High court to end automatic depublication

Lawyers applaud decision to end 110-year-old practice

By Saul Sugarman
Daily Journal Staff Writer

Lawyers on Wednesday applauded a decision by the state Supreme Court to abolish the depublication of lower California appellate opinions once they have been granted high court review.

Effective July 1, the decision ends a practice that began more than 110 years ago. The state Supreme Court began automatic depublication in 1905, and the practice became part of the California Rules of Court in 1964.

"This is probably something that should have been done a long time ago," said Benjamin G. Shatz, a Los Angeles-based appellate partner with Manatt, Phelps & Phillips LLP.

"People would find these cases and would have trouble citing them and would have to pretend they didn't exist," added Shatz. "This makes things a bit more above board. It allows a little more flexibility on how lawyers can present their case."

But it could just be the "tip of the iceberg" on the issue, according to Michael K. Schmier, an Emeryville-based retired attorney and outspoken critic of depublishing opinions.

Schmier and his brother Kenneth, another Emeryville-based lawyer, say the state Supreme Court should make good on promises made in 2004 and 2008 to do studies on getting rid of depublishing altogether.

"It's OK, what they're doing," Schmier said of Wednesday's announcement. "Anything to lessen the amount of depublication is good."

David S. Ettinger, an Encino-based partner with Horvitz & Levy LLP, called the change a "positive" one.

He added that he was pleased that the state Supreme Court elected to go with a version of its new rule that will label appellate decisions granted review as "persuasive" and not binding.

"If it were otherwise – meaning an opinion remained binding precedent pending review – and if the Supreme Court reversed the Court of Appeal ... the Court of Appeal opinion would have required superior courts throughout the state to make flawed rulings during the entire period that the case remained pending in the Supreme Court," Ettinger said in an email.

Mary-Christine Sungaila, an appellate partner at Haynes and Boone LLP in Costa Mesa, said Wednesday's decision represents a "sea change in California law," bringing the state "in-step with every other state and federal jurisdiction."

She cautioned, however, that "lawyers will need to be extremely careful to determine the status of

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High court shifts on depublishing

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any particular published intermediate appellate decision before citing it, and may consider this another reason to consult an appellate expert."

David J. de Jesus, a San Francisco-based counsel with Reed Smith LLP, said determining the status of an appellate opinion has been made easy with electronic research, which is something lawyers did not have when automatic depublishing first became a practice.

"In some ways, the [depublishing] rule was paternalistic. The Supreme Court kept the rule because it wanted to eliminate confusion," said de Jesus.

"I am pleased that the Supreme Court is getting away from this notion it has to protect lawyers from themselves," he added. "The rule places responsibility for thorough legal research squarely on the attorney's shoulders, where it belongs."

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