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REQUEST FOR BILL INTRODUCTION QUESTIONNAIRE

1) What is the deficiency in current law you are trying to correct?

Unknown to most Californians, more than ninety percent of California appellate court opinions are uncitable, that is, illegal to use, or even mention, in any California state court, per California Court Rule 8.1115. As one of America's leading judges wrote:

- "Indeed, some forms of the non-publication rule even forbid citation. These courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but that does not bind us today, and what's more, you cannot even tell us what we did yesterday.' As we have tried to explain in this opinion, such a statement exceeds judicial power, which is based on reason, not fiat."
  Judge Richard S. Arnold, Judge of the United States Court of Appeals, Eighth Circuit, in Anastasoff v. United States of America, (2000).

The deficiency is best exemplified by asking: "should a trial judge prevent a criminal defendant from citing an appellate court decision that would exonerate him?"

A current "hot button" example: many recent newspaper articles from all over the state report angry motorists, who are trapped by fines of about $500 and driver's license and insurance penalty "points" from newly installed "red light cameras". These motorists are shocked to learn that in California state courts they are *not allowed* to use or, even mention, the ample legal *precedent* determining (at least seven times) that a state statute has invalidated the tickets - unmentionable

because the opinions were marked “unpublished”. Over ninety percent of state appellate opinions are marked “unpublished” - even though all unpublished opinions are available on the internet [see appellant’s brief to the federal Ninth Circuit Court of Appeal in the pending case against the *Justices of the California Supreme Court et al.*, Case No. 09-17195, http://www.nonpublication.com/svsc/FiledOpeningBrief.pdf [1]].

The no-citation rule also shields appellate opinions from criticism that would otherwise improve our law. Because these decisions are not law for all, court watchers do not criticize them in law journals or newspapers, join with litigants seeking Supreme Court review, or press for legislative correction. The result is that rather than our law learning and improving over time, it becomes uninformed, illogical and arbitrary. Judicial error remains solely the burden of powerless individual losing litigants. No force remains to raise the error to the attention of any powerful constituency capable of protecting that individual, or correcting the error to benefit future litigants. In summary, California Court Rule 8.1115 has destroyed the mechanism by which the rule of law brings benefit to civilization.

2) Specifically, how would you change [the] California statute?

Court Rule 8.1115 would be vacated by this bill. Vacation of the rule may create a challenge: what to do about the myriad unpublished so-called “junk” opinions issued during the thirty some years of operation of the no-citation rule. This is a legitimate concern, but should not stop correction of the no-citation problem for the future. Also there are thousands of thoughtful and helpful unpublished opinions written by conscientious judges that resolve issues that will have to be continuously (and unnecessarily) re-litigated if the opinions remain uncitable.

This issue was addressed in SB 1655 (2004) introduced by Senator Sheila Kuehl. The Kuehl bill language included a provision legislatively restricting precedential value of these unpublished opinions - so that trial judges could hear about them, as freedom of speech, equal protection, and due process of law require, but also allow trial judges to recognize that these unpublished opinions may have been the bad result of a failure of the appellate court system to provide a predictable and reliable work product with the expected traditional warranty of trustworthiness..

Alternatively, the bill could be prospective in operation as is new Federal Appellate Rule ("FRAP") 32.1, although this could lead to the loss of the value of the many beneficial unpublished opinions.

Nothing in this bill would require any judge to follow precedent. Judges, according to their level, must be free to offer alternatives to, reject, differentiate or overrule precedent. Such freedom is appropriate for judges provided that they clearly explain their reasons for so doing, and are willing, at the time of making that decision, to decide other similar cases in the same way.

3) Please include any legal and empirical information on which the proposal is based:

The report of the federal Advisory Committee on Appellate Rules (FARC) [www.nonpublication.com/alito2memo.pdf], chaired by now United States Supreme Court Justice Samuel Alito, and upon which now Chief Justice of the United States John Roberts was a leading member who actively advocated restoring the historical right to cite, is authoritative on all issues raised by this bill. The FARC committee unanimously determined that all "no–citation" rules should be abolished in all federal courts, found that the no-citation rules could not be justified on any grounds, that they interfere with the administration of justice,

and raise Constitutional issues about abridgements of First Amendment rights, including freedom of speech.

