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PUBLISHING ALL OPINIONS WILL IMPROVE JUDICIAL SYSTEM IN STATE
By Stephen R. Barnett

Court of Appeal Justice William Rylaarsdam usefully calls attention to the ongoing controversy over the court rules in California and the 9th U.S. Circuit Court of Appeals that prohibit citation of "unpublished" appellate opinions. ("Lawmakers Must Resist Movement to Cite Unpublished Opinions," Forum, March 3.)

Rylaarsdam aptly notes the pending efforts in the state Legislature (SB1655 Kuehl) and the Appellate Rules Committee of the U.S. Courts to require courts to permit citation of their opinions. On the merits, however, he is not persuasive.

While describing a parade of "adverse effects" that assertedly would result if all appellate opinions could be cited, the justice never mentions the questions of principle involved. These include:

- Should an attorney be prohibited from telling a court how another court has ruled in a prior case involving similar facts? Should courts be allowed to say to lawyers and litigants, as 8th U.S. Circuit Court of Appeals Judge Richard S. Arnold has put it, "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday"? Does that not raise questions of equal protection, due process, freedom of speech and the nature of judicial power?
- Would Rylaarsdam himself, as an appellate judge, feel comfortable denying a criminal defendant before him the right to cite an exculpatory decision of a Court of Appeal? As attorney Kenneth Schmier has asked, wouldn't the justice feel he was compromising basic American values? Are civil cases any different?
- Is it appropriate that the California judiciary declares fully 93 percent of its Court of Appeal opinions to be uncitable and therefore not law? Absent citability, what mechanism insures that appellate courts carefully reason every case and do not bury decisions they cannot defend?

Among the asserted effects of making all opinions citable, Rylaarsdam fears: (1) concern about "phrases in appellate opinions being taken out of context" will require more judicial care and time in editing citable opinions; (2) More judicial time will be needed to "iterate the facts and issues" for readers not previously familiar with the case; and (3) "A tenfold increase in the database" will "greatly increase" the research time for courts and litigants.

The short answer to these fears lies in an inquiry the justice ignores: What are other jurisdictions doing? In both federal and state courts, there is a pronounced trend away from no-citation rules. Nine of the 13 federal Circuit Courts of Appeals now allow citation of their unpublished opinions; only the 2nd, 7th, 9th and federal circuits still forbid it (except in related cases, where all courts allow it, and with a further exception in the 9th Circuit for asserted conflicts).

In the states, the trend again is clear. Within the past three years, seven states have switched from prohibiting citation to allowing it. States allowing citation include major ones such as New York, Michigan, Ohio, and Texas. If the results were as calamitous as Rylaarsdam asserts, it seems unlikely that so many jurisdictions would be jumping off that cliff.

The justice misstates the issue. It isn't whether all opinions must be accorded "equal precedential value." Differences between published and unpublished opinions could remain. Five of the federal circuits that allow citation of unpublished opinions, and many of the states that allow it, in fact stipulate that the opinions may not be cited as "precedent," but only for "persuasive" value.

Further, Rylaarsdam's worry about having to produce "full written opinions" clashes with his recognition that the constitutional requirement of written opinions applies in appellate cases "whether published or not." The constitution thus requires for citable opinions nothing more than the opinions now written by the court of appeal.

Fears of "a tenfold increase in the database" overlook the nature of computer research. If 10,000 cases are added to the database, that doesn't mean lawyers must stack that mountain of cases on their desks and go through them one by one. It means that a given search may retrieve more cases than before, hence the researcher may wish to narrow the search terms. There's no reason to think the time involved is greatly increased.

Consider New York. The intermediate appellate courts in New York decide 12,000 cases a year, close to California's number. In New York, all these cases are decided with opinion (usually "memorandum" opinions, which average one printed page in the published reports but often run longer). these opinions are published in the Official Reports, and all are citable.

Asked how they handle the supposedly crushing burden of research, New York lawyers and judges uniformly say it is no problem. It used to be, they say, before computers came along, but now the research is easily done online. No one, it seems, complains about having too many cases to research.

Nor is this one of those things that only New Yorkers can do. Texas last year abolished its unpublished opinions in civil cases, making all those cases citable. Michigan's appellate opinions are all citable. If these states (and many others) can decide all their appeals with citable opinions, why can't California?

One possible answer is that the state's no-citation rule lets judges wield judicial power largely free of accountability. This untrammeled power is addictive, and the judges maximize it with their 93-percent nonpublication rate.

Finally, there's the problem of how it's decided whether an opinion will be published. Rylaarsdam is defensive about this ("the system is not perfect"), and rightly so. Not only are the Rule 976(b) criteria for publication not applied consistently, and not only are today's judges in no position, anyway, to decide whether an opinion's "audience" includes "future litigants." Moreover, one Court of Appeal unabashedly has held that Rule 976(b) gives courts "discretion" to publish opinions that make new law but "imposes no requirement" that they do so. *Schmier v. Supreme Court of California*, 96 Cal.App.4th 873 (2002). In deciding whether their opinions make law, judges thus are subject to no law themselves.

It may seem fantastic in our system of law based on precedent that legislation should be needed in order to make judicial decisions citable. The need exists, however, and Sen. Sheila Kuehl's SB1655 deserves support. It would be better, though, if Justice Rylaarsdam and his judicial colleagues stopped circling the wagons around the present system and confronted the problem themselves.

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