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RONALD M. GEORGE
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03-AP-471

February 13, 2004

Sent by e-mail — Original by U.S. Mail

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

After reading Judge Alex Kozinski's letter to Judge Samuel A. Alito, Jr., concerning the proposal before the Committee on Rules of Practice and Procedure to change the Federal Rules of Appellate Procedure to authorize the citation of unpublished opinions, I am writing to describe California's experience in this area. In California, we similarly have been urged to permit the citation, as precedent, of all opinions by the intermediate courts of appeal, whether designated as published or as unpublished. We have reviewed the issue and for a variety of reasons believe that taking such a step would be unwise. I am writing to describe some of the reasons for our decision.

As background, I note that California presently uses a system under which the opinions of California's intermediate courts of appeal may be designated as published or unpublished by the authoring court, although the Supreme Court has the final authority to order a court of appeal decision published or unpublished. All Supreme Court opinions are published, but the vast majority of court of appeal opinions, some 93 percent, are issued as unpublished opinions. Unpublished opinions may not be cited as precedent.

California's Constitution expressly requires that the Legislature provide for the publication of opinions of the courts of appeal and of the Supreme Court "as the Supreme Court deems appropriate." (Cal.Const.Art.VI, § 14.) The Supreme Court has adopted Rule 976 et seq. of the California Rules of Court setting standards for publication of

Court of Appeal opinions. An opinion may not be published unless it: "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law." (Cal. Rules of Court, Rule 976(b).) Rule 977 specifically bars citation of or reliance upon unpublished California opinions, except in narrowly defined circumstances relating to res judicata, law of the case, and collateral estoppel. Subdivision (c) of rule 977 allows citation of opinions of other courts that are available only in a computer-based source of decisional law if a hard copy of the opinion is provided.

During the past few years, some individuals have urged that the California Supreme Court permit citation of unpublished opinions. The ensuing debate between proponents and opponents has produced arguments similar to those that apparently have been presented to your committee thus far. As part of our system's review of the issue, our Appellate Process Task Force, which had been appointed earlier and charged with reviewing generally a variety of appellate processes and procedures, was asked to consider the various arguments and to make a recommendation. A copy of the resulting white paper is attached. After full consideration of the white paper and other arguments presented directly to the court and in the literature on this subject, the Supreme Court declined the request to change the prohibition on citation of unpublished opinions contained in Rule 977. Nevertheless, the court expanded access to "unpublished opinions" by placing them on the official court web-site for 60 days. As had always been true, these opinions remained available to the public at the clerk's office counter. An "unpublished opinion" has never meant an "unavailable opinion" — and the court's action was intended to provide broader on-line availability.

There were several reasons underlying the court's determination not to make unpublished opinions citable as precedent. Many of these reasons related to the potentially adverse impact on meaningful public access to the courts. Elevating unpublished opinions to the status of precedent would increase the number of citable opinions from California's courts of appeal by more than a factor of 12. Although the availability of opinions on-line may make research easier for some, many individuals do not have informed access to this source. The increased body of cases requiring review would substantially increase the cost and time associated with researching and analyzing almost any issue. This was of particular concern because the number of self-represented litigants has markedly increased in our courts. In some jurisdictions, in more than two-thirds of family law proceedings neither side has representation. In many additional

cases, only one party is represented. Our court system is working on a number of levels to enhance meaningful access to the court system by the public at large, and self-represented individuals in particular. Transforming all opinions, no matter whether they meet the criteria of Rule 976 or not, into possible precedents would vastly increase the number of cases an individual might have to review in the course of court proceedings. It would require litigants to cull out significant from less significant cases in order to work effectively with precedent. When one considers that there would be a more than 12-fold increase in the number of cases — with more than 90 percent presently deemed not appropriate for publication — it becomes apparent that the task of ascertaining useful and informative precedent would become far more complicated not only for self-represented litigants, but for lawyers and trial judges as well.

By definition, unpublished opinions are not published because they do not add analytically to the body of law. It also may be worth noting that these are not the only cases that do not become part of the published, precedential body of the law. Many cases resolved through private and alternative adjudication and the use of retained adjudicators often involve significant issues of law. The determination of these matters, and the related reasoning of the decision-makers, rarely are released into any public forum and are neither available for the asking from a clerk, nor placed on a regularly maintained public web-site. To suggest that changing the status of unpublished opinions will make all significant determinations readily transparent simply does not take into account these other cases. Distinctions already exist between cases that become part of the public domain for future reference and those that do not, whether through publication, diversion to a private judging system, or settlement. As discussed below, the increase in workload resulting from a rule permitting citation of all opinions may well increase the likelihood that more cases will be removed from the public domain.

