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LAWMAKERS MUST RESIST MOVEMENT TO CITE UNPUBLISHED OPINIONS
By William Rylaarsdam

California Rules of Court Rule 977 prohibits the citation of the "unpublished" opinions of our appellate courts. A similar rule applies in the 9th U.S. Circuit Court of Appeals and its district courts. The controversy concerning these rules continues. Each year for the last several years, bills have been introduced in the Legislature requiring courts to permit citation of so-called unpublished opinions. SB1655 (Kuehl), introduced two weeks ago, is to this effect; a similar bill passed the Legislature in 2002 but was vetoed by then-Gov. Gray Davis.

Lawsuits have been filed contending litigants have a constitutional right to cite "unpublished" opinions. Requests to change the California Rules of Court to allow such citations persist. A proposal to adopt Federal Rule of Civil Procedure, Rule 32.1, which would permit citation of all opinions in the federal courts, is currently under consideration by the Committee on Rules of Practice and Procedure of the U.S. Courts.

These attempts to change the rules to remove the distinction between published and unpublished opinions are ill-founded and, if successful, will result in much mischief in the state's judicial system.

Most appellate lawyers with whom I have discussed the issue agree that it would be a deplorable idea to permit all opinions to be cited as precedent. Yet when I raised the question with trial lawyers, I found that many of them disagree. This disagreement is frequently based on isolated instances where lawyers have persuaded themselves that, if only they would have been permitted to cite a particular unpublished opinion, they would have won their particular motion or other petition.

First a comment about the nomenclature. I use the usual term "unpublished" but suggest it is inappropriate. This unfortunate designation has enabled some opponents of the prohibition on citability to label these opinions as "secret opinions."

The debate is not whether to publish or not to publish certain opinions. All opinions are now readily available on the Internet. I do not believe anyone proposes that all appellate opinions henceforth be published in the bound volumes of the official and unofficial reporters; for one thing, the cost of maintaining libraries 10 times as large as the present ones would probably destroy the markets for these books.

The debate should, therefore, be characterized as relating to the "citability" rather than the "publication" of these opinions.

I have been an associate justice of the California Court of Appeal for more than eight years. In recent years, my chamber has prepared approximately 170 opinions per year and, in addition, I sign off on approximately double that number of opinions written in my colleagues' chambers.

We have great difficulty in keeping up with the number of appeals filed in our division, as do other divisions and districts of our appellate courts. If each of our cases required an opinion meeting the standards for published opinions, we would not come close to being able to keep current on our appeals.

The state's constitution requires full written opinions in all appellate cases whether published or not.

Our state's approximately 100 appellate justices, constantly struggling with ever increasing caseloads, issue about 15,000 opinions each year. Approximately 10 percent of these opinions are published in the official reporter and may thus be cited as precedent. This may be compared with the state Supreme Court, which must publish all its opinions, and does so at the rate of somewhere between 100 and 200 opinions per year.

If all opinions generated by our appellate courts were to be treated as worthy of equal precedential value, at least the following adverse effects would result:

Because of concern about phrases in appellate opinions being taken out of context when applied to other facts in later litigation, great care is required in editing "published" opinions.

Thus a publication requirement would add to an already-oppressive workload for our appellate judiciary and to further delays for impatient litigants. Although all cases are worthy of full consideration, where the sole audience of the opinion is the parties and their lawyers, substantially less time is required to fine-tune all of the language of the opinion.

An opinion addressed solely to the parties and their lawyers need not iterate the facts and issues to the same extent as a published opinion that is addressed to future litigants.

Again, time required to be sure that readers, otherwise unfamiliar with the case, gain the necessary understanding of the facts and the issues would adversely affect the productivity of our appellate courts.

Citability of unpublished opinions would result in a tenfold increase in the database to be searched by the conscientious California legal researcher.

As a result, the time needed for legal research and the cost of appeals, already unreasonably high, would greatly increase. This would be true both for the appellate court itself and for litigants.

As to the latter, this increased cost might well cause an economic bar to the pursuit of or resistance to appeals, resulting in effectively blocking some litigants' access to our appellate courts.

For the same reasons, the litigants and the judges in our trial courts would also face a greatly enlarged database to be researched, resulting in greater costs and lesser access to the civil justice system and greater costs to an already severely overburdened criminal justice system.

A rule permitting all cases to be cited confuses the error-correcting function of our appellate courts with their law-making function.

Most opinions affirm the trial court on the basis of existing legal principles, whether statutory or common law, relied on by the trial court. In the far smaller number of cases where the trial court is reversed or the judgment is revised, in most instances, the result is again compelled by existing legal principles.

California has adequate procedures to permit parties and other interested people and entities to address the issue of publication. Requests to publish unpublished opinions or depublish published opinions are frequently addressed to our appellate courts and to our Supreme Court, providing another screening mechanism to ensure that opinions worthy of publication are, in fact, published.

It is true that some decisions to publish or not to publish have been controversial. The system is not perfect. But to attempt to cure this imperfection by removing the distinction between the two types of cases would be analogous to removing all traffic signals to solve the problem of drivers who run the red light.

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