April 28, 2003

By: Fax, E-Mail & U.S. Mail

The Honorable Mervyn M. Dymally
California State Assembly
State Capitol
Room 3132
Sacramento, CA 95814

re: Tuesday, May 6, 2003, 8:00 a.m.
Judiciary Committee Hearing [Room 4202] on:

AB 1165 -- to Reverse the Judicial Ban That Prohibits
Citation of Unpublished Appeal Court Decisions

Dear Mr. Dymally:

A. Introduction

We respond to the April 17, 2003 letter to you regarding AB 1165 from Horvitz and Levy attorney, Lisa Perrochet, Chair of the Subcommittee on Future of Appellate Courts of the Appellate Courts Committee of the Los Angeles County Bar Association.

Following is substitute language to amend the bill, which we think addresses most of the criticisms of the initial language.

We maintain www.nonpublication.com as a library of materials related to this issue.

Ms. Perrochet's letter focuses on technical and legalistic matters and so this response tracks these technicalities. Debating legalities removes attention from the reality the people see. Many persons, workers and business owners alike, are afraid of our legal system. They know that they cannot rely or depend on it, and that it can wreak great and unexpected devastation on their lives. Although their stories deserve thorough legislative investigation, they are only mentioned, but not thoroughly developed in this response.

B. Summary

The essence of our position is that our law must reflect the principle that courts make precedent every time they act, but courts need not follow precedent every time they decide a case.

We believe that AB 1165 is not unconstitutional and we hold the following:

· The Legislature is not prohibited from publishing appeal court decisions;

· "No-Citation" rules are improper;

· Court Rule 976 does not require the publication of any decisions, even those meeting its own prescribed standards;

· The current system of non-publication and no-citation gravely threatens the rule of law by compromising the equal protection of the law and the ability of the people to monitor the courts;

· Cost based arguments opposing AB1165 are not supported by the experience of other states;

· Free speech, the right to petition government for redress of grievances and equal protection of the law outweigh other considerations.

C. Stare Decisis and Persuasive Precedent

We believe courts must acknowledge relevant precedents called to their attention and should follow, distinguish, or overrule those precedents, coupling their reasons for doing so with appropriate citations, so that our indexed body of law is constantly improved by the contribution of their thoughts.

We think that as a matter of definition all actions of the appellate courts constitute precedent. This is because we understand the word "precedent" to mean simply, "that which was allowed before." After all, can it be rightly said that if an appellate court resolves an issue on Monday, and the same issue comes before it again on Tuesday, that the issue can be unprecedented? Tuesday's issue is "precedented" by Monday's action by definition, whether or not Monday's issue was resolved by a decision that its authors ordered not published.

We wonder if Ms. Perrochet's objections regarding AB 1165 are driven by concerns about whether or not it is prudent policy to bind courts to resolve Tuesday's issue according to Monday's precedent. Clearly courts must have discretion to choose appropriate precedent, distinguish inappropriate precedent, and to overrule precedent that can be shown to be bad law. Stare decisis has never been interpreted to prevent courts of appropriate stature from overruling prior precedent where reason and the good of the community are served. We support broad discretion of courts to engage in this function. We think that appeal courts have no power to make "binding precedent" for later appeal courts, but they cannot avoid making precedent at all. Were courts able to make absolutely binding precedents, they would usurp the authority of the Legislature. In our view, stare decisis asserts a balance that holds precedent firm against all forces, except articulable reason and mercy.

Ms. Perrochet appears to concur with our position on this because her letter asserts that in California "there is no such thing as controlling [appellate] case law - all decisions are merely persuasive precedent". Our first draft of the bill's language included the word "persuasive" before authority, in order to be sure that the judiciary retains discretion in the use of precedent. This was removed by Legislative Counsel, and had we not offered a substitute bill, we would have reinserted the modifying word "persuasive" so that the bill would have read: "all opinions of the Court of Appeal and appellate divisions of the superior courts shall constitute persuasive precedent under the doctrine of stare decisis, the same as opinions published in the official reports".

Put another way, we recognize that throughout the history of jurisprudence, debate has raged as to the weight to be given precedents in judicial proceedings, but we do not think that this debate should be confused by re-defining the word precedent. The debate should be confined to the role precedent is to play in our judicial process.

D. AB 1165 is Not Unconstitutional.

1. THE CONSTITUTION DOES NOT PROHIBIT THE LEGISLATURE FROM PUBLISHING DECISIONS

The California Constitution, Article VI, Section 14, in pertinent part, reads:

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

Ms. Perrochet's letter is incorrect in its assertion that this language gives the judiciary exclusive power to exclusively select those decisions of the courts that are to be distributed to the public or to prevent selected decisions from being distributed to the public. In fact, all opinions are now being distributed. Section 14 only mandates that the Legislature must publish certain decisions selected by the California Supreme Court. Nothing in this section prohibits the Legislature from publishing other decisions of the courts among any other matter it might choose to publish, nor could it so limit the Legislature because of federal constitutional principles of free speech and free press. Therefore the Legislature is free to publish any decisions the California Supreme Court does not select for publication.