After reviewing the exhaustive April 14, 2005 report from the careful study which FARC had done by the Federal Judicial Center ("FJC") [available at http://www.nonpublication.com/fjcprelim.pdf], of all issues raised by those opposing elimination of no-citation rules, FARC determined that elimination of such rules involved no costs to court systems or litigants. This was subsequently confirmed by the real life experiences of the actual operations of the federal and major state court systems for more than four years since the December 1, 2006 effective date of FRAP 32.1.

FARC's decision, by overwhelming vote, to recommend elimination of the no-citation rules in the federal judiciary was ratified by the unanimous vote of the Judicial Conference Standing Committee on Rules of Practice and Procedure, then by the entire Judicial Conference of the United States, by the United States Congress, and was adopted by the United States Supreme Court effective December 1, 2006 as new Appellate Rule ("FRAP") 32.1. [See http://www.nonpublication.com/chorney616.htm]

4) Do you anticipate any opposition?

Yes.

5) From whom, and why?

California Chief Justice Tani Cantil-Sakayue opposes citation of unpublished opinions, but refused to give reasons why. Former California Chief Justice Ronald M. George opposed this bill. His principal public arguments of costs

("efficiency") to the judicial system, and costs to litigants, all made in writing to FARC, were all expressly rejected by FARC as being without substance (see, 03-AP-471 Chief Justice Supreme Court of California (Ronald M. George)) ; FARC also rejected similar and more arguments of federal Ninth Circuit Court of Appeals (now Chief) Judge Alex Kozinski in his January 16, 2004 letter to the Alito Committee (www.nonpublication.com/kozinskiletter.pdf (see particularly pgs. 2-7, 21), also available at www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0803Comments/2003APCommentsChart.aspx [No. 03-AP-169]).

Moreover no such effects have been noted in jurisdictions that have eliminated no-citation rules before or since the elimination of these rules in the federal judicial system. See: The report of the federal Advisory Committee on Appellate Rules (FARC).

Retired Chief Justice George's real concern was revealed by a newspaper quote: "Unpublished opinions are a necessary evil to chill the development of the law." The idea is that our appellate courts cannot be trusted to state the law.[2] They just decide case results, and then have clerks ("back") fill-in opinion language that never led to the conclusions in the first place - and should not be viewed as statements of the law. As former Chief Justice George's argument goes, a small group of people around the Chief Justice should decide what will be operative precedent, and what will not. And, they should be allowed to do so outside their traditional sphere of judicial authority to determine a "case or controversy", on their own, usurping this traditionally legislative function. The "efficiency" claimed here is that the published law can be protected from the effects of an errant opinion without having to make the effort to fix the result for the losing individual litigant, or stating correct law. The Chief Justice contends that decisions that deviate from law as the judges see it do not "contribute to the orderly development of the law" and are best kept from public view. They do not care that the benefit of inconsistent views, which forces reconciliation, and throughout

the history of knowledge has lead to truth, is lost. The judges are satisfied with the control it gives them.

See the letter and questions from Assemblymember Jared Huffman, invited by former California Chief Justice George (9-5-08, www.nonpublication.com/huffman090508.pdf), but which the Chief Justice then expressly refused to answer in writing; and the letter from former Assemblymember Mervyn Dymally to the Chief Justice (9-8-07, www.nonpublication.com/dymally.pdf).

There are large institutional parties that appreciate and regularly use the power to lobby the Supreme Court to "depublish" Court of Appeal opinions, and *erase* precedent which they find objectionable. They do not seem to care that in doing so they abandon the individual stuck with a bad result. Because their efforts to prevent publication lead to no actual correction in the law, the groups they represent will be able to benefit unfairly from such unpublished "non-decisions", over and over again. This increases expenses enormously for other litigants and society, creates "horror stories" of roughshod devastation from aberrant opinions, diminishes the humanity, respect and civility of litigants by stripping them of their dignity, and adds much more work and costs for the court system. Moreover the depublication process, if it can be called a "process", is devoid of the opportunities for the critical notice to the public about the real operating opinions – beyond those published opinions that supposedly "count" as precedent. Opinions that don't count as precedent are not regarded by most as "important", and therefore are neither followed, nor generally known to the public or its elected representatives. This ignorance of the real operating opinions thus destroys the supervisory legislative process.

