

*DEPUBLICATION OF
CALIFORNIA COURT OF APPEAL DECISIONS*

I. WHAT IS DEPUBLICATION?

California's unique procedures for the superseding and decertifying of opinions, or "depublication" as it is more commonly known, causes a great deal of confusion. The term "depublished" is commonly used to refer to any case that appears in the official advance sheets but is deleted from the official bound reports.¹ Depublication is important because, with limited exceptions, *only opinions ordered officially published can be cited as authority before the California courts (California Rules of Court, rule 977)*. Publication of an opinion in the official advance sheets does not constitute official publication, so you must first determine the status of any California Court of Appeal opinion before you rely on it as authority.

- A. Before 1985, when a case went to the Supreme Court, the Court of Appeal opinion published in the official advance sheets was considered to be superseded by the granting of a hearing before the Supreme Court and the Supreme Court conducted a complete review of the issues appealed from the trial court. Opinions superseded by the grant of a hearing were deleted from the official bound reports and could not be cited or relied upon as legal authority.
- B. In 1985, the California Constitution was amended to provide the Supreme Court with a variety of review options.² Since 1985, the Court has been able to select the issues it will hear on review rather than granting a complete rehearing of a case (*California Rules of Court, rule 29*). The Court of Appeal's opinion upon grant of review by the Supreme Court is considered to be superseded (*California Rules of Court, rule 976(d)*) and cannot be cited as precedent unless specifically otherwise ordered by the Supreme Court. However, the Supreme Court may decide at any time to *re-certify* or *republish* the opinion of the Court of Appeal.
- C. The Supreme Court may also certify some, but not all, parts of a Court of Appeal opinion, a practice known as "partial publication" (*California Rules of Court, rule 976.1*). Unpublished portions of partially published opinions cannot be cited as authority.

¹ The opinions of the California Supreme Court are officially published in the *California Reports* and those of the Court of Appeal and the Appellate Departments of the Superior Court in the *California Appellate Reports*. The official advance sheets contain opinions of the Supreme Court, the Courts of Appeal and the Appellate Departments of the Superior Court. Supreme Court materials are found at the front of the advance sheet, printed on grey striped paper; Court of Appeal materials are in the back on white paper and cases from the appellate departments of the Superior Court have "Supp." (for supplement) pagination.

² Proposition 32, 1984 Cal. Stat. A223 (effective May 6, 1985). Prior to Proposition 32, a petition for review was called a petition for hearing.

- D. The Supreme Court can, on its own initiative or in response to a petition, order that cases published in the official advance sheets be decertified for publication and deleted from the bound reports even though no grant of review has been requested or granted (*California Rules of Court*, rule 976(c)).
- E. *Depublication occurs only in the official reports for the state.* Superseded and decertified cases appear in West's *California* and *Pacific Reporters'* advance sheets and bound volumes. They also remain on Westlaw and LexisNexis. Before citing to a California Court of Appeal case appearing in any West reporter or on Westlaw or LexisNexis, you must check to make sure that you understand its official status.

II. USING THE OFFICIAL REPORTS TO DETERMINE A CASE'S STATUS

- A. In order to determine the current status of a recent Court of Appeal decision (one still in the official advance sheets), researchers should consult the *Cumulative Subsequent History Table* in the official advance sheets for the most recent advance sheet pamphlet published.³ The *Cumulative Subsequent History Table* is arranged alphabetically by the case name and tracks significant case history for a case until that case is final and reported in bound volume form. If the opinion is not to be published in the bound volume, its history will likewise be removed from the table at the time of publication of its corresponding bound volume unless it remains under review. Researchers should take care to remember that when a review or rehearing is granted, the superseding of the Court of Appeal decision is automatic and is not specifically stated in the table. Unless the opinion is affirmatively ordered republished, in whole or in part, by the Supreme Court, it may not be cited as authority. Again, only published portions of opinions may be cited.
- B. Once the bound volume of the official reports is issued, the status of a case is fairly easy to determine by simply looking up the citation. Only advance pamphlet opinions that are final at the time the corresponding bound volume is published appear in that bound volume. However, in order that published cases retain the same pagination as in the advance sheet, the bound volumes retain the pagination of the advance sheets. If the bound volumes indicate that the pages have been "omitted" it means that the opinion(s) that appeared on those pages were depublished at the time that volume was published. Because the Court would like to delay the publication of bound Court of Appeal volumes until the status of cases is final, there is a substantial lag time between the publication of the advance sheets and the corresponding bound volumes. However, if a decision of a Court of Appeal is not final at the time the bound volume is published because it remains subject to Supreme Court review, the opinion is withdrawn from the bound volume. For tracking purposes, review-granted opinions that were withdrawn from the bound volumes will remain available during the pendency of the Supreme Court review in the annual or midyear *Pamphlet of Review Granted Opinions*. Information regarding such an opinion's later history (e.g. "review granted") is noted

³ Advance sheet pamphlets are published approximately every ten days. The Reporter of Decisions indicates that about 20 - 25 days should be allowed to permit data posting. The information in the most recent advance sheet may be updated by consulting the case information feature of the California Courts Web site at <http://appellatecases.courtinfo.ca.gov> or calling the clerk's office at (415) 865-7000.



