

THE COMMITTEE FOR THE RULE OF LAW
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February 13, 2007

By: e-mail.

Assemblymember John Laird
California Legislature
Sacramento, CA

Re: Request timely personal meeting to discuss authorship of bill to end the ban on citation of unpublished appeal court opinions.

Dear Assemblymember Laird:

A new federal rule corrects a major flaw in nationwide court practice that still prevails in California -- where 93% of state appeal court decisions are ordered "NOT TO BE PUBLISHED", and are forbidden to cite or mention in court. California courts should afford equal rights and conform.

Federal Rule of Appellate Procedure 32.1, overwhelmingly adopted by the federal Advisory Committee on Appellate Rules, advocated by its then chairman, now United States Supreme Court Justice Samuel Alito, and by its then member, now Chief Justice of the United States John Roberts, is the framework for California Legislative Counsel's following bill language (RN 07 05178; 01/31/07, followed in turn by a short case reference). For background, please see www.NonPubication.com ("News" and "Press Clippings").

We ask for a timely personal meeting to discuss authorship for the bill.

Thank you.

Sincerely,

THE COMMITTEE FOR THE RULE OF LAW

Michael Schmier
Director/Attorney

LEGISLATIVE COUNSEL'S DIGEST

Bill No.
as introduced, _____.
General Subject: Appellate opinions: citation.

The California Constitution requires the Legislature to provide for the prompt publication of those opinions of the Supreme Court and the courts of appeal as the Supreme Court deems appropriate.

Existing law provides that those opinions of the Supreme Court, the courts of appeal, and the appellate divisions of the superior courts, as the Supreme Court may deem expedient, shall be published in the official reports under the general supervision of the Supreme Court.

This bill would prohibit a state court from prohibiting or restricting the citation of state judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "nonprecedential," "not precedent," or other similar designation. The bill would require a party that cites to a state judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, to file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Ninety percent of California appellate opinions are not published, and are not allowed to be cited or mentioned in court. This percentage may be reduced pursuant to Rule 8.1105 of the California Rules of Court, urging more publication, but unpublished opinions will remain numerous and uncitable.

(b) The United States Supreme Court recently promulgated Federal Rule of Appellate Procedure 32.1, which bans restrictions on citation of "judicial opinions, orders, judgments, or other written dispositions" that have been "designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like."

(c) While Rule 32.1 applies prospectively to federal opinions issued on or after January 1, 2007, this act includes past state opinions. The California Constitution has always required state opinions to be "in writing with reasons stated." Accordingly, this act would conform California court practice to that required of all federal courts by the United States Supreme Court pursuant to Rule 32.1, and overwhelmingly adopted by the federal Advisory Committee on Appellate Rules, advocated by its then chairman, now United States Supreme Court Justice Samuel Alito, and by its then member, now Chief Justice of the United States John Roberts.

SEC. 2. Section 68906 is added to the Government Code, to read:

68906. (a) A court shall not prohibit or restrict the citation of state judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "nonprecedential," "not precedent," or other similar designation.

(b) If a party cites a state judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party shall file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

The following case is an example of the damage wrought by the no-citation rule. Michiko Kamiyama served four months in prison because, in order to go to work, she left her four year old child home alone. On writ of habeas corpus, an appellate court ruled her action not criminal,

and freed her. However, the written appellate decision was stamped: "Not to Be Published", as are 93% of appeal opinions in California. This stamp means that we are not allowed to cite or mention these opinions in court. The court noted it could not find another case on point, arguably because previous relevant cases were likewise "uncitable". The Kamiyama case was thus erased as precedent, leaving the criminality of future other parents with "latch key" children as an open, unsettled question.

Social workers and police complain the appellate court has left them without guidance.

We have four questions: 1) If appellate courts are not going to decide these issues precedentially for us, what institution will? 2) When another person is similarly charged, shouldn't that person be able to call a court's attention to this Kamiyama decision rather than be imprisoned? 3) Is it more efficient, better for the child, or cheaper for a person so charged to be able to cite the Kamiyama case to gain release; or to be forbidden to cite the case, to go through trial, serve time in jail, and perhaps win release on application to the appellate court? 4) Had the court sustained the conviction in a published and citable opinion disclosing the precedent and law, wouldn't many times the number of people then note and care about Kamiyami's situation, because this opinion then "counts" and affects them and the whole society, and act to protect us all from prosecutions claiming latch key parents are criminals?

Just as important as being able to cite the law to help us all, is a second aspect: keeping the courts in line. This cannot be done when citation is forbidden. Appellate courts often affirm bad law which trial courts applied to the litigants, and order the bad law unpublished so no persons other than the parties are affected, care or know. Appellate affirmance of the bad law applied by the trial court in Kamiyami would have been the most typical result as, by far, most appeal cases result in affirmances. Unpublished and effectively hidden and secret, the people do not know that the bad law is being applied to them, and their legislators cannot know to fix it. Individual litigants are divided and conquered by judges not just "calling balls and strikes", but playing in the game with the enormous club of state power. Reliability, trust, dignity and humanity are destroyed. The warranty of good law is stripped. The only thing that keeps the judges in line is the certainty that every ruling applies to the whole society because when judges err seriously, an aware citizenry will rise up through its representatives to correct the error. Unpublished decisions destroy this critical awareness.

Mom who left 8-year-old alone not a "common criminal,"
(<http://www.nonpublication.com/eight.html>) ; Marin Independent Journal, June 21, 1998

In re Machiko Kamiyama _ (<http://www.nonpublication.com/newfiles/kamiyama.html>)

(<http://www.nonpublication.com/newfiles/kamiyama.html>) ;

California Court of Appeal Division 3 G022140;
Super. Court No. AP-10379;
Muni. Ct. No. 96WM03282
Filed May 29, 1998
"Not To Be Published"

[N.B. dissent: as one of Cal. Court Rule 976 criteria indicating, but never requiring publication].