Appellate judges have said that they learn quickly that writing citable decisions only brings criticism and accountability. Writing unpublished decisions involves far less responsibility to use the care necessary to ensure the analysis and the

result that follows from that analysis are correct. Citable decisions require personal involvement in a case on the part of the judge; cases whose decisions are to be uncitable can be delegated to staff or interns. This is of little comfort to the many people whose lives are ruined by careless, inept and illogical opinions. Careful investigation of the stated need for delegation in the appellate system will reveal many problems in our appellate system.

See: Final Report of: California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, chaired by California Supreme Court Justice Kathryn Werdegar, November 2006, http://www.nonpublication.com/sc_report_12-7-06.pdf).

Approximately 300 of the 513 letters received by FARC opposed eliminating no-citation rules. One judge solicited most of the letters. The comments of all were dismissed as without substance. See www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0803Comments/2003APCommentsChart.aspx

6) Do you anticipate any support (outside of the sponsor)?

Yes.

7) From whom and why?

The American Bar Association and the American Trial Lawyers Association backed the change in federal rules. See: ABA Recommendation for full citation. Law professors, many lawyers, virtually all private citizens recognize impropriety of the no-citation rule and the need for accountability in the use of judicial power. There were over two hundred letters of support for Federal Rule 32.1

8) Is there a fiscal component to the proposal? In other words, how much will it cost the taxpayers of California?

No. In fact there may be a large savings. There is absolutely no evidence of such additional costs to anyone. That was determined by the Federal Judicial Center for the Federal Appellate Rules Committee. No evidence has been reported of additional costs from the operations of the federal or the many state court systems that have eliminated no citation rules in more than four years since FRAP 32.1 became effective on December 1, 2006. Several appellate judges have publicly stated that writing citable opinions is no more time consuming than writing uncitable decisions.

There is substantial evidence that making citable precedent available and usable from the thousands of issues formerly resolved in uncitable opinions can allow litigants to resolve matters on their own without use of court time. After all, that is the basis of the common law. When you can reliably trust in predictable outcomes fostered by citation, there is no need to spend the effort, time or money to litigate because the outcomes are reasonably foreseeable. The people's reliance on accurate predictability is critical. When people cannot reliably predict results, huge numbers of them are induced to gamble on litigation, instead of settling based upon predictable outcomes. The resulting volume overwhelms the system, which depends on a preponderating percentage of settlements in order to function.

9) If there is a cost factor to the bill, please explain how it would be funded.

There is no cost.

10) Is this an unnecessary burden on local governments or the business community?

No. The opposite in fact, the burden is reduced. It is the no-citation rule, not its elimination that burdens local governments and business communities. No-citation rules deprive government and business of any clear idea as to what constitutes the real rules they are supposed to follow and use. See e.g., *Mom who left 8-year-old alone not a "common criminal,"* Marin Independent Journal, June 21, 1998. Similarly, consider the burden on police departments and courts from "red light camera" fines that continue to be issued despite appellate court (unpublished and uncitable) opinions determining (at least seven times) that a state statute invalidated such fines, as discussed in 1) above. These all cause enormous wastes of government (police and court) and business time, which are very costly.

Should police and prosecutors ignore these appellate decisions? Is "respect for law and order" fostered by ignoring appellate decisions? The questions are endless because the appellate courts, by making their decisions uncitable, have not carried out their basic function, namely: to decide what the law is for all; and to announce in all their opinions the precedent to be mentioned, followed and used by all.

Similarly, the business community is best served by "granularity" in the effective law, which is afforded by a creating a very large number of usable opinions. This helps address a multitude of future factual situations. Businesses can then foresee, predict, rely on, and trust the law in order to plan, decide and act. The legal consequences are then substantially known. How does the business community plan for law with uncitable unpublished cases? California state courts presently are legally bound *not* to regard, consider or follow over ninety percent

of appellate opinions. The law remains unresolved and unknowable. Such a situation cannot possibly benefit business.

