DEPUBLISH OR PERISH:

WHY DEPUBLICATION IS GOOD FOR THE CALIFORNIA JUDICIAL SYSTEM

By Kent L. Richland

Depublication—the California Supreme Court's discretionary power to order that a Court of Appeal opinion not be published in the Official Reports, thus depriving the opinion of precedential value[1]—has been the subject of increasingly widespread criticism in recent years.

Lawyers claim the practice results in injustice to their clients; intermediate appellate court justices lament that its effect is to consign some of their best work to oblivion.[2] One appellate justice has denounced depublication as "evil," charging that its use "to erase the prior history of a case" is akin to "something we associate with the Stalinist era in the Soviet Union."[3]

Notwithstanding the vehemence of the criticism, depublication performs a useful—perhaps even vital—function in California's judicial system today. Far from being the cause of injustice, depublication helps prevent the proliferation of injustice. Moreover, it seems evident that the charges of censorship are at least overblown, if not utterly groundless.

In any event, the frustration and disappointment experienced by a few attorneys and appellate justices at seeing their proudest efforts deprived of precedential impact seems a small price to pay for the greater certainty of result which the depublication process brings to California law.

DEPUBLICATION IN ACTION

Most lawyers possess a healthy, deeply ingrained distrust of any process that smacks of censorship of views relating to public issues. Perhaps for this reason, it is difficult to appreciate the utility of depublications in the abstract. An actual example of depublication in action is essential.

Jordan v. Long Beach Community Hospital was one of those hard cases so notorious for making bad law. The hospital was a peripheral defendant in a nightmarish medical malpractice action: somehow, the doctors had managed to remove the plaintiff's healthy left kidney rather than his cancerous right one. Expert evidence was necessary to prove whether there was any negligence on the hospital's part. At their pretrial depositions, plaintiff's experts testified to no one's great surprise that they believed the treating doctors had been negligent; however, each expert also stated he had no opinion whether the hospital had been negligent.

Nevertheless, by the time of trial, plaintiff's experts had formed opinions concerning the hospital's negligence, and the plaintiff offered this newly formulated opinion testimony as part of his case against the hospital. Holding that to permit presentation of such never-before-disclosed evidence would seriously prejudice the hospital (which had had no opportunity to prepare a rebuttal case) and would subvert the very purpose of pretrial discovery, the trial court refused to let the witnesses testify on this topic. Although the jury returned a substantial verdict against many of the doctors, it found the hospital was not liable.

The court of appeal reversed in a published opinion. It held that the trial court had no discretion to prohibit the expert testimony because the discovery statutes did not limit a witness's trial testimony to that which had been testified to at deposition. As for the prejudice to the hospital, the appellate court

observed that the experts could have been deposed during the trial outside of court hours, or the experts could have been "impeached" with their non-testimony at the depositions.

The hospital filed a petition for review in the California Supreme Court. However, it faced a formidable problem in attempting to obtain review. The problem had to do with the institutional role of the supreme court.

The California Supreme Court is not a court of error, it is a court of policy. That is, except in limited circumstances (*e.g.*, capital cases), the supreme court does not review cases to determine whether the lower court reached the correct result or whether justice was done; rather, the court is, of necessity, concerned with policy issues of widespread significance to the legal system as a whole or to a large segment of California's citizenry.[4]

The reason this presented a problem in the *Jordan* case was that the discovery statutes had recently been revamped, and there was little chance the supreme court would take up a case—no matter how wrongly it may have been decided—that turned on interpretation of a superseded statutory scheme.

Nevertheless, the policy embodied in the court of appeal's decision was a bad one, for it effectively permitted circumvention of pretrial discovery. Moreover, there was an argument that the new discovery statutes did not significantly alter the old ones with respect to the issue involved. Even before the petition for review was filed, trial lawyers were suggesting the opinion placed an official imprimatur on pretrial "sandbagging." And since the published court of appeal opinion was the law, the doctrine of stare decisis would mandate that it be followed in the trial courts.

The supreme court denied the petition for review, and it depublished the opinion. This disposition was clearly the appropriate one. The supreme court simply cannot spend its precious resources correcting every error perpetrated by a lower court. Although no one could be certain that the trial courts would have read the court of appeal opinion as announcing a major loophole in the pretrial discovery process, there was a substantial possiblity they might. By depublishing the opinion, the supreme court eliminated any future mischief that might have emanated from it.

