STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0052
(916) 319-2052
FAX (916) 319-2152

DISTRICT OFFICE
322 W. COMPTON BLVD., SUITE 100
COMPTON, CA 90220
(310) 223-1201
FAX (310) 223-1202

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BUDGET SUB #2
AGRICULTURE
UTILITIES AND COMMERCE

MERVYN M. DYMALLY
ASSEMBLYMEMBER, FIFTY-SECOND DISTRICT

May 8, 2007

Honorable Ronald M. George
Chief Justice of California
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Abolition of Ban on Citation of Unpublished Opinions

Dear Mr. Chief Justice:

Four years ago I introduced legislation on the subject listed above. As you are aware, this bill died in the Assembly Judiciary Committee. This session I was asked to reintroduce the bill. Because of my profound respect for Justice Vaino Spencer, and of course you, I opted to write to you on this subject.

I am concerned that the administration of justice is harmed by the "No-Citation Rule" (California Rules of Court §8.1115, formerly §977), not allowing us to mention in court more than ninety percent of appeal court opinions because their authors order them "not to be published." The rule deprives litigants of the benefit of precedents established by others, often at great cost, and renders the law vague and random. It makes reliance on, and adherence to established law impossible, and burdens all who wish to avoid expensive contact with the courts. This has a particular impact on the poor. The rule destroys accountability. It also inhibits enlightenment and the development of our law. The public and the press lose all incentive to monitor and comment upon uncitable opinions because they do not "count" – they do not affect anyone other than the parties, who are often devastated by their unpredictable results.

Effective January 1 of this year, Federal Rule of Appellate Procedure 32.1, promulgated by the United States Supreme Court, prohibits prospective application of rules similar to §8.1115 in federal courts. This action was taken after thorough review of the issues involved by the federal Advisory Committee on Appellate Rules, by the federal Standing Committee on Rules of Practice and Procedure, by the Judicial Conference of the United States, and by the United States Supreme Court. The United States Supreme Court took action only after the Advisory Committee carefully reviewed the study by the Administrative Office of the United States Courts and another study by the Federal Judicial Center, which thoroughly examined the objections raised by you, Ninth Circuit Judge Alex Kozinski and others (FJC Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 15, 70 (2005, www.NonPublication.com/fjc.prelim.pdf; cf., www.NonPublication.com/fjc.pdf).

Chief Justice of the United States John Roberts was a member of the Advisory Committee and voted with the overwhelming majority to adopt FRAP 32.1. So did its chair, now United States Supreme Court Justice Samuel Alito, who authored the Memorandum to the Standing Committee dated May 6, 2005 (www.NonPublication.com/alitomemo2.pdf). The Alito Memorandum noted the Advisory Committee's response to the FJC study, and to your opposition. Pages 12, 4, and 6 respectively are quoted in part as follow:

> "The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee - both supporters and opponents of Rule 32.1 - agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members - including one of the two opponents of Rule 32.1 - went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even

for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 – they prefer a discouraging citation rule to a permissive citation rule - but it is worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place...

Rules prohibiting or restricting the citation of unpublished opinions - rules that forbid a party from calling a court's attention to the court's own official actions - are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns: But whether or not no-citation rules are constitutional, a question on which neither Rule 32.1 nor this Committee Note takes any position - they cannot be justified as a policy matter...

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants - who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past - to suspect that unpublished opinions are being used for improper purposes... And they forbid attorneys from bringing to the court's attention information that might help their client's cause...

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1 (a) abolishes those rules and requires courts to permit unpublished opinions to be cited."

I am aware that in December 2006, the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions chaired by Justice Kathryn Werdegar issued its final report finding numerous publication problems, and promulgated new rules to correct them effective April 1, 2007 (www.NonPublication.com/sc_report_12-07-06.pdf). However, that report did not address the harm to the administration of justice posed by the no-citation rule. Your mandate to the Werdegar Committee restrained it from studying whether or not abolition of the rules that prohibit citation is necessary to protect federal and state constitutional free speech rights and fair policy (report, pg. 6). I regard this as the most significant issue.

Now that the Federal Judicial Center has found all reasons for opposing citation of unpublished appeal opinions to be without substance, and the leadership of the federal judiciary has accepted its report, I am determined to reconcile California citation practice with that of the federal court system, and if necessary, to revive my 2003 bill AB1165 or Senator Sheila Kuehl's 2004 bill SB1655.

In light of the stated reasons for the rejection of your opposition to citation of unpublished appeal opinions by the Administrative Office of the United States Courts, by the Federal Judicial Center, by the Alito Advisory Committee, by the federal Standing Committee on Rules, by the Judicial Conference of the United States, and by the United States Supreme Court, it would be helpful to know if you still stand by your earlier position against such citation

I look forward to hearing from you. With very best wishes.

Respectfully,

MERVYN M. DYMALLY
Assemblymember 52nd District

MMD:kao