Committee for the Rule of Law
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Mr. Clifford Alumno
Administrative Office of the Courts
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Re: Comments on Werdegar Committee Report

The committee has, by majority vote, deliberately chosen not to make mandatory the publication of decisions that meet the standards set out in Rule 976.

The committee thus leaves appellate courts free to decide any case, even those establishing a new rule of law, in a manner that is completely free of the constraints of stare decisis. If an appellate court can decide a case according to rationale that by virtue of being unpublished, cannot be cited in the future, then any constraints imposed upon the judicial branch by the making of precedent are rendered ineffective.

Before persisting in this folly the committee should answer these simple questions: By what mechanism is the rule of law enforced upon the judiciary if judges are free to make a new rule of law that is not for everyone but only effective at one time and place? And, if new rules of law are not published to the general community, how are citizens to know the law, and how may they criticize it? Given that – by your own survey – 50% of appellate judges are relying upon unpublished decisions for the rationales of decision, how are errors to be caught before being replicated?

If the committee cannot identify another mechanism to enforce the rule of law other than the making of citable precedent, then by failing to recommend standards for mandatory publication the committee will be complacent in the destruction of the rule of law. The members of the committee are duty bound to uphold the rule of law. Therefore the committee has an affirmative duty to recommend elimination of the compromise to the rule by existing rule 976 and establish mandatory standards.

Before failing to do so, each committee member should individually consider whether such a failure constitutes obliquity to oath and treason to the rule of law.

The committee should also consider that according to its survey 50% of appellate judges rely on unpublished appellate opinions. The same appellate court having sustained the validity of Rule 977, it is the highest form of hypocrisy for appellate judges to flagrantly violate the rule. For reasons described in the attached op-ed piece, I filed charges with the Commission on Judicial Performance, charging this wholesale violation of Rule 977. The facts, and the CJP declination to prosecute, indicate further lack of respect for the constraints of the rule of law within California judicial institutions. Surely the committee must address this.

Finally, I simply cannot understand the committee's willingness to consider Rule 976 in a vacuum. It seems to me that once charged with making a recommendation as to Rule 976, the committee has a duty to examine the impacts flowing from the standard for publication, which immediately, and perhaps solely, includes whether a decision may be cited. I cannot comprehend by what authority the committee has been restricted from considering rule 977 as it relates to what is, or is not, to be published, or why the committee respects that authority. The associate justices of the Supreme Court and its Chief Justice are not potentates, but have only the authority to decide cases brought to them for decision. What gives them the power to limit the inquiry of the committee?

I am genuinely concerned that the leadership of the judiciary has, through the acquisition of administrative responsibilities and appointing powers, and establishment of political like relationships among lower levels of the judiciary, acquired a power over the actions and decisions of lower level judges throughout the system far greater than that which should be associated with judging at the Supreme Court level. The Chief Justice has said that he is so busy in this regard that he only gets around to deciding cases "at 10 o'clock at the kitchen table." I am further concerned that judges of the appellate bench voluntarily acquiesce to this contortion of responsibility. And I am concerned still further that via constitutional amendment the judiciary seeks to increase the power of the Chief Justice to control monetary issues for local courts as well.

This improper power is enhanced by the ability to suppress the citation of decisions of appellate judges. I have heard judges say that our state needs a small group of persons to edit our law for consistency. If we do, that duty belongs to the legislature. The power of the judiciary is to be dispersed among many judges, and to be exercised only within the context of cases that state law applicable to all, or perhaps scholarly writings.

The committee has so far missed the mark. It should do better before it disbands.

Sincerely,

Kenneth J. Schmier
Chairman
Committee for the Rule of Law

Enclosure: *Justices Carve Exception to No-Cite Rule*
The Recorder, November 4, 2005

Justices Carve Exception to No-Cite Rule
The Recorder
By Kenneth J. Schmier and Michael K. Schmier
November 4, 2005

Fifty California appellate justices, half the bench, were caught violating the same court rule they insist on enforcing against litigants — the rule prohibiting reliance on unpublished appeal decisions. The Judicial Performance Commission must now decide whether to sanction them.

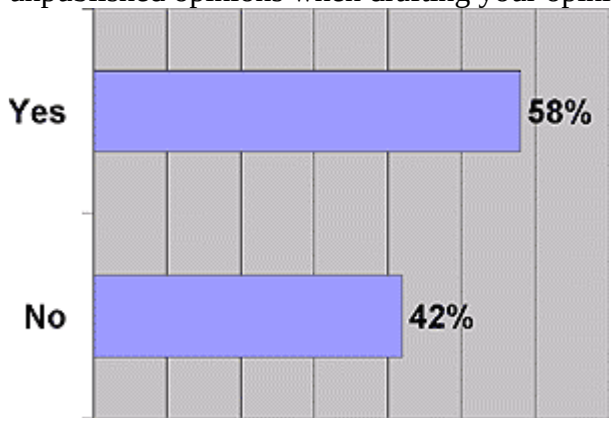
The embarrassing violations of Rule 977(a) came to light when the Supreme Court Advisory Committee on Rules for Publication ("Werdegar Committee") released its preliminary report two weeks ago. A survey taken by the committee revealed that 58 percent of 86 justices responding rely upon "unpublished" appellate opinions. California's "no-citation" Rule 977 says unpublished opinions "must not be cited or relied on by a court or party."