The value of making all opinions precedential would be minimal. Should tracking a group of unpublished opinions reveal troubling trends about decision-making, a circumstance that would be readily ascertainable because these opinions already are publicly available on our court web-site, such information could be gathered and discussed publicly. If the need is demonstrated, existing rules and standards for publication can be adjusted to ensure that appropriate cases are published and thus may be cited as precedent. But, as we all are aware, the vast number of unpublished opinions have little or no import beyond the parties and their immediate interests. Making all opinions citable will make tracking important trends in the law and distinguishing among important and less important decisions and analyses far more difficult and costly for the practitioner and the litigant, and for the public in general.

Beyond the effect on litigants and the public, making all opinions citable and precedential would have an adverse effect on appellate courts as well. As has been reiterated by many, the preparation of an opinion for publication is typically very different from preparation of one that will not be published: the former requires far more time and attention from the authoring judge and his or her colleagues on the panel. If all opinions become citable, judges necessarily will feel compelled to devote far more attention to the form of each opinion. The other judges on a panel may be less willing to sign on to the work product of a colleague if they know that the specific wording or rationale will be citable as precedent. By treating all matters as equivalent for purpose of issuing citable opinions, the proposal risks muddying or slowing the development of the law, because of the heavy burden that will be imposed on the time and workload of judges. It also ultimately may lead to more and more parties choosing to bring important cases to decision-makers outside the public court system, thus eliminating any public review of these matters and thus eliminating even the potential for creating precedent to guide future conduct.

Finally, rendering all court of appeal opinions of equal precedential value might well make the California Supreme Court's task of discretionary review more difficult, both in terms of keeping track of lower court decisions and their consistency, and in terms of ensuring that statements of the law are accurate and complete to avoid misleading future litigants and the public. Our court has the power to depublish opinions that the Courts of Appeal have designated for publication — a power that is used very sparingly but is nonetheless invaluable. At times there may be substantial reasons for depublication, but in most instances when our court exercises that authority, it is because the lower court has misstated or misapplied a fundamental legal doctrine that already is well-established in the law — even though the result may be correct. Were an opinion to be accorded precedential value, it might well create an analytical conflict with other opinions — although the result might be the same under the standard analysis or the one applied in the particular matter. By judiciously depublishing cases, our court can avoid unnecessary and anomalous conflicts and focus on more significant issues of the law in determining when to use its discretion to grant review. This tool has enabled our court to handle its heavy workload of more than 9000 petitions for review and original petitions filed each year in a manner that provides the most consistent guidance to the public. Conceivably, if all federal circuit court opinions were to be accorded equal precedential value, the United States Supreme Court's task of discretionary review similarly might be rendered more difficult.

In summary, in my view, permitting unpublished opinions to be afforded the same precedential weight as published opinions may well impede rather than assist in the orderly analysis of the law. Such an approach would vastly increase the number of

opinions that the public, litigants, lawyers, and appellate and trial courts must consider. By their very nature, those cases presently deemed unpublished and therefore not citable are those that do not advance the understanding and development of the law. In order to discredit completely the notion that the present system in some way advances a "secret" agenda or creates a "hidden" body of law, the committee might wish to consider promoting the placement of these opinions on an appropriate web-site for a specified period of time, and developing standards for publication for the courts to apply.

I hope these comments are helpful. Should you, or any member of the committee, have any questions, I would be pleased to discuss this matter further.

Sincerely,

RONALD M. GEORGE

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cc: Hon. Alex Kozinski

A White Paper on Unpublished Opinions of the Court of Appeal

Authored by Professor J. Clark Kelso and Joshua Weinstein

Appellate Process Task Force

March, 2001

A White Paper on Unpublished Opinions of the Court of Appeal

Background

At its inception the Appellate Process Task Force – created in 1997 by the Judicial Council of California – identified issues affecting California's intermediate appellate courts that should be studied. One issue was public access to unpublished appellate court opinions. In the task force's Interim Report (released in March 1999) and in its Report of August 2000, the issue was listed as one that was still being contemplated. (See *Report of the Appellate Process Task Force* (August 2000) page 4.)

When the task force took up the study last year, it observed that unpublished court of appeal opinions are available to any member of the public from the court clerk's office. (See *McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685 [court records generally available to public] and *People v. Ford* (1981) 30 Cal.3d 209, 216 [unpublished opinions are "available in the public records of ... the Court of Appeal"].) However, in practice, unpublished opinions have limited exposure; they are often only read by litigants and institutional practitioners. The task force focused on whether and how to improve public access to unpublished opinions of the courts of appeal.

