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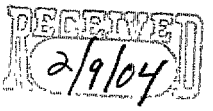

03-AP-296

February 5, 2004

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

Dear Sir:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. In 2000 California faced a similar type proposal. Kenneth and Michael Schmier, Bay Area attorneys, and Professor Stephen Barnett of Boalt Hall School of Law led an attempt to require that all state appellate opinions be available for publication and be citable by counsel as precedent. At that time I was the Chair of the Appellate Process Task Force, a committee of 23 attorneys and judges which was charged with examining the California appellate system. In March 2001, the Task Force published a White Paper which after a careful examination of the issue recommended the rejection of the proposal with reasons stated. A copy of that report is attached to this letter. The paper is quite short, 7 pages, and succinctly states the position of the Task Force. There is no need to repeat the reasons advanced in opposition to the proposal in the body of this letter. As you are aware those arguments prevailed in California and California Rule of Court 977 which provides for limited publication remains unchanged to this date.

There is an additional, and to me, powerful argument against the proposal which for reasons which now escape me did not find its way into the White Paper which I believe is worth considering. One of the most important functions of the appellate courts remains the shaping of the law. During the early common law period this function was performed in large part by the reporters who chose those cases of importance and interest to memorialize. Now the Supreme Courts, state and federal, use the power to select which cases to hear to aid in performing this function. All cases they choose to hear are published, but most cases are not chosen for decision. Many cases that are significant never are taken by the high court because they do not pose the legal question clearly, they are not ripe for decision, or they simply do not merit an examination which could affect the future state of the law. Intermediate appellate courts generally do not have the power not to hear a case. Much as the trial courts they must decide any case that presents itself. The only way they have to signal to the bench and bar the importance of a case and to perform their law shaping function with clarity is not to publish cases which do not serve that purpose. To require publication of all intermediate appellate court opinions strips from the intermediate courts one of their most important tools for shaping the law. A court simply cannot and would not state boldly, "pay special attention to this case" or "this case is not worthy of study and consideration." There is no compelling reason to hobble judges in the performance of one of their most important tasks and to turn it over to book writers and publishers who will surely fill the void by substituting their own preferences as to what cases are important and significant to the profession at large. Interestingly virtually the only people on the Task Force who showed any interest in publishing all cases were the law professors. The practitioners, lawyers and judges, who are charged with the daily resolution of real disputes were virtually unanimously opposed to taking the signaling power from the judges and giving it to self-selected critics.

In short, I believe that the proposed Federal Rule of Appellate Procedure 32.1 is no better than the proposal to alter California Rule of Court 977. For the reasons presented in the White Paper and the additional argument that I have advanced in this letter, the purposed change should share the same fate.

Sincerely,

Gary E. Strankman, Administrative Presiding Justice (Retired)
Former Chair, California Appellate Process Task Force

GES/tb
Enclosures

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

Task Force Membership

Hon. Gary E. Strankman (Chair)
Ms. Mary Carlos
Mr. Peter Davis
Mr. Donald Davio
Mr. Jon Eisenberg
Mr. Dennis Fischer
Ms. Laura Geffen
Hon. Margaret M. Grignon
Hon. Judith L. Haller
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Mr. Jonathan Steiner
Hon. Steven J. Stone (Ret.)
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Judicial Council Liaison

Hon. Marvin R. Baxter

Committee Staff

Ms. Marcia Taylor
Mr. Joshua Weinstein

Reporter

Professor J. Clark Kelso
University of the Pacific
McGeorge School of Law

JUDICIAL COUNCIL OF CALIFORNIA
EUREKA
1926

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

[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.