STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0006
(916) 319-2006
FAX (916) 319-2106

DISTRICT OFFICE
3501 CIVIC CENTER DRIVE , SUITE 412
SAN RAFAEL, CA 94903
(415) 479-4920
FAX (415) 479-2123

Assembly
California Legislature

JARED HUFFMAN
ASSEMBLYMEMBER, SIXTH DISTRICT

COMMITTEES
CHAIR, ENVIRONMENTAL
SAFETY AND TOXIC MATERIALS
APPROPRIATIONS
UTILITIES AND COMMERCE
WATER, PARKS AND WILDLIFE

September 5, 2008

Honorable Ronald M. George
Chief Justice of the California Supreme Court and
Chairman of the Judicial Council of California
350 McAllister Street
San Francisco, CA 94102

Re: <u>Citation of Unpublished Court of Appeal Opinions</u>

Dear Chief Justice George:

Thank you for your letter of March 7, and your kind offer to respond with additional information regarding the issue of unpublished opinions, which last year comprised over ninety percent of Court of Appeal opinions. I appreciate in particular your explanation that citation of unpublished appellate opinions "is a complex subject, and one that [you] believe may have fiscal ramifications not only for the courts, but for the practice of law in general." While I have great respect for you and your assessment of this issue, I am unable to reconcile your conclusion with the body of evidence that has led to a different conclusion at the federal level.

Specifically, your views seem to be at odds with studies by both the Administrative Office of the United States Courts (AO) and by the Federal Judicial Center (FJC) done for the federal Advisory Committee on Appellate Rules of the Judicial Council of the United States (Advisory Committee) as part of its consideration of the now adopted Federal Rule of Appellate Procedure 32.1 [see, e.g., *FJC Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 15*, 70 (2005, www.nonpublication.com/fjc.prelim.pdf)]. The federal Advisory Committee, chaired by now United States Supreme Court Justice Samuel Alito, and upon which now Chief Justice of the United States John Roberts was a concurring member, reported that while numerous federal and state courts have abolished or liberalized no-citation rules, there is no evidence of additional costs or other negative consequences to the judiciary, attorneys or litigants. For the Advisory Committee, then Chairman Alito wrote:

> "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

Printed on Recycled Paper

> least, fail to support the main arguments against Rule 32.1 [including (unproven contentions about) additional costs]. 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... - 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."

(www.nonpublication.com/alitomemo2.pdf., pgs. 12-13, cf. pgs. 4 & 6).

I would be most interested in any evidence of negative fiscal ramifications at the federal level since either the 2005 federal reports, or the December 1, 2006 effective date of Rule 32.1, as it is my understanding that the new federal policy is working well.

In the absence of evidence showing negative ramifications from the new federal rule, it seems hard to justify the continuation of a no-citation rule for California. Indeed, continuing the no-citation rule would raise questions that could undermine confidence in the fairness and accuracy of our system of *stare decisis*. I am informed that you have defended the no-citation rule by arguing that it is a "necessary evil to chill the development of the law"; that it is "folly" to force the legal system to reconcile cases that are essentially insignificant; and that "[y]ou'd have a difficult time separating the wheat from the chaff if you published everything," [*Publish is his Platform,* Peter Blumberg, San Francisco Daily Journal, March 9, 1998]. The flipside of these arguments, however, is that the rule creates the appearance, if not the reality, of our Supreme Court having extra-judicial veto power over appellate judging. Further, I am concerned that the Supreme Court's reservation of authority to decide what precedents will be operative in any or all appellate districts through actions taken outside of the determination of any case or controversy could constitute an encroachment upon the powers of the Legislature. If you believe the Supreme Court has such sweeping authority, I would respectfully ask you to explain the source of that authority.

I am also concerned about the effects of the no-citation rule on essential checks and balances in our democracy. Appellate judges are a critical link in the chain of our democracy because they often see new issues first. Court watchers monitor published appellate decisions to protect their interests, and through this process many communities of persons in which all manner of expertise resides scrutinize appellate decisions, join with affected litigants to urge the Supreme Court to correct errors, petition the Legislature for correction of unwise holdings or for further consideration and legislation, or otherwise comment so as to improve the quality of our laws. As long as the citation of unpublished opinions remains forbidden, we have an anomalous situation where these case holdings apply in full force to the parties in those cases, but for the rest of society this body of judicial opinions simply does not "count." Because they do not impact non-parties, what incentives motivate the community of court watchers and public advocates to monitor these uncitable decisions? What errors, injustices, or opportunities for reform are we missing by shielding the vast majority of judicial opinions from the same public

scrutiny that plays such a vital role with regard to the small minority of opinions that are published?

