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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

vs.

JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange; ANTHONY RACKAUCKAS, District Attorney for the County of Orange; and DOES 1 through 50, inclusive,

Defendants.

CASE NO. C-09-02740-WHA

PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT JUSTICES OF THE CALIFORNIA SUPREME COURT'S REQUEST FOR PRE-FILING REVIEW ORDER.

COMES NOW, Plaintiff KENNETH J. SCHMIER, and pursuant to leave of court granted on July 16, 2009, hereby submits the following further brief in regard to the request of the JUSTICES OF THE CALIFORNIA SUPREME COURT for an order requiring prefiling review of any further action filed by Plaintiff in any new action concerning the validity or enforceability of the California publication rules.

I. A PRE-FILING REVIEW ORDER IS NOT LAWFUL IN THIS ACTION UNDER THE FOUR, SETTLED PREREQUISITE FACTORS ENUNCIATED BY THE NINTH CIRCUIT'S *MOLSKI* DECISION.

Defendant JUSTICES OF THE CALIFORNIA SUPREME COURT failed to cite any factual or legal basis in their opposition memorandum for imposition of an order compelling pre-filing review by this Court of any future cases involving California's publication rules.

However, the rules and guidelines concerning such orders were recently enunciated in detail by the Ninth Circuit Court of Appeals in *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *citing De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir.1990). As the Ninth Circuit therein held:

> "The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir.1999). However, such pre-filing orders are an extreme remedy that should rarely be used. *De Long*, 912 F.2d at 1147. Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts. *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir.2004); *Moy v. United States*, 906 F.2d 467, 470 (9th Cir.1990); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (noting that the Supreme Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336.3, at 698 (3d ed.2004). A court should enter a pre-filing order constraining a litigant's scope of actions in future cases only after a cautious review of the pertinent circumstances....
>
> "Thus, in *De Long*, we outlined four factors for district courts to examine before entering pre-filing orders. First, the litigant must be given notice and a chance to be heard before the order is entered. *De Long*, 912 F.2d at 1147. Second, the district court must compile "an adequate record for review." *Id.* at 1148. Third, the district court

must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Id.* Finally, the vexatious litigant order "must be narrowly tailored to closely fit the specific vice encountered." *Molski, supra*, 500 F.3d at 1057.

None of these four factors exist, nor have been, nor genuinely could be fairly established under the facts of this case.

First, Plaintiff has not been given fair notice of the factual and legal grounds for this request. No noticed motion has been made by Defendants. More importantly, as shown below, Defendants have conspicuously offered no facts establishing any frivolous conduct by the Plaintiff either in this action, or in any prior action filed before the state or federal courts. While Plaintiff has been given this information brief, there will be no oral argument offer to him to address any response by the Defendants or the Court.

Second, it is difficult to see how the Court can, at this early juncture of the litigation, wherein none of the Defendants has filed a responsive pleading, reach any conclusion supported as required by an adequate record that Plaintiff is a vexatious litigant as to which "a vexatious litigant order [i]s needed." *Molski, supra*, 500 F.3d at 1059, *DeLong, supra*, 912 F.2d at 1147. As the Ninth Circuit has instructed, "the simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as "vexatious." *Molski, supra*, 500 F.3d at 1061; *De Long, supra*, 912 F.2d at 1147; *In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982).

Third, and clearly the one element genuinely impossible to establish herein, this Court must make "substantive findings as to the frivolous or harassing nature of the litigant's actions." *De Long*, 912 F.2d at 1148 (*quoting In re Powell*, 851 F.2d 427, 431 (D.C.Cir.1988)). To decide whether the litigant's actions are frivolous or harassing, the district court must "look at both the number and content of the filings as indicia' of the frivolousness of the litigant's claims." *Id.* (quoting *Powell*, 851 F.2d at 431). "An injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must not only be numerous, but also be patently without merit." *Moy*, 906 F.2d at 470. No such finding has been or could be so made herein.

Not a single one of the prior decisions of the California Appellate Courts held that Plaintiff's prior efforts to overturn a rule (CRC Rule 8.1115) he genuinely maintains is an unconstitutional

prior restraint (a proposition with which even Justice Alito appeared to agree as suggested in his May 24, 2004 Committee Report recommending for abolition of the same rule [i.e., then Ninth Circuit Rule 36-3], via the federal appellate judiciary's adoption of FRAP Rule 32.1) is "patently without merit."