The *Jordan* case is a pardigm of the type of case that is depublished. Former Supreme Court Justice Joseph Grodin has explained that depublication is utilized when "a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent," but the issue presented is not of sufficient societal importance to justify full-scale review.[5]

Depublication serves an important institutional role in such circumstances. Depublication permits the supreme court to reserve the review process—which involves an enormous expenditure of its resources—to only the most important cases, while at the same time limiting the potential damage which might result from the fact that trial courts are bound to follow published opinions, even if they are wrong.

Indeed, if the choice is between no supreme court review and leaving the misleading opinion on the books, or no review and elimination of the misleading opinion as precedent, the latter option seems clearly preferable. The alternative is to permit the opinion to stand until it does such widespread injustice that the supreme court has no choice but to grant review somewhere down the line.

WHY THE CRITICS ARE WRONG

Depublication thus seems to be a sensible tool for "damage control"—particularly useful today,

when the supreme court's resources are at a special premium because of the number of non-discretionary matters, such as capital cases and attorney disciplinary actions, which it has before it. Yet the practice has been widely and vocally criticized. The reasons cited by the critics against depublication are either wrong or are decidedly shortsighted.

The criticism of depublication that has the greatest gut-level appeal is the claim that it is a form of censorship with distinctly Orwellian overtones. Lawyers and appellate court justices alike assert that the practice constitutes an attempt to rewrite history and results in their most brilliant and hard-wrought inspirations being banished to the limbo of unpublished opinions. They argue that when opinions are depublished they are extirpated from the common law process, which normally thrives upon the clash of ideas.

But depublication does no such thing. The effect of depublication is to deprive the opinion of its force as precedent.[6] However, depublication does not establish precedent either. Simply because the trial courts are not compelled to follow the opinion does not mean that they are prohibited from applying the rule announced there, if they are persuaded that the rule is the correct one and there is no binding authority to the contrary. The concepts expressed in depublished opinions may still be argued in the trial courts, to the courts of appeal and to the supreme court; indeed, if they are sufficiently forceful as ideas (rather than simply as conclusions an appellate court has previously reached), they may yet become the law, or at least contribute to the law's development.

And while it is true that depublished opinions are not printed in the Official Reports, they are hardly wiped off the face of the earth. In fact, they are quite accessible to anyone interested. All opinions once ordered published by an appellate court are printed in the bound volumes of West's California Reporter and are maintained in the Westlaw database; if an opinion is depublished, an appropriate notation is appended.[7] Access to the issues discussed in depublished opinions may be gained through the West key number system or through the usual Westlaw computer search methods. In fact, no appellate lawyer worthy of the name would think of submitting a brief on an issue of any significance without reviewing the depublished cases as well as the published ones, since the former may well contain invaluable research or an inspired approach to the problem.

A quite different criticism of depublication is lodged by many attorneys—most frequently, by an attorney whose client lost on appeal, only to have the supreme court deny review but depublish the opinion. They claim that the depublication process is basically unfair. As one lawyer put it, "It was tremendously unfair to my client for the court to consider the issue, in effect decide that the decision was wrong, eradicate the offending decision, and yet deprive my client [of] a remedy for it."[8]

There are several answers to this claim. Initially, the fact that an opinion is depublished does not lead to a necessary inference that the supreme court disagreed with the result. In fact, Justice Grodin has explained that depublication is most frequently used when the supreme court believes the outcome was correct but considers some of the lower court's reasoning to be "wrong or misleading."[9]

More fundamentally, though, any perceived unfairness is not a function of the depublication process, but rather stems from the institutional role of the supreme court. As noted, the supreme court does not sit to correct every error or right every injustice committed by a court of appeal. Since the supreme court may grant review in only a handfull of highly significant cases, it will inevitably encounter court of appeal opinions—both published and unpublished—which it considers to be in error but not of sufficiently

widespread importance to justify a grant of review. The depublication process may make this circumstance manifest, but it does not create it.

Another criticism of depublication is that, since the supreme court provides no explanation of reasons why it is depublishing, the legal community is left guessing as to what the supreme court considers the law to be. But this objection misses the entire point of depublication.