California appellate courts have repeatedly rejected challenges to Rule 977. Rule 977 and other no-citation rules have spawned a great deal of controversy over the past decade. Many high ranking judicial officers have argued that no-citation rules must be rescinded.

"A lawyer ought to be able to tell a court what it has done," said new Chief Justice John Roberts Jr. Supreme Court nominee Samuel Alito Jr. has said that the three decade old experiment with no-citation rules has proved to "conflict with basic principles underlying the rule of law."

FLOUTING THE LAW

86 state justices were asked if they "ever rely on unpublished opinions when drafting your opinions"



Source: Administrative Office of the Courts. View PDF report.

Alito and Roberts are among those backing the adoption of Federal Rule of Appellate Procedure Rule 32.1, which, Alito wrote for the Federal Appellate Rules Committee, "abolishes such rules and requires courts to permit unpublished opinions to be cited."

Rule 32.1 is expected to be approved by the U.S. Supreme Court by May. In considering Rule 32.1 the federal rules committee called upon the Federal Judicial Center to investigate defenses of no-citation rules offered by Ninth Circuit U.S. Court of Appeals Judge Alex Kozinski and California Chief Justice Ronald George. It found their assertions to be without substance.

Nonetheless the California judiciary, its chief justice, its Judicial Council, the attorney

general and, most importantly, the appellate courts, have resolutely defended the validity of Rule 977. To paraphrase the late Johnnie Cochran, if the rule is fit, the appellate bench too must submit.

But half are not submitting. A comment included in the Werdegar Committee's report said, "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." Justices are deciding cases by relying upon unpublished decisions in the same way they would use decisions marked "Certified for Publication" — except without citation. Apparently the admission escaped the attention of the committee's chair, Justice Kathryn Mickle Werdegar, and the members of her committee specially chosen by Chief Justice George.

We concur with Justices Roberts and Alito, the American Bar Association, the American College of Trial Lawyers, 21 states, including New York, Texas, Illinois, Michigan and New Jersey: rules like 977 must go. Yet, we are the ones who complained to the Commission on Judicial Performance that justices are violating Rule 977. Given the poor regard in which we hold Rule 977, why did we do so? We invoke the rule of law to attack it. The rule of law requires 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 the bench to change it. It is not acceptable that judges, who made and enforce the rule that forbids us to rely on unpublished decisions, secretly violate the same prohibition.

"Violating rules relating to court administration" constitutes judicial misconduct, according to the CJP. But is the CJP sufficiently independent of the judicial establishment to issue charges?

We are giving the CJP an opportunity to prove its rectitude.

The complaint is not frivolous; there is great harm in what the justices are doing.

Clandestine reliance upon unpublished decisions deprives litigants and attorneys of any opportunity to argue against their validity. Worse, these decisions have never been vetted before the tens of thousands of court watchers, incentivized by citability and *stare decisis*, who monitor published appellate decisions. Among these court watchers is vast expertise regarding all manner of issues that come before appellate courts. Vetting decisions before them serves as a realistic and vocal quality control mechanism for the enormous volume of appellate dispositions.

But court watchers, and justices too, have been misled by Rule 977 into believing unpublished decisions do not influence the determination of future cases, and rarely criticize them. Unpublished opinions lack the crucial dignity of standing for something. They are not supposed to count, except for the parties, who are often shocked, and many devastated, by their "result orientation." The warranty of rightness is stripped when unpublished opinions circumvent court watcher inspection. Yet the Werdegar Committee

report reveals that these opinions are calcifying into decision-determining lines of secret precedent anyway.

Our strategy depends upon the CJP to enforce Rule 977. Will it? It's already waffling. Its executive secretary, Bernadette Torivino, responded to our complaint the day it was received. She wrote that the investigation will not go forward until we name the justices and "specify exactly, what action or behavior of each judge is the basis for your complaint." When 50 of 101 justices have admitted a serious violation in writings held by a Supreme Court advisory committee, it is hard to believe the CJP does not have enough information to move forward. Sounds like evasive bureau-speak to us.

We cannot identify the specific justices because, despite open government Proposition 59, the committee met in secret and will not release to us the survey responses or other records of their meetings. We have sued the Judicial Council to gain access, but the Judicial Council, represented by Morrison & Foerster, aggressively defends its questionable right to hold all of its policy-making subcommittee meetings in secret and to keep their papers from the public.

So we shall name all of the appellate justices and rely upon the CJP to use its investigative powers to defend the rule of law, and hope for the best.

Kenneth J. Schmier is the chairman and Michael K. Schmier the director of the Committee for the Rule of Law. They are the authors of "Has Anybody Noticed the Judiciary Has Abandoned Stare Decisis?" *in the Journal of Law and Social Challenges and maintain www.nonpublication.com.*