In fact, this Court was misled at the hearing in the matter on July 16, 2009. No prior case on this issue has even found standing, let alone reached a finding on the merits. The following exchange occurred at the hearing on July 16, 2009 (Tr., page 2, line 25):

> 25 THE COURT: You're telling me that the State Court
> 1 ruled on standing grounds and did not reach the merits?
> 2 MR. AFTERGOOD: That's correct, Your Honor.
> 3 THE COURT: Is that true?
> 4 MR. BLAKE: No, Your Honor, what we call Schmier 1
> 5 was squarely on the question of the enforceability of the
> 6 publication rules.

This is simply not true. *Schmier I* was dismissed on standing grounds. *Schmier I* expressly said, "Preliminarily, we observe that the complaint lacks facts sufficient to establish the requisite element of appellant's standing to bring the action." 78 Cal.App.4th 703, 707 (2001). A finding of no standing precludes determination of any further issue. Further, while *Schmier I* recognized that Schmier had raised the First Amendment issue, it did not in any way address it in writing with reasons stated as required by Cal Const. Art. VI, Sec 6. It should be noted that its dicta regarding the factual circumstances upon which it decided *Schmier I* establish obvious bias. Plaintiff had asked the court to determine if it had bias, and the court should have recused itself when it determined it was influenced by its own perception of the needs of the appellate courts. *Schmier I* was brought in the Superior Court of California, County of San Francisco.

The subject matter of *Schmier II* was attorneys fees under the private attorney general statute (Cal. Code Civ. Proc. Sec. 1021.5), contending that a new construction of the publication and no-citation rules contained in *Schmier I* that appeared to require decisions espousing new rules of law to be published and allowing all opinions to be cited for whatever persuasive value they might have,

restricting only precedential value, established a change in the law benefitting the people of California. Legal commentators had noted the benefit. *See A New Day*, by UC Berkeley Prof. Stephen Barnett, a copy of which is attached hereto as "Exhibit A." But the court clarified the ambiguity caused by its dismissal of the case on standing and its new construction of the California publication and citation rules by reconstruing its new construction to eliminate its obvious intent. The issue of this case was attorneys' fees, and in no way related to First Amendment rights. *Schmier II* was brought in the Superior Court of California, County of San Francisco.

Before the determination of *Schmier II*, the United States Supreme Court decided *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 545, 121 S.Ct. 1043 (2001). In order to give the Appellate Court the opportunity to consider the decision in *Legal Services Corp., Schmier III* was brought. The court did not find standing in *Schmier III* either, although it noted that Plaintiff 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*. Hence there was no valid determination of issues where standing born of the real harm of preventing an attorney from citing exonerating authority is present. *Schmier III* was brought in the Superior Court of California, County of San Francisco.

Finally, the Ninth Circuit itself openly acknowledged that Plaintiff's raising of the constitutional infirmity of the federal equivalent of the same rule in *Schmier v. U.S. Court of Appeal for the Ninth Circuit* 279 F.3d 817 (9th Cir. 2001), in the future (with an adequate showing of standing) would not be either inappropriate or disinvited:

> "Our ruling, of course, ***does not preclude another lawsuit by Schmier*** alleging (subject to the pleading requirements of Fed.R. Civ. P. 11) a situation in which he did immediately face sanctions for citing an unpublished disposition. Nor does it preclude him from attempting to rely on an unpublished disposition in the course of representing a client with a bona fide case or controversy. In either event, the standing doctrine would not divest us of the authority to address Schmier's claims on the merits….

> Given the wide range of interest shown in the debate about unpublished opinions, and assuming that parties with personal stakes in live controversies will properly raise the issue with the federal courts, we think it is only a matter of time before the theoretical questions raised by Schmier's complaint are all properly presented and resolved." *Id.*, 279 F.3d at 825 [emphasis supplied].

Schmier v. U.S. Court of Appeal for the Ninth Circuit was brought in the United States District Court for the Northern District of California.

Exactly as invited by the Ninth Circuit Court of Appeals, Plaintiff has brought a case in the Federal Courts in which he does have standing. Each of the cases has been brought in the San Francisco area, where venue is proper for the principal defendants and where Deputy Attorney General Thomas Blake is officed either within the building where these courtrooms are located, or less than a block away.