11) Does this proposal provide for any financial gain for you, your business or a family member?

No, although the rule of law is essential for prosperity in any community.

12) Can you provide witnesses to testify on the merits of the proposal? Please indicate names and organizations:

Yes. See above letters in support of Federal Rule 32.1

13) If you have any further relevant information, please provide to appropriate staff.

See: www.Nonpublication.com (homepage left (orange) margin) for a listing of a compendium of information on this issue, accessible directly from any personal computer, includes:

1. "Press Clippings";
2. "Law Review Articles";
3. "News Events", a thirteen year (reverse) chronology of the history of this issue;
4. Useful quotes;
5. Congressional Hearings in 2002 in Washington, D.C. before the House Judiciary Subcommittee on the Courts;
6. Complete exhaustive federal and California reports;

7. Assemblymembers Jared Huffman (9-5-08) and Mervyn Dymally (5-8-07) letters to former Chief Justice George;

8. Federal Ninth Circuit Court of Appeals (now Chief) Judge Alex Kozinski January 16, 2004 letter to the Alito Committee (www.nonpublication.com/kozinskiletter.pdf (see particularly pgs. 2-7)).

9. Prior California Legislature Bills:

SB 1655 (Kuehl 2004);

AB 1165 (Dymally 2003);

AB 2404 (Papan 2000);

and much more.

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[1] To be f*orbidden* to mention unpublished opinions by our government, and *not allowed* to use them in court is an unconstitutional "prior restraint" on our First Amendment free speech rights. To be *prohibited* to mention or use "history" and the "news" is a *censorship* which effectively *rewrites* both history and the news. Rewriting history and controlling news result in "revisionist history", a hallmark of totalitarianism. See:

Erica S. Weisgerber, *UNPUBLISHED OPINIONS: A CONVENIENT MEANS TO AN UNCONSTITUTIONAL END*, Georgetown Law Journal, January 2009, http://www.nonpublication.com/weisgerber.htm;

Tusk, Marla Brooke*, COLUMBIA LAW REVIEW; NO-CITATION RULES AS A PRIOR RESTRAINT ON ATTORNEY SPEECH,* 103 Colum. L. Rev. 1202 (2003*),* http://www.nonpublication.com/tusk.pdf;

Quitschau, Drew R. *ANASTASOFF V. UNITED STATES: UNCERTAINTY IN THE EIGHTH CIRCUIT - IS THERE A CONSTITUTIONAL RIGHT TO CITE UNPUBLISHED OPINIONS?,* 54 Arkansas Law Review 847 (2002)*,* http://www.nonpublication.com/quitschau.htm;

Carl Tobias, *ANASTASOFF, UNPUBLISHED OPINIONS, AND FEDERAL APPELLATE JUSTICE*, Harvard Journal of Law and Public Policy, Summer 2002, http://www.nonpublication.com/tobias3.htm;

Suzanne O. Snowden, "THAT'S MY HOLDING AND I'M NOT STICKING TO IT!" COURT RULES THAT DEPRIVE UNPUBLISHED OPINIONS OF PRECEDENTIAL AUTHORITY DISTORT THE COMMON LAW, Washington University Law Quarterly, Winter 2001, http://www.nonpublication.com/snowden.htm

[2] The appellate judiciary has come to see its role as something greater than deciding cases with implications for the law, but rather as having the primary role as

lawgivers. But three appellate judges should not have the power to make rules with statutory like persistence. Judicial power is limited to the ability of one court's reasoning to convince later courts to follow. If the later court does not follow a conflict occurs, and others must carefully consider what is right. That process is compromised by no citation rules. Courts differing from precedent often leave their decision unpublished to avoid conflict. The published law stands, apparently unquestioned. Thus, our published law appears perfect, unquestionably right. But, our unpublished law becomes ever more grotesque, like in Oscar Wilde's classic novel, The *Picture of Dorian Gray*. Is this the path to truth?