2. NO-CITATION RULES ARE IMPROPER

Ms. Perrochet is not correct when she claims that whatever right the California Supreme Court has under the state constitution to determine which appellate opinions are appropriate for publication necessarily includes a power in the California Supreme Court to determine what decisions of the appellate courts are citable in California courts. This claim was expressly rejected in 1965 by the Constitutional Revision Commission:
Section 16 - Mr. Busterud had suggested at the May Commission meeting that the Committee consider making only published opinions available for citation as precedent. MC- Kleps - reject suggestion prohibiting citation of unpublished opinions as precedent. Mr. Kleps noted that the Judicial Council could do this by rule. Mr. Selvin stated that Illinois once had such a provision which lawyers and judges ignored so that it was repealed. He felt that since law review articles and everything else is being cited to courts that to adopt this section would be a constitutional prohibition on enlightenment . (Minutes of the Meeting of the [Constitutional Revision] Committee on Article VI, July 9, 1965 at the International Hotel, Los Angeles, emphasis supplied).
Even if such an intention to limit citations to decisions that the California Supreme Court permitted published were evident in Section 16, it would be in violation of the United States Constitution. Legal Services Corp. v. Velazquez, 121 S.Ct. 1043 (2001) makes clear that arguments to courts are speech and therefore subject to federal constitutional protection.

The United States Supreme Court "time and again has held content-based or viewpoint-based regulations to be presumptively invalid." (Hill v. Colorado, (2000) 530 U.S. 703, 769 (Kennedy, J., dissenting). California Rule of Court 977 restricts only content that indicates an appellate court actually embraced a principle as law at sometime in the past. When the United States Courts of Appeals Advisory Committee on Appellate Rules voted on November 18, 2002 for elimination of no citation rules from the federal judicial system, it noted:

And, most broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence except those contained in the court's own non-precedential opinions.

During this meeting, U.S. Court of Appeals (4th Circuit) Judge Diana Gribbon Motz, an Advisory Committee Member, stated that no-citation rules were "just plain crazy."

Imagine, if you will, being a judge at a criminal arraignment. The defendant offers to cite one or more unpublished appellate court decisions holding that the acts he is charged with committing do not constitute a criminal offense. Is it proper for you, as judge, to refuse to hear about these appellate decisions? One cannot help but sense the gross injustice of enforcing the overbroad Rule 977.

E. Rule 976 Does Not Require Publication of Any Decisions.

Perhaps Ms. Perrochet mistakenly believes that only new rules of law must be published and therefore if at least one example of every legal principle is available to a litigant, the system works fairly. Even if we disregard the important effect of cumulative precedent recurring over years, Ms. Perrochet's letter is substantially incorrect in stating and depicting the content of Rule 976, because Rule 976 does not require any opinion to be published. The language of Rule 976: "…may be published…" is precatory. There is no warranty, or other assurance, that a holding constituting a new rule, in theory supposedly applicable to all persons, will not be buried and hidden from them. The people then do not even know what the law is, let alone what it demands of them, or enables them to do.

In her footnote 1, Ms. Perrochet wrote that:

Rule 976 provides that the Court of Appeal is to publish an opinion if it: "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given an existing rule; (emphasis added).

But that is not what Rule 976 provides. Rather Rule 976 states:

a. [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
i. establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
ii. resolves or creates an apparent conflict in the law;
iii. involves a legal issue of continuing public interest; or
iv. makes a significant contribution of legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.
Ms. Perrochet's representation of Rule 976 misleads the Legislature to believe that the judiciary is compelled by Rule 976 to publish opinions that meet Rule 976 standards. But the judiciary has expressly ruled that it is not required to publish decisions that meet the criteria of Rule 976, Michael Schmier v. the Supreme Court of California, the California Court of Appeal and the Judicial Council of California, (2002) 96 Cal.App.4th 873. Moreover, even when formally requested to publish them, the judiciary usually does not publish.

F. The Current System of Non-Citation and Non-Publication Gravely Threatens the Rule of Law

1. EQUAL PROTECTION OF THE LAW IS COMPROMISED

The result of non-citation and non-publication related to Rules 976 and 977 is devastating to the rule of law in that the possibility of launching bad precedent into the law no longer stands to limit or control the discretion of judges. And, the result is even more devastating to our ideal of equal protection of the law because others similarly situated cannot argue for the same result as was had before.

Ms. Perrochet notes that "bad facts make bad law". We remember the saying as "good facts make bad law", but we understand her meaning. We imagine that deciding cases according to law can be heart-wrenching for appellate judges tasked with this responsibility. But shall we respond by continuing to offer judges the cop-out of deciding such cases outside the reach of the law of precedents? If we do that, what remains of the mechanism by which the rule of law operates?

But there are still worse consequences. This failure to create rules that affect us all threatens the entire structure of the democracy.