As per all of the Courts that have been petitioned to resolve the issues presented herein, have declined to find standing, there can be no res judicata, and there can be no abuse of judicial process by Plaintiff.[1]

Furthermore, none of the State Court decisions admonished Plaintiff for brining a frivolous lawsuit. Indeed, there has never been any finding therein that any of Plaintiff's prior actions brought were brought without colorable merit, or were frivolous or brought for an improper purpose.

Nor could such a claim be made here, particularly given the numerous recent developments casting serious doubt on the legality of Rule 8.1115(a).

Since the last *Schmier* decision, the federal and appellate courts of this nation have themselves universally abolished their equivalent "8.1115" no-citation rules because they have been expressly found to be unsupported by any genuine governmental interest whatsoever. Defendants in this proceedings conspicuously offered no contrary evidence. Defendants have also recently

[1] Even if standing could be found for *Schmier III*, a troubling result would follow. The Court would have to maintain that Plaintiff is bound by res judicata to the determination of that unpublished opinion, while suggesting that the People of the State of California are not bound by res judicata to the determinations of the unpublished opinions in *Fischetti I*, *Vrska* and *Fischetti II*. If this is not to be thought manifestly unfair, some explanation is required.

changed their own publication rule (as of April 1, 2007) *installing a presumption of publication*, and offer no explanation how Defendant CALIFORNIA SUPREME COURT claims to have had the authority to depublish a previously published case (clearly meeting these new publication criteria) principally in acquiescence to the *ex parte* request of a nonparty stranger to the underlying lawsuit lacking any standing whatsoever. It is unclear how this shocking transaction cannot be found to be anything other than a profoundly disturbing development inconsistent with fundamental principles of judicial impartiality, and traditional notions of justice and fair play.

Moreover, since the last *Schmier* case, both a Chief Justice and an Associate Justice have been confirmed and installed on the U.S. Supreme Court (which may ultimately be called upon to review this case), both of whom have openly stated their fundamental opposition (including on the very potential Prior Restraint/First Amendment grounds raised herein) to the since-abolished federal equivalent of CRC Rule 8.1115(a).

Even had the California courts *arguendo* somehow previously decided the same issue (far from clear from the sparse and vague record offered by Defendants herein), there can be no question that these recent developments were and are sufficiently weighty and constitutionally newsworthy to warrant at the very least a good faith re-examination of the constitutionality of Rule 8.1115(a), particularly with Justice Alito's alluded-to viewpoint that such a rule may in fact be unconstitutional for the very reasons raised by Plaintiff herein.

Moreover, even this Court appeared to acknowledge at the July 16, 2009 hearing that Plaintiff has likely met the standing requirements suggested as sufficient by the Ninth Circuit's prior *Schmier* decision, quoted hereinabove, 279 F.3d at 825. There has also been no dispute that, had the relief sought by Plaintiff been granted herein, Plaintiff's client (Mr. Jennings) would have been entitled to an acquittal as a matter of law in the underlying criminal case below, in which Mr. Schmier has been retained to furnish his defense.

"[T]he simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as "vexatious." *Molski, supra*, 500 F.3d at 1061; *De Long, supra*, 912 F.2d at 1147; *In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982). Plainly, Mr. Schmier brought this action in good faith and has presented a colorable constitutional challenge which

cannot fairly be found "patently without merit," as the law of this Circuit expressly requires before any pre-trial review order may be entered under the constitutional due process restrictions imposed by *Molski* and *DeLong*, *supra*.

As for the assertion that Plaintiff was somehow "forum shopping," in the hope of finding a less "conservative" district court, there is neither factual nor legal merit to this assertion. The one and only reason the action was filed in this judicial district, is because the principal Defendant California Supreme Court has its principal place of business in the City and County of San Francisco, expressly making venue in this district proper as a matter of law. 28 U.S.C. § 1391(b). Neither was Plaintiff forum-shopping when he filed *Schmier I* (78 Cal.App.4th 703) in the San Francisco County Superior Court (Case No. 995232), and *Schmier II* (96 Cal.App.4th 873) in the San Francisco Superior Court (Case No. 995232); and *Schmier III* (Unpublished Case A101206) in the San Francisco Superior Court (Case No. CGC-02-403800). At all times, because the Defendant California Supreme Court in each of those cases had its principal place of business in San Francisco, that was also the only place the action could have been filed under California's venue rules. *See*, C.C.P. §§ 394, 395. Since Plaintiff has never brought any case related to these issues against Defendants outside of the Northern District of California, and there has never been any objection to such venue from Defendants, there can be no valid allegation of forum shopping.