During the time the task force took up the topic, the issue was provoking interest in other circles as well. Several commentators and scholars weighed in,[1] an appellate court published an opinion on the issue (see *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4th 703), and legislation was proposed that would have required all appellate opinions to be published and citable as precedent.[2] (Assem. Bill 2404 (Papan) 1999-2000 Reg. Sess., § 1.)

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[1] A. Kozinski and S. Reinhardt, "Please Don't Cite This!" (June 2000) *California Lawyer*, 43; R. Arnold, *Unpublished Opinions: A Comment* (1999) 1 J. App. Prac. & Process 219 (1999); B. Martin, Jr., *In Defense of Unpublished Opinions* (1999) 60 Ohio St. L.J. 177; C. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?* (1998) 50 S.C. L. Rev. 235; K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeal* (1997) 85 Calif. L. Rev. 541; and D. Merritt and J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals* (2001) 54 Vand. L. Rev. 71.

[2] Additionally, for a few brief months last year, there was a federal appellate decision from the Eighth Circuit declaring as a matter of federal constitutional law that unpublished opinions were required to be treated as binding precedents (the decision was

The issue is not new. In fact, several years earlier in a report commissioner by the Appellate Courts Committee of the 2020 Vision Project, Professor J. Clark Kelso made the following recommendation:

> Make all unpublished opinions available electronically (which would give the public, scholars and the court of appeal easy access) but retain the no-citation rule (which would address the practical concerns expressed by appellate lawyers and judges). As appellate courts become paperless, provision should be made for giving the public access to unpublished as well as published opinions.[3]

That recommendation was a compromise position. In widely circulated drafts of his report, Professor Kelso argued that all appellate opinions should be published and citable as precedent and that the increasing use of unpublished opinions was contrary to fundamental principles of good appellate practice. This tentative suggestion triggered a chorus of protests from around the state, from both judges and practitioners, who asserted that "the nonpublication and noncitation rules are critically important to the court of appeal in preparing and processing its cases and to the practicing bar in litigating appeals."[4] Critics argued that publication of all opinions would overburden the appellate courts and practitioners, that publication and citability of all appellate opinions would substantially increase the workload of an already overburdened appellate court system and that practitioners would have to wade through an "overwhelming" amount of unpublished opinions that are "useless for future litigation because they involve no new law and no new, applicable factual situations."[5]

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subsequently vacated as moot by an en banc panel of the circuit after the United States agreed to pay the disputed $6,000 tax claim made by the taxpayer). (*Anastasoff v. United States* (8th Cir. 2000) 223 F.3d 898, vacated on reh'g en banc, (8th Cir. 2000) 235 F.3d 1054.) For a critique of the constitutional analysis in *Anastasoff*, see Case Note, *Constitutional Law C Article III Judicial Power C Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect* (2001) 114 Harv.L.Rev. 940.

[3] C. Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L.J. 433, 492.

[4] *Ibid.*

[5] *Ibid.*

Although Professor Kelso's compromise position was not formally adopted by the full Commission on the Future of the California Courts, the Commission's final report endorsed the general proposition that "[s]implified, electronic access to the appellate courts, their records, and their proceedings will have a salutary effect on the public's comprehension of and trust in justice."[6] Moreover, the Commission formally recommended that "[a]ppellate justice should accelerate its adoption of and adaptation to new technology."[7]

Everything old is new again

The arguments for and against publication and citability of appellate court opinions have not changed much over the years. The dispute remains largely, but not entirely, between those who believe that all appellate court opinions should be published and citable and others who argue that the publication and citability of all unpublished opinions would overburden the courts and counsel, increasing the costs to clients and causing delays. For the reasons given below, the Appellate Process Task Force has decided after thorough consideration of the issue to make the following recommendation:

> Unpublished opinions should be posted on the Judicial Council's Web site for a reasonable period of time (e.g., 60 days), but the general proscription against citation of unpublished opinions (i.e., rule 977) should remain in place without change.

A. Electronic access

The Web site for California's appellate courts already makes published opinions available on the Web with commendable speed. Access to court opinions on the Web is often the preferred method of access for reviewing recently issued decisions. With the development of these widely available electronic portals to government information, there is no longer any convincing justification for not facilitating greater public access to the written work product of the appellate courts by taking advantage of existing information technologies. We live in an open, democratic society where the accountability of public servants is secured in large part by public access to government activity and output. Of course, openness and public access have their limits. Other important interests such as privacy, the attorney-client privilege, national security, and

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[6] Commission on the Future of the California Courts, *Justice in the Balance B 2020* (1993) 166.

