Committee for the Rule of Law
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October 18, 2005

COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, California 94102

To the Commission:

I hereby file a formal complaint. Shockingly, 50 appellate justices have admitted in writing that they are routinely, willfully, and clandestinely violating California Court Rule 977 (attached) in that they are relying upon opinions of the California appellate courts that are not certified for publication in appellate decision making. Rule 977 expressly forbids the practice.

The evidence of this wholesale violation is incontrovertible. The *Preliminary Report and Recommendations on Rules for Publication of Court of* Appeal issued this month by the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, available at http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf reports that according to their own survey 58% of the 86 justices (50 justices) responding to the survey rely upon unpublished appellate opinions when drafting their opinions. See *Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Survey for Appellate Court Justices, Survey Results 9/14/2005 Q14*, page 17 (attached).

The comment of the reporter that "Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division" in no way excuses their behavior. Rather, it demonstrates that justices are deciding cases by relying upon unpublished decisions, an offense that is exacerbated by this blatant admission that the justices are using these decisions in the same manner they would use precedents of their courts they have certified for publication. The harm of this practice is that they are depriving litigants, including myself as an appellate litigant and attorney, of due process by giving affected litigants no opportunity to be heard as to the validity of the decisions upon which they admit relying to resolve their cases.

I cannot identify the specific justices because despite Proposition 59 the committee met in secret and will not release to me the survey responses or other records of the their meetings. (Contact Lyn Hinegardner, Attorney, Administrative Office of the Courts, 415-865-7698). However, the responses are in the possession of the committee (Contact: Justice Kathryn M. Werdeger, Chair, or Mr. Clifford Alumno, Administrative Office of the Courts, 455 Golden Gate Avenue, San Francisco, CA 94102-3660, Fax: 415-865-7664). The veil of secrecy imposed by the committee should be no barrier to investigative powers of the Judicial Performance Commission.

In fairness to the justices I charge, I should disclose that in the opinion of the Federal Appellate Rules Committee, endorsed by the United States Standing Committee on Appellate Rules, The United States Judicial Conference, the United States Department Justice and the United States Solicitor General, as well as the American Bar Association, the American College of Trial Lawyers and the Brennan Center for Justice, among many others and myself as well, believe Rule 977 to be constitutionally invalid. Federal Appellate Rule 32.1 has been promulgated to abolish

no-citation rules in the federal judicial system. See www.nonpublication.com for information on this issue. I have attached an excerpt from the Federal Appellate Rules Committee report. Defenses for no-citation rules offered by Chief Justice Ronald George, Federal Appellate Justice Alex Kozinski and others were carefully evaluated by the committee, even to the extent of commissioning a study of the arguments by the Federal Judicial Center. The Judicial Center Report and the committee found those defenses of no-citation rules to be entirely without substance.

However, the California Judiciary, its Chief Justice Ronald George, Justice Kathryn Werdeger, its Judicial Council, and its Appellate Court have resolutely defended the validity of Rule 977 and determined it to be not constitutionally infirm. *See Schmier v. Sup. Ct. of Cal*., 78 Cal. App. 4th 703, 93 Cal. Rptr. 2d 580 (2000); *Schmier v. Sup. Ct. of Cal.,* 96 Cal. App. 4th 873, 117 Cal. Rptr. 2d 497 (2002). *See also Schmier v. Sup. Ct. of Cal.*, 4th Appellate District No. A101206, San Francisco Super. Ct. Dec. 16, 2003, which holds Rule 977 not to infringe free speech as a matter of first impression, but is itself illegal to mention in our courts because it is "unpublished". That decision is available at *http://www.nonpublication.com/schmiervsupremeappeal.pdf*.

I am sure you will share my indignation if it is determined that Justice Simons, Presiding Justice Jones, and Justice Stevens, who determined the validity of Rule 977 in the above decisions are among those that willfully violate it.

The reason I bring these charges is to invoke the mechanism by which the rule of law protects all of our liberty from inappropriate infringement. The rule of law protects us by requiring that law –bad or good- be applicable to all, including the appellate bench. If the appellate bench finds abiding by Rule 977 awkward, the rule of law forces it to do something about the rule because the rule of law will not allow the appellate bench to hypocritically maintain its validity for the people while itself ignoring its restrictions.

I therefore call upon you, the Judicial Performance Commission, the only agency of the state now allowed to investigate or discipline judges, to enforce Rule 977 by identifying and reprimanding the offenders, or explain why you refuse to do so.

It might also serve the administration of justice if the Judicial Performance Commission was to remind California judicial officers that a bad policy, like a lie, continues to spread its pustulation until corrected.

Sincerely,

Kenneth J. Schmier
Chairman
Committee for the Rule of Law

Attachments: Rule 977
Supreme Court Advisory Committee on Rules for Publication
of Court of Appeal Opinions, Survey Results, 9/14/2005, Q14 page 17
Report of the Advisory Committee on Appellate Rules

The following is excepted from:

DATE: May 14, 2004

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

The entire document can be accessed at http://nonpublication.com/alitomemo2.pdf

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. In an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. 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 Note takes any position — they cannot be justified as a policy matter.

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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. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. 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, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

2005 California Rules of Court

Rule 977. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or

(2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Rule 977 repealed and adopted effective January 1, 2005.

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Survey for Appellate Court Justices

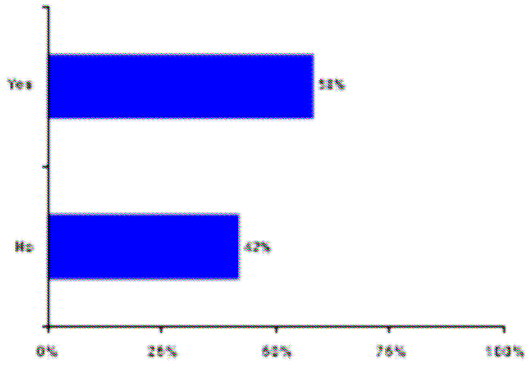
Survey Results

9/14/2005

Q14: Do you ever rely on unpublished opinions when drafting your opinions?

Results

Justices were evenly split on whether they rely on unpublished opinions, with a slight majority (58%) responding that they do use them when drafting their opinions.



Comments

Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division.

Some justices also use unpublished opinions as a source of boilerpoint language.

Q15: Should parties be permitted, in a petition for review or an answer, to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?

Results