I am grateful for the offer in your March 7, 2008 letter to provide additional information on the subject of unpublished opinions, and I look forward to your responses to the questions I have raised above. I would also appreciate your responses to the following questions relating to the no-citation rule:

1. The federal Advisory Committee on Appellate Rules opined that a no-citation rule could infringe on First Amendment free speech rights, stating: "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... they cannot be justified as a policy matter" (see e.g., the law review article by professor Marla Brooke Tusk: *No-Citation Rules As A Prior Restraint on Attorney Speech*, 103 Columbia Law Review 1202 (2003), www.nonpublication.com/tusk.pdf). Have you considered the free speech implications of California's no-citation rule? What state interests do you believe justify Rule 8.1115(a) as a policy matter, and why are such interests sufficiently compelling to protect the rule from constitutional challenge as a prior restraint on free speech?

2. If the Legislature determines for policy reasons that California should conform to the federal rule regarding citation of non-published opinions, do you contend that the "separation of powers" doctrine would preclude legislative revocation of the no-citation rule? If so, please explain how and why this would differ from routine legislative amendments to many California codes that make law for the courts, including, e.g., Civil Procedure, Evidence, Probate, etc.?

3. The California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee") reported that 58% of California appellate judges regularly rely on unpublished opinions in determining cases before them (www.nonpublication.com/sc_report_12-07-06.pdf). These judges admitted that they routinely rely on uncitable, i.e., unpublished case authorities. The judges do not and cannot mention or cite this authority because the no-citation rule prohibits them from doing so. It would appear, therefore, that judges are routinely contravening the spirit if not the letter of the rule, and that they are relying heavily on what amounts to an un-vetted and incontestable body of law. Do you believe this is a problem, and if so what are you doing to address it?

4. What percentage of Court of Appeals opinions for each of the years from 2000 to 2008 to date, and for each of the months from the beginning of 2006 to date, was ordered unpublished and thus not citable?

5. Litigants often seek equal treatment from judges – frequently by urging that court dispositions of their cases be just like the dispositions given to previous litigants. How can denying a right to cite previous cases be reconciled with our constitutional rights: to equal protection of the law; to petition the government for redress of grievançes; to due

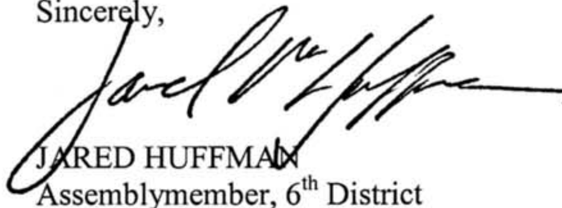
process of law and to fair hearing? How can the principles underlying the federal holding that court rules prohibiting publication and citation are unconstitutional in *Anastasoff v. United States*, 223. F.3d 898 (8h Cir. 2000), vacated on other grounds (mooted by settlement), 235 F.3d 1054 (8th Cir. 2000)) not be applied in our state courts?

6. One example of how the no-citation rule could have extreme adverse consequences would be if persons being charged with a crime were not allowed to advise arraignment judges that an appellate court opinion had already decided that the actions alleged would not constitute a criminal offense. Among the myriad unpublished opinions, it is hard to imagine that at least some of them would not be beneficial in defending against criminal charges. Do you agree that inherent in the no-citation rule is a risk of suppressing some opinions that could exonerate criminal defendants and potentially protect them at the arraignment stage against enormously disruptive, stressful, and costly court procedures, including possible incarceration?

7. Your letter states that you want to accumulate data regarding the new publication rules before moving to charge a new follow-up committee that could recommend revocation of the no-citation rule. What more information is needed to determine the scope of the new committee's charge and how long could it take to gather that information? What is the connection, if any, between the effect of the April 1, 2007 revisions of the California state rules for publication and the no-citation rule? On what date do you now expect to convene the new committee? When you convene the committee, will its meetings be open to public attendance and public input, as were the meetings of the federal Advisory Committee on Appellate Rules?

I look forward to reading your response as I work to deepen my understanding of the complexities of this issue and to assess the need for legislative engagement.

Sincerely,



JARED HUFFMAN
Assemblymember, 6th District