

## **State Justices Revive Depublication Debate**

Cheryl Miller, The Recorder

July 31, 2015

SACRAMENTO — The California Supreme Court is diving into the issue of depublished opinions once again, asking for public comments on a potential rule change that would end the practice of automatically depublishing an appellate court ruling once the high court grants review in a case.

In a statement released by the Supreme Court, Chief Justice Tani Cantil-Sakauye said that although such a change has been rejected four times since 1979, "reflection" and a "renewed interest for change voiced by some Court of Appeal justices" led the high court to revisit the issue.

The cheering you may have heard when the review was announced Wednesday probably came from attorney-brothers Michael and Kenneth Schmier, who have long waged war, via letters, legislative lobbying and lawsuits, on unpublished opinions and lawyers' inability to cite them in future litigation.

"I think the Supreme Court of California is waking up," Michael Schmier said Thursday. The court's alarm clock, Schmier hypothesized, may have come in the form of its own July 22 ruling that rejected requests by Gov. Jerry Brown and Attorney General Kamala Harris to depublish a key Fourth District Court of Appeal opinion on water rates. The Fourth District struck down the city of San Juan Capistrano's tiered water prices, holding that the cost of higher water use couldn't be artificially inflated to discourage use. Brown called the ruling a "straightjacket" on local agencies' efforts to encourage conservation. On the same day of the San Juan Capistrano ruling—July 22—justices voted to seek comments on the possible depublication rule change. A coincidence? Schmier thinks not. His organization, The Committee for the Rule of Law, sent the court a letter on July 20 asking that justices not depublish the appellate court ruling and that, again, they revisit the depublication and no-citation rules.

"We like to think that, after years of these letters and lawsuits, our efforts have had some positive impact," Schmier said.

The proposed rule change would only affect the small number of cases in which the Supreme Court grants review. But, Schmier said, "hopefully, the camel has his nose under the tent here and movement ... away from these restrictive policies may continue." Comments can be made through Sept. 25 via the California Courts website on the "Invitations to Comment" page under "Supreme Court." The court will receive a report with the results of those comments in November.

Contact the reporter at [cmiller@alm.com](mailto:cmiller@alm.com).