Implicit in the supreme court's decision to depublish rather than grant review is a judgment that if the offending opinion is eliminated as precedent, the potential problem it created may go away—even without the necessity of an explanation. If the court believed it had to explain what was wrong with the opinion, it would grant review. Of course, the court may be wrong and the problem may recur, in which event a grant of review may eventually be necessary anyway. But depublication (without the burdensome necessity of formulating an explanation to which a majority of the justices must agree) is surely the most efficient means of dealing with a potentially troublesome point of law which is not clearly of widespread significance. And since the fact that an opinion has been depublished has no precedential value, the usefulness of an explanation of reasons is dubious at best.[10]

Finally, some critics charge that depublication is bad because total strangers to the lawsuit may affect its outcome by submitting letters to the supreme court urging depublication—letters which need not even be served on the parties. Although the critics are certainly correct that the current system is deficient in not requiring depublication letters to be served on the parties (although it is the common experience that such service is routinely made even in the absence of a rule requiring it), that is no reason for disposing of the practice of depublication altogether. Moreover, since depublication affects only the precedential effect of the case and by definition does not affect its outcome vis a vis the parties, it seems completely appropriate for the supreme court to receive input on the question from whoever knows most about its potential societal impact.

A CAVEAT

By all accounts, the California Supreme Court is presently inundated with work. Some matters, such as capital cases, it is required to hear. Where review is discretionary, the Court must necessarily limit its expenditure of resources to those cases which present issues of such widespread importance that the system itself requires a definitive ruling from the highest court. Given the current demands upon the court, depublication acts as a sensible escape valve by which the court can keep the system operating relatively smoothly while conserving its limited resources.

But like any other useful tool, depublication can be misused. California needs a supreme court which issues opinions on the significant legal questions of the day. Depublication provides no substitute for that function. If, as some have suggested, the supreme court is responding to its current workload crisis by depublishing opinions where it should grant review, the answer is not to abolish depublication, which plainly has a legitimate role to play. The answer, rather, is to institute whatever reforms are necessary to insure that our supreme court can perform its fundamental job—to provide guidance to our legal system on important issues—in optimum fashion.

1. The supreme court derives its authority to depublish from art. 6, § 14 of the CAL. CONST. (providing for publication of "such opinions of the [s]upreme [c]ourt and courts of appeal as the [s]upreme [c]ourt deems appropriate") and Rule 976(c)(2) of the CAL. RULES OF CT. (providing that "[a]n opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the [s]upreme [c]ourt to that effect").

2. The chorus of criticism was led by Robert Gerstein in a 1984 article branding depublication a "process of covert substantive review." Gerstein, *Law By Elimination: Depublication in the California Supreme Court*, 67 JUDICATURE 292, 298 (1984). More recently, the practice has been disparaged in Uelman, *Mainstream Justice: A Review of the Second Year of the Lucas Court*, CALIFORNIA LAWYER, July 1989, at 37, 40; Carrizosa, *Making the Law Disappear*, CALIFORNIA LAWYER, September 1989, at 65-66; and Stansky, "Depublication: Law Made By Eraser," The Recorder, Jan. 9, 1990 at 2-3.

3. Presiding Justice J. Anthony Kline of Division 2 of the First Appellate District, quoted in Stansky, *supra* n.2, at 2.

4. People v. Davis, 147 Cal. 346, 348 (1905); CAL. RULES OF CT., Rule 29(a).

5. Grodin, *The Depublication Practice of the California Supreme Court,* 72 CAL. L. REV. 514, 515, 520 (1984).

6. CAL. RULES OF CT., Rule 977(a); Powers v. Sissoev, 39 Cal.App.3d 865, 872 n. 8 (1974).

7. For example, the citation of the case discussed above is Jordan v. Long Beach Community Hospital 248 Cal.Rptr. 384 (1988).

8. Quoted in Stansky, *supra* n. 2, at 3.

9. Grodin, *supra*, n.5, at 522.

10. In his article on page 49 of this issue, Dean Gerald Uelman urges that, when ordering depublication, the Supreme Court should be required to identify the portions of the opinion of which it disapproves. But such a rule would be hazardous indeed. Its effect would inevitably be to accord de facto precedential effect to depublication orders, since both trial and intermediate appellate

courts would be reluctant to apply a rule of law which they knew the supreme court disapproved of. At the same time, the legal community would still be left guessing as to the reason the supreme court disapproved of the language in question. The minimal benefits of such a rule would seem to be clearly outweighed by the dangers of a sub rosa system of precedents which it would create.

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