California (Finally) Ends Automatic Depublication
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California's intermediate appellate courts, the Courts of Appeal, produce approximately ten thousand written opinions each year. Fewer than one in ten are published. In most cases, the decision to publish or not is made by the deciding court applying criteria set out in Cal. Rules of Court 8.1105(c). Except where res judicata or related doctrines are involved, opinions that are not certified for publication may not be cited or relied upon by "a court or a party in any other [California] action." Cal. Rules of Court 8.1115(a). While the deciding court makes the initial call, the California Supreme Court can "depublish" an opinion even as it lets the lower court's disposition of the case stand. Cal. Rules of Court 8.1105(e). During 2015 the court did so in a dozen cases. (It can also direct that a Court of Appeal decision be published, but that is a rare occurrence.)

In a year's time the California Supreme Court receives nearly eight thousand petitions for review, agreeing to hear less than ten percent. Prior to a rule change that takes effect on July 1, 2016, the high court's decision to take a case automatically placed the opinion being appealed in the "unpublished" category. Of course, in the modern era, this did not prevented the circulation of the previously "published" decision in print or online. Indeed, all "unpublished" opinions of the Courts of Appeal are released to the public at a judicial branch website. But automatic depublication blocked citation of it and any subsequent judicial reliance.

This unique rule dates from a time when the California Supreme Court reviewed trial court decisions de novo, so that its agreeing to hear a case effectively nullified the prior opinion of the intermediate appellate court in the matter. A 1984 constitutional amendment altered that framework. Bar groups and judges urged that the depublication rule be revisited, but without success. Three decades later the California Supreme Court released a set of proposed amendments for public comment. With some modification those changes were adopted in June 2016, effective July 1.

After that date a grant of review by the California Supreme Court will no longer automatically remove "published" status from a Court of Appeal opinion. Under the revised rule, the Supreme Court can take that step but only upon an affirmative decision to do so. Even with that change, a grant of review does automatically affect the weight to be given the opinion by other California courts. Pending resolution of the appeal, the Court of Appeal opinion "has no binding or precedential effect." It may be cited but only for its "potentially persuasive value."

Chalk this up as a very modest reform. As Professor David Cleveland reports in the most recent issue of The Journal of Appellate Practice and Process, the last decade has seen a significant and steady shift in state rules governing "unpublished" or "non-precedential" decisions. His article counts seven states as having moved to permit citation of unpublished decisions, one as going the further step of granting them precedential weight, and five as having eliminated the "unpublished" category altogether. California's change comes nowhere near such measures or even the situation in the federal courts under Rule 32.1 of the Federal Rules of Appellate Procedure. Perhaps, in another thirty years?