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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KENNETH J. SCHMIER, **Plaintiff and Appellant,** **v.** **THE SUPREME COURT OF CALIFORNIA et al.,** **Defendants and Respondents.**	**A101206** **(San Francisco County Super. Ct. No. CGC-02-403800)**

Kenneth J. Schmier appeals the dismissal of his complaint for declaratory and injunctive relief after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks a declaration that California Rules of Court, rule 977, governing the citation of unpublished opinions, is unconstitutional and seeks to enjoin respondents from enforcing rule 977.[1] We affirm.

BACKGROUND

Rules 976 through 979 govern the publication of opinions. Stated simply, rule 976(b) provides that no opinion of the Court of Appeal may be published in the Official Reports unless it establishes a new rule of law, resolves a conflict in the law, presents an issue of continuing legal interest, or reviews the history of a common law rule or statute.

[1] All rule references are to the California Rules of Court.

Rule 978 establishes the procedure for requesting publication of appellate opinions. Rule 979 establishes a similar procedure for requesting depublication of appellate opinions.

Rule 977 (the "no-citation" rule), at issue in this appeal, provides in relevant part:

"(a) An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

"(b) Such an 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 or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

This is appellant's third appeal on behalf of himself or as counsel for his brother, Michael Schmier (Schmier), challenging rules 976 through 979. In the first appeal, *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703 (*Schmier I*), Schmier contended that these rules violate the federal and state constitutional separation of powers doctrine and the constitutional rights to freedom of speech, to petition the government for redress of grievances, to due process and to equal protection. He also contended that these rules conflict with Civil Code section 22.2 and the doctrine of stare decisis. (*Schmier I*, at pp. 706-707.) This court affirmed the dismissal of Schmier's action, which sought injunctive relief and a writ of mandate to compel respondents to publish all appellate opinions and to permanently enjoin them from enforcing rules 976 through 977. (*Schmier I*, at pp. 707, 712.) "The rules were established by persons in possession of a public office with authority to do so, and they comport with applicable statutory and constitutional requirements." (*Id.* at p. 712.) The California Supreme Court denied Schmier's petition for review.

In the second appeal, *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873, (*Schmier II*), Schmier alleged he was entitled to attorney fees for *Schmier I*, under the

private attorney general doctrine (Code Civ. Proc., § 1021.5), though he had not prevailed, because the case conferred a significant benefit on the public by restricting the discretion of the Courts of Appeal to publish or not publish appellate opinions. The court rejected that contention and affirmed. (*Schmier II*, at pp. 876, 878-880, 882-883.)

While *Schmier II* was pending, appellant filed the instant action, individually and as a private attorney general (Code Civ. Proc., § 1021.5), for declaratory and injunctive relief to permanently enjoin respondents from enforcing rule 977. He also sought nominal damages as a result of being precluded from citing and discussing unpublished opinions at oral argument in *Schmier I*, and the refusal of this court to consider appellant's citation of unpublished opinions in his written briefs in *Schmier II*. Appellant contends that on its face and as applied, rule 977 violates the constitutional rights to freedom of speech and to petition the government for redress of grievances. Respondents demurred on the ground that the rule is valid and therefore appellant's complaint failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The trial court sustained the demurrer without leave to amend on the ground that rule 977 "is not legally or constitutionally infirm," and ordered the case dismissed.

DISCUSSION

A demurrer admits the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the judgment of dismissal de novo, and exercise our independent judgment as to whether the complaint states a cause of action. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

In *Schmier I*, this court held that the challenged rules did not violate the First Amendment. Appellant argues that a post-*Schmier I* decision by the United States Supreme Court should lead to a reevaluation of that issue. In *Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533, the court considered a challenge to the Legal Services Corporation (LSC) funding provision. That provision permitted LSC lawyers to represent clients challenging the level of welfare benefits they received, but precluded the lawyers from arguing that any applicable state statute conflicts with a federal statute or

that either the state or federal statute violates the United States Constitution. Over a strong dissent, the high court ruled that the challenged provision was a viewpoint-based discrimination that violated the First Amendment. (*Legal Services Corp.*, at pp. 536-537.) "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. (*Id.* at p. 545.) "A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech." (*Id.* at p. 546.)

Legal Services Corp. v. Velasquez is inapposite. First, the "no-citation" rule does not discriminate between competing viewpoints. No unpublished case may be cited regardless of its position on any particular issue. Second, counsel is not precluded from advancing any argument to a court. In fact, a contention that rests on the reasoning of an unpublished decision may be asserted in a party's brief or argued in court. The party may not, however, reference the unpublished decision adopting the argument. Third, no separation of powers issue exists; the sole limitation is self-imposed by the judiciary.

In a decision that focused on the First Amendment implications of disciplining a lawyer for comments about a pending case made outside the courtroom, the high court stated that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1071.) As we concluded in *Schmier I*, the "no-citation" rule does not encroach on this "extremely circumscribed" right.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.