[7] *Id.*, at p. 167 (Recommendation 10.1).

the deliberative process privilege, may dictate limited or no access to some types of information in certain circumstances. But no one claims that unpublished opinions fall into any of these categories. Indeed, as noted above unpublished opinions are already publicly available.

Those who argue that unpublished appellate opinions in California are some form of "secret" law have seriously overstated their case.[8] Nevertheless, it is true that unpublished opinions are not as widely and easily available as published opinions. Further, if the difference in availability can be eliminated at reasonable expense, the courts, no less than any other branch of government, should make unpublished opinions more accessible. The task force recognized that many institutional litigants – the insurance industry, the Attorney General, and the appellate projects, for example – to varying degrees review a large percentage of court of appeal opinions in their area of interest, whether published or not. Given the changes in technology and the apparent wide-spread interest in unpublished opinions, the task force recommends that the public have the same ease of access that is already afforded institutional practitioners.

In California, all published appellate opinions are now made available for a period of time on the judicial branch's Web site. Cost permitting, there is no compelling reason for not expanding the existing system so that *all* California appellate opinions, whether published or unpublished, are made available on the Web site for a reasonable period of time.

B. Citability

The remaining question is whether unpublished opinions should, once made available electronically, be citable as precedent. The task force is convinced that allowing all opinions to be citable as precedent would do substantial damage to the appellate system in California. If all appellate court opinions were citable, there would be increased potential for conflict and confusion in the law, which would, in turn, increase the cost of legal representation, as well as appellate workload and appellate delay. This damage would not be offset by any practical advantages gained through making unpublished opinions fully citable as precedent.

Under rule 977 of the California Rules of Court, unpublished opinions may not be "cited or relied on by a court or a party" except (1) "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel," or (2) "when the

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[8] See, e.g., Carpenter, p. 236, fn. 7 ("What else, but a secret, is an unpublished opinion wrapped in a no-citation rule?").

opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." (Calif. Rules of Court, rule 977(a) & (b).)

It has been argued that a non-citation rule allows the courts to "hide" precedent setting decisions. Proponents suggest that an appellate court simply issues an unpublished opinion that is not citable, and the law that court "created" is not subject to public scrutiny and thus "hidden" from view. That argument fails on its face because, as noted above, all appellate court opinions are public records available from the clerk's office. Moreover, the California Supreme Court may review any court of appeal opinion – whether published or unpublished – to "secure uniformity of decision or the settlement of important questions of law." (Rule 29(a).)

One would have to assume that three justices of the court of appeal decided to violate rule 976 in a particular case in order to accept the notion that uncitable opinions are used to "hide" new law. Indeed, rule 976 provides that publication is appropriate for court of appeal opinions that establish new law, apply existing law to new facts, or modify or criticize existing law. (See rule 976(b)(1); see also rule 976(b)(2) & (3) for other criteria for publication.) The task force declined to accept that premise. Rather, the task force's combined experience is that unpublished opinions, considered as a whole, generally recite well-established law and do not apply it to new fact scenarios. As such, there is no justification to impose upon the public, the bar and the bench more than a ten-fold annual increase in the number of citable opinions by the Court of Appeal. [9]

The task force also considered suggesting that the California Supreme Court amend rule 977 to permit citation of unpublished opinions in cases where there is no other precedent or in cases where no other precedent would serve as well. This approach is taken in some other jurisdictions. But the task force declined to endorse this recommendation because of the likelihood that the exceptions would swallow the general rule and would engage the court and counsel in costly, tangential disputes over collateral issues regarding the weight or value of an unpublished opinion. Every citation of an unpublished opinion would trigger from opposing counsel an argument that the cited opinion actually does not satisfy the criteria for citation, and the court would be forced to do precisely what the proscription is designed to guard against: determine the weight as precedent of an unpublished opinion. The efficiencies that lie at the heart of the proscription against citation of unpublished opinions would be

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[9] In fiscal year 1997-1998, 7% of court of appeal opinions were published. (Judicial Council of Cal., Ann. Court Statistics Rep. (1999) p. 31.)

largely lost if counsel were required to search all unpublished opinions to determine whether an unpublished opinion was more closely on point than a published opinion and the court was required to resolve a dispute involving that question. Moreover, the constitutional provisions on which the whole scheme is based would be undermined.

For the reasons given above, the task force recommends that rule 977 be retained without change.