion does not necessarily lead to review. The grant of review is the exception, not the norm, and the Supreme Court has demonstrated a willingness to allow Court of Appeal opinions to stand as the governing authority on many important legal issues.

If the Court of Appeal does not grant a request for publication, it must forward the request to the Supreme Court with a brief explanation of its reasoning for not publishing the opinion. (Cal. Rules of Court, rule 8.1110(b).) The Supreme Court may then order the opinion published. (Cal. Rules of Court, rule 8.1110(b).) But this is generally a dead end. In the 2009-2010 court year, the Supreme Court ordered the publication of only *one* opinion that the Court of Appeal did not certify for publication, and that was in a case where the Court of Appeal recommended publication (but the time for the Court of Appeal to grant the publication request had expired).

Sometimes it is depublication, not publication, that is desired. Any person may submit a letter to the Supreme Court requesting that a Court of Appeal opinion that was certified for publication not be published. (Cal. Rules of Court, rule 8.1125(a)(1).) The letter must be submitted within 30 days after the Court of Appeal opinion is final in the Court of Appeal. (Cal. Rules of Court, rule 8.1125(a)(4).)

Like the publication rules generally, the depublication of Court of Appeal opinions has been controversial. (See Gerstein, *Law By Elimination: Depublication in the California Supreme Court* (1984) 67 Judicature 293, 297 [depublication "leaves no trace to guide lawyers and judges in the future"].) Perhaps in response to this criticism, the Supreme Court over the years has dramatically curtailed its use of depublication. In the court year 1989-1990, the Judicial Counsel first began to track the number of Court of Appeal opinions that were ordered depublished. In that year, the Supreme Court ordered 111 opinions depublished. The number has steadily trended downward. By 2007-2008, the Supreme Court



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ordered just 14 opinions depublished. And in the most recent court year (2009-2010), the court ordered a mere four opinions depublished.

If the trend were to continue, depublication would exist in name only. But the 2009-2010 court year may have been somewhat of an aberration. In the first two months following the end of that court year, the Supreme Court ordered six Court of Appeal opinions depublished—half again more than it had ordered depublished during the enter prior year. The depublication of only four opinions during the 2009-2010 court year may thus turn out to be a low water mark. Nonetheless, there is no reason to expect the Supreme Court to return to the days of depublishing 100 or more opinions a year.

Since the Supreme Court orders so few Court of Appeal opinions depublished, it is useful to know when the Supreme Court views depublication to be appropriate. Retired Supreme Court justices have explained that "[d]epublication is most frequently used when the court considers the result to be correct, but regards a portion of the reasoning to be wrong and misleading." (Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 522; see also Note: *Decertification of Appellate Opinions: the Need for Articulated Judicial Reasoning and Certain Precedent in California Law* (1977) 50 S. Cal. L. Rev. 1181, 1185, fn. 20 (1977) [quoting retired Chief Justice Donald Wright as writing: "With few exceptions, the only opinions which are ordered to be nonpublished are those in which the correct result has been reached by the Court of Appeal but the opinion contains language which is an erroneous statement of the law"].)

It also appears that the Court of Appeal opinions most likely to be depublished are those that address unusual facts and do not modify or criticize existing rules of law. Of the 10 decisions that the Supreme Court ordered depublished between September 1, 2009, and November 1, 2010, not one criticized or disapproved of another appellate court decision or identified a split in appellate court authority. And most or all involved relatively unusual facts that seem unlikely to be repeated. For example, in *People v. Ligons* (ordered not published September 1, 2010, S183795), the Court of Appeal had considered whether the defendant could be convicted of attempted escape by force or violence when the defendant sought to escape from her jail cell to make a phone call but apparently did not seek to escape from the jail itself. Some cases are unique.

Although the Supreme Court appears unlikely to order depublication of an opinion on an issue that has divided the appellate courts, such a result is still possible. On November 10 of this year, the Supreme Court ordered depublished the opinion in *In re Skyler* (ordered not published S186170). The Supreme Court did so although the opinion recognized a split in intermediate appellate court decisions on the issue of whether a child's attenuated Indian heritage invoked the Indian Child Welfare Act. Justice Kennard dissented from the denial of review, which may signal that the court is looking for a more appropriate case in which to resolve that split. As the case shows, depublication may be a viable, if not common, remedy in cases involving a split of intermediate appellate authority.

In summary, the bar should remain attentive to the benefits of seeking both publication and depublication. A depublication request may be appropriate when the Court of Appeal has reached the right result in a case involving unusual facts, but via an opinion that could be misleading if citable as precedent. Requests for publication are of even greater importance. Because the Court of Appeal is publishing an increasing percentage of its opinions, and the criteria for publication are broad and flexible, counsel who wish to shape the development of law in California should consider monitoring newly issued unpublished opinions on topics of interest to their clients (perhaps using electronic research alert services), and requesting publication of those that establish new rules of law, modify, explain, or criticize existing rules of law, or otherwise meet the criteria for publication.

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