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New Day
California Unpublished Decisions to Be Posted Online

By Stephen R. Barnett, Scott Bennett, Maria Lin and Janet Tung

A **new day** in California practice dawns Oct. 1, as the unpublished opinions of the state Courts of Appeal will be posted on the California courts' Web site (www.courtinfo.ca.gov). These opinions make up about 94 percent of all Court of Appeal opinions - some 13,000 opinions per year - as compared with the 6 percent of Court of Appeal opinions, or roughly 840 per year, that are published in the Official Reports.

Although the unpublished opinions will be posted, under present plans, for only 60 days, both LEXIS and Westlaw will put them in their databases permanently. (Some already are in Westlaw.) Under California Rule of Court 977, however, citation of the unpublished opinions as precedent still will be prohibited.

This bold step by the state's judiciary presents many questions, a few of which are opened here.

• **The burden of research.** A practical concern is the additional research burden, if any, that all these newly available cases will impose on California attorneys and judges. Although unpublished opinions may not be cited as precedent, many lawyers will want to research them anyway and maybe request publication if something good is found.

To be sure, the unpublished opinions of the Courts of Appeal already are public documents, available at the courthouse from whence they came. But there's a difference, if an attorney is in San Francisco, between having the opinions available in paper at the courthouse in Santa Ana and having them online and data-based on the computer.

Once thus available, how great a research burden will these opinions exact? The numbers sound horrendous. Cases decided with opinion by the Courts of Appeal total about 14,000 per year. Published opinions are now down to 6 percent of that total, or 840. So more than 13,000 unpublished Court of Appeal opinions per year now will be available online - a crushing burden, one might think.

On closer examination, though, some 52 percent of those opinions are in criminal cases, and another 15 percent in juvenile cases, leaving only 33 percent in civil cases, presumably the relevant universe for researching a civil case. Still, that's some 4,300 unpublished civil-case opinions, more than a fourfold increase over those published. Isn't that still a fearsome pile of cases?

That depends on the techniques of modern legal research. LEXIS and Westlaw reportedly plan, while including the unpublished Court of Appeal opinions in their existing California databases, to exclude them from searches with a "but not" option, to tag them as unpublished when searches do bring them up, and to offer a separate database of unpublished opinions alone.

Still, any time the researcher spends on unpublished opinions mostly will be time additional to that now spent. Experience in other courts - including the 9th U.S. Circuit Court of Appeals, whose unpublished opinions are on LEXIS and Westlaw - suggests that the burden is bearable. Time will tell.

• **Obtaining publication.** One thing likely to happen as unpublished opinions become readily and quickly known to practitioners, and to institutional litigants as well, is a rise in attempts to get selected opinions published. Both the mechanism and the standards for this are likely to draw attention.

Under California Rule of Court 978, a request for publication of a Court of Appeal opinion can be made only to the court that issued the opinion, and it can be granted by that court only within the 30-day period before the decision becomes final. If the Court of Appeal denies a publication request or cannot grant it because the decision is final, it transmits the request to the Supreme Court, together with the Court of Appeal's recommendation and reasons. The Supreme Court then either grants or denies the request.

After Oct. 1, requests for publication may multiply. Supreme Court Reporter Edward Jessen suggests that, with interested attorneys able to spot right away the unpublished opinions that they would like to see published, there will be more requests for publication at earlier stages. These may well include more requests during the 30 days when the Court of Appeal still can act (thus taking advantage of that court's "pride of authorship," as well as the chance to get two bites at the publication apple).

At the same time, there will be the lawyer who researches a new matter in LEXIS or Westlaw and finds an unpublished opinion several years old that is directly in point on its facts. In such cases, the new regime may produce requests to publish opinions years after they were issued.

Although the Court of Appeal must give its reasons for denying a publication request, the Supreme Court never has given a reason for granting or denying a request to publish - or to depublish - a Court of Appeal opinion. With unpublished opinions now visible online, and with court battles over publication more frequent and visible as well, one wonders whether the Supreme Court will be able to maintain its stealth treatment of these requests.

The standards for publication appear in California Rule of Court 976(b), which says that "[n]o opinion ... may be published" in the Official Reports "unless" it makes new law, applies existing law to new facts, resolves a conflict, etc.

Despite this language, the Court of Appeal in *Schmier v. Supreme Court of California*, 78 Cal.App.4th 703 (2000), cert. denied, 531 U.S. 958 (Oct. 30, 2000), faced with the claim that unpublished and uncitable opinions deny equal treatment under law, read Rule 976(b) as "specifying" that opinions making new law "be" published. This decision - in a published opinion - apparently makes publication mandatory, not permissive, if one of the rule's criteria is met.

The *Schmier* court's ruling - although an alternative holding to a denial of standing - is the law of the state, to be followed by other Courts of Appeal absent a "compelling reason" not to. *Metric Institutional Co-Investment Partners II v. Golden Eagle Ins. Co.*, 29 Cal.App.4th 1610 (1994). The Supreme Court as well should follow *Schmier* or explain why not.

One healthy consequence of following *Schmier* should be to narrow the existing chasm between publication rates within the Courts of Appeal. The rate varies in civil cases, for example, from 21 percent (2nd District, Division Four) to 6 percent (2nd District, Division Seven). It's hard now to claim with a straight face that the state's appellate courts all are applying the same rule of law in deciding which Court of Appeal opinions to publish.

• **Pressure for citability.** Finally, the $64,000 question raised by the oxymoronic regime of "unpublished" opinions available online will be whether making the opinions so visible and accessible steps up decisively the pressure to make them citable. The justices who signed off on the Oct. 1 proposal were persuaded that the line against citability could be held, in part because each unpublished opinion will display prominently a "Rule 977 box" warning that the opinion may not be cited or relied on. Nevertheless, the question looms.

On one hand, to the extent that the campaign for citability complains of "secret law," making the opinions plainly and readily public may defuse that charge. On the other hand, when unpublished opinions appear to conflict with other opinions (published or not), when they seem to make significant law, or when they make news for other reasons, a rule that bans lawyers from telling another court about prior court decisions may not commend itself to the public's common sense.

It also is possible that the pressure on attorneys to tell courts about unpublished decisions helpful to their clients will produce so many diversionary attempts - so many claims that the case is being cited not "as precedent" but for some other asserted reason - that Rule 977 will wither away. "All studies show that, when the cases are made available, they get cited," Boalt Hall librarian Robert Berring said.

The pressure for citation may gather force, too, from increased public awareness about the paucity of publication in the Courts of Appeal. Not only are 94 percent of that court's decisions unpublished and, hence, "not law," but of the average appellate justice's output of about 150 opinions per year, only nine are published. The 9th Circuit has a similar annual average of about 150 opinions per judge, but the number published is 20, twice California's figure.

The public may think that it's not getting its money's worth of lawmaking from California's Court of Appeal and that either more opinions should be published or all unpublished opinions should be citable or both.

The full impact of the regime that begins Oct. 1 can only be guessed at today. But it will be interesting. Chief Justice Ronald George deserves credit for the faith in judicial openness that has led him to take this plunge.

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