Nor has any factual or legal authority been advanced by Defendants establishing any improper choice of venue by Plaintiff for this action. Nor has any authority been cited supporting the notion that a proper choice of venue, standing alone, can be deemed "frivolous" for the purposes of supporting a pre-filing review order.

Nor did Plaintiff perceive this Northern Federal District to be necessarily more "sympathetic" than might have been another California district (even assuming *arguendo*, venue there would have been proper to begin with). On the contrary, this Court is respectfully invited to take judicial notice, pursuant to Fed,R.Evid. Rule 201, of a case styled *Hild v. California Supreme Court* Case No. 3:07-CV-05107, in which the Plaintiff Joshua Hild therein also recently challenged the same noncitation rule (C.R.C. Rule 8.1115) on constitutional due process grounds. Plaintiff herein was never a party to *Hild*, nor had any association with the Plaintiff's counsel in that action. Therein,

Judge Thelton Henderson of this Court granted Mr. Blake's Fed.R.Civ.P. Rule 12(b)(6) motion made in that case on February 26, 2008.

In fact, the *Hild* case has been fully briefed for the better part of a year, and was just recently scheduled (in the last week) for oral argument on September 15, 2009 before the Ninth Circuit Court ***in San Francisco***. (*See*, Case No. R 08-15785).

Plaintiff was well aware Judge Henderson of this Court had made clear he was not particularly "sympathetic" to the constitutional challenges brought therein by Joshua Hild, when Plaintiff Schmier filed the instant action in this Court, purely out of necessity because venue was and is proper here. 28 U.S.C. § 1391(b).

Accordingly, there clearly has been no "forum shopping" here, and such suggestion made gratuitously by Defendants is disingenuous and best and in bad faith at worst in light of the fact that every action to date raising the issue of the constitutionality of Rule 8.1115 (or its predecessor) was properly venued in the City and County of San Francisco.

Finally, the fourth and final factor in the *Molski* and *De Long* standard is that the pre-filing order must be narrowly tailored to the vexatious litigant's wrongful behavior. Even if the other three (3) prerequisite *Molski* and *DeLong* factors could somehow be met, it is unclear how Plaintiff can be constitutionally enjoined in perpetuity from exercising any challenges to his constitutional rights that may arise "concerning the validity or enforceability of the California publications rules" as broadly demanded by the CALIFORNIA SUPREME COURT.

II. CONCLUSION

Plaintiff is entitled to a detailed decision on the merits of this case that evaluates Plaintiff's claims according to the burdens of proof and structured analysis well established as appropriate for First Amendment and prior restraint issues. Plaintiff argues that the no-citation rules destroy the mechanism by which the rule of law governs our society. A similar proposition has been stated by the Federal Appellate Rules Committee (May 14, 2004 Report of Advisory Committee on Appellate Rules, at p. 45): "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." Given the costs of mankind's struggle to establish

the rule of law, and the gravity of the concerns not only expressed by Plaintiff but by the committees comprised of the leadership of the United States Judiciary, Plaintiff should be given significant leeway to see the issues he presents thoughtfully addressed.

For all of the foregoing reasons, Plaintiff respectfully submits that the four (4) prerequisite factors necessarily found in this Circuit before any pre-filing review order may be issued, are not and cannot genuinely lie in this case. Accordingly, no such relief may be granted as a matter of established law, and such request must therefore be denied.

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DATED: July 20, 2009

THE AFTERGOOD LAW FIRM

By: _____
AARON D. AFTERGOOD,
Attorneys for Plaintiff.

EXHIBIT A

Daily Journal - Sep 26, 2001

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.

Stephen R. Barnett is a professor at Boalt Hall. **Scott Bennett, Maria Lin** and **Janet Tung** are Boalt Hall students enrolled in his seminar on California Legal Institutions.