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in the bound volume at the place where it otherwise would have appeared advising of its status, and these cases are tracked in the *Cumulative Subsequent History Table*, the *Multivolume Table of Review Granted Cases*, and the *Pamphlet of Review Granted Opinions*.⁴

III. USING THE WEST (UNOFFICIAL) REPORTERS TO DETERMINE A CASE'S STATUS

The West Reporter system treats superseded and decertified opinions differently from the official reporters.⁵ The text of superseded or decertified opinions is not deleted from the *California Reporter* (nor were they from the *Pacific Reporter*). In addition, the notations used by West require that the user understand the Rules of Court and the effects of particular orders on one's ability to cite to the case as precedent. Because of this, before citing to a California Court of Appeal case appearing in any West reporter, you must check to make sure that you understand its official status.

- A. One tool for determining a case's status is the *California Subsequent History Table*, which is issued on an annual basis. The table is arranged by California Reporter citation. This table supplies the citations to Supreme Court orders that affect cases back to volume 248 of the *Pacific Reporter*, first series, except for depublication information, which is covered back to volume 1 of the *California Reporter*. The *California Reporter* advance sheets' *Cumulative Review, Rehearing and Hearing Table* updates this table.
- B. The advance sheets for the *California Reporter* include two tables which can assist researchers in determining the status of a decision. These tables are found in the preliminary pages at the front of the advance sheets. The first is the *Case History Table*, which, like its official counterpart, the *Cumulative Subsequent History Table*, lists cases by their name. The *Case History Table* covers all cases still in the *California Reporter* advance sheets; cases are deleted from the table once the bound *California Reporter* volume is published. The second is the *Cumulative Review, Rehearing and Hearing Table*, which updates the annual *California Subsequent History Table*. This table is organized by West Reporter cite and gives subsequent history information. Cases that are decertified by Supreme Court order are identified (West uses the phrase "not officially published"). The advance sheets also contain **Parallel Citation Tables**. These tables give no information on the granting of review, transfer and hearing and rehearing, so they should not be relied upon to ascertain an opinion's official status.

⁴ Preface, *Cumulative Subsequent History Table California Official Reports*, note 2.

⁵ California Supreme Court opinions appear in both the *California Reporter* and the *Pacific Reporter*. Court of Appeal decisions were published in the *Pacific Reporter* from 1905 to 1959. When the *California Reporter* was introduced in 1959, Court of Appeal decisions were dropped from the *Pacific Reporter* and now appear only in the *California Reporter*.



- C. The full text of all opinions originally certified for publication appear in the bound volumes of the West reporters. Information that the opinion was not certified for official publication (decertified) has also been included in the *California Reporter* since about 1972 when the practice became common. Depublication or partial publication information (West uses the phrases “not officially published” or “ordered not published”) is noted as follows:
1. If the Supreme Court granted either a review or a hearing (meaning that the case has been superseded), the full opinion remains in the West reporter, but a note on the grant of review (or hearing or rehearing) appears just after the date of the decision in the caption of the case. Researchers are presumed to know that the grant of review (or hearing) supersedes the opinion.
 2. If review of a Court of Appeal decision is requested and denied, but the Supreme Court decides to decertify the lower court opinion, the information is noted with an asterisk following the review denied notation.
 3. If the Supreme Court, on its own initiative or in response to a motion, decertifies an opinion, that information is noted with an asterisk following the date of the decision.
 4. If the Supreme Court certifies only portions of a decision for official publication, the full text of the decision remains in the *California Reporter*. Information on which portions of the opinion were not certified for official publication is noted with an asterisk following the date of the opinion.

Researchers are presumed to know that opinions that are not officially published cannot be cited as precedent before the California courts.

IV. USING LEXISNEXIS & WESTLAW TO DETERMINE A CASE'S STATUS

The publication status of an opinion is also readily available online on both Westlaw and LexisNexis. As with the unofficial print reporters, the databases do not use such terms as “depublished.” Instead, the databases indicate that the Supreme Court either granted a review or a rehearing (superseded) or that the opinion was not certified for official publication (decertified). When using either LexisNexis or Westlaw, the researcher must recognize the wording used in the Rules and in Supreme Court orders in order to make proper judgments concerning the case's use as precedent.

On LexisNexis, subsequent history information appears in the SUBSEQUENT HISTORY segment of the opinion. Depublication and partial publication information appears in the NOTICE segment of the opinion. A red stop sign also appears on all superseded or depublished cases at the top of the screen.

On Westlaw, the notations regarding status and subsequent history, such as “Review Granted” or “Not Officially Published,” are found in bold at the top of the screen on which the opinion appears. The KeyCite red flag will also appear on all superseded or decertified cases on Westlaw.

Decertified and superseded opinions remain in both LexisNexis and Westlaw.



V. USING CITATORS TO DETERMINE A CASE'S STATUS

Subsequent history information for Court of Appeal cases is also available in the two citator services: Westlaw's KeyCite and LexisNexis' Shepard's. These services are updated daily.

For superseded cases, Shepard's indicates in its Publication Status section that the case is "Not Citable; Superseded by Grant of Review." For decertified cases, Shepard's indicates that the case is "Not Citable; Ordered Not Published." A red stop sign also appears on the left-hand side of the Shepard's screen for superseded or decertified cases, just above the Publication Status section.

For superseded cases, KeyCite states, "Not Officially Published" and "Review Granted and Opinion Superseded." For decertified cases, KeyCite states, "Unpublished/noncitable" or "This case may not be cited" and "... ordered not to be officially published." A red flag also appears at the top of the KeyCite screen for all decertified and superseded opinions.

Neither KeyCite nor Shepard's gives partial publication information (e.g. indicates when only portions of a superseded opinion have been re-certified for publication).

Shepard's Citations in print also provides subsequent history information in its *Shepard's California Citations* and *Shepard's California Reporter Citations* series. Shepard's provides subsequent history information for California cases except for information on partial publication (when only portions of a superseded opinion have been re-certified for publication).