2. THE PEOPLE'S ABILITY TO MONITOR COURTS IS COMPROMISED

It is still the case that government can take no action against a person without the imprimatur of a court. But it used to be that every person had the right to elevate that court's application of law to an appellate

body whose decision became, by virtue of stare decisis, at least some measure of law for all of us. Because most of the us are not nearly as concerned with injustice or error of law when it impacts faceless others, as we are if the rules of law potentially threaten ourselves, the plenary legal effect of any appellate decision has a purpose. It attracts all manner of court watchers: attorneys, academics, industry representatives, civil rights groups, politicians, press, clergy, and others, to comment or criticize decisions, or join in seeking review, keeping judges and justice on track. Making decisions uncitable sedates public concern so that unpublished opinions are unlikely to receive any attention from the otherwise large and alert body of court watchers.

Contrary to Ms. Perrochett's assertion that the volume of appellate court cases necessitates abandoning all of these controls on the appellate judicial process, the volume of cases makes these controls essential if the rights of individuals in our system are to be protected. This is because neither the California Supreme Court, nor the appellate courts can possibly maintain a quality assurance mechanism, or a warranty thereof, equivalent to the tens of thousands of court watchers -- all motivated by self interest -- that monitor the release of citable decisions.

Ms. Perrochet asserts that an efficiency of allowing opinions to be uncitable is that "the court and its staff can dispense with a full blown statement of the case and instead write a succinct opinion focusing directly on the legal issues in the case before it", and that "making all opinions citable as precedent will induce the writing of more concurring and dissenting opinions, as judges seek to limit the stare decisis effect of portions of the opinion with which they disagree."

But in gaining this "efficiency", the judiciary makes review of its work by court watchers impossible, and thus defeats the protection the community generally can afford individuals whose matters are before the courts.

Moreover, the intention of the written statement of the case is not that the litigants understand the facts of the case, but rather, to make certain the judges understand the facts correctly - an understanding best fostered, and tested, by an accurate fact recitation. As a seventh grade algebra teacher might insist, showing one's work on a step-by-step basis makes the identification of error much easier. The steps must be readily trackable, appropriate and logical. The steps must lead to the result. The steps are more important than the result that flows from them. A result, without shown acceptable steps, is inherently suspect.

According to Ms. Perrochet's letter, her committee believes that so long as three judges can agree on an outcome, their job is done. We disagree. An outcome should remain a working hypothesis until the outcome is justified by logical application of legal principals good enough for all. The option to not make precedent makes it too easy for judges to leap to a conclusion that would otherwise require further thought. The law must stand to encourage that further thought.

G. Cost Based Arguments Against AB1165 Are Not Supported By Other States' Experiences.

Ms. Perrochet asserts that the production of citable opinions will impose large costs on the judiciary. But there is no evidence from other jurisdictions that have dispensed with no citation rules to support that conjecture. Alaska, Hawaii, Oklahoma, Ohio, Michigan, Minnesota, New Mexico, Tennessee, Texas, Utah and the United States Circuit Court for the District of Columbia have all recently terminated similar experiments with no-citation rules like 977. See McCoy v. State of Alaska (Alaska App. 2002) 59 P.3d 747. The sky has not fallen in any of those jurisdictions, so there is no reason to suspect it will fall here. Our time-tried historical tradition was to publish all appeal court decisions and they were all citable. The sky did not fall.

In fact, just the reverse may be true - costs may decrease. Making all opinions citable reasserts two forces to lessen the workload of the courts, and particularly the appellate courts. First, the increased concern for the careful resolution of appellate cases that Ms. Perrochet notes will be a result of the passage of AB 1165, helps ensure that cases are resolved according to established law. Second, a far larger database of resolved issues will be available to the public. Thus the reasons for litigation and the

temptation to appeal are greatly reduced. Early resolution of disagreements among disputants is more likely to take place outside of the judicial process when the results of litigation become more certain. This could simultaneously lower the volume of litigation, ease the load on the courts and curb lawsuit abuse.

But even if efficiency in resolving cases were obtained by retaining the "no-citation" rule, can that justify an infringement of constitutional guarantees like freedom of speech, or the right to petition government for redress of grievances, or the equal protection of the law for similarly situated parties? And, even if it would justify such an infringement of constitutional rights, would it be wise to so infringe them?

Ms. Perrochet contends that AB 1165 would also require investment of additional resources to do legal research. Unlikely. Nevertheless, poor litigants will always be better served by sharing law already put on the books because they cannot afford exhaustive trial and appellate processes to otherwise try to make their point. An extra half hour of research may well save hundreds of thousands of dollars of litigation expense for the parties, as well as expensive court time.
For example, consider In Re Machiko Kamiyama, Cal.App.4th, Div. 3, G022140 (1998) [available at www.NonPublication.com]. In this unpublished opinion resolving a habeas corpus petition. The appellate court released a woman who had spent three months in prison because she left her eight-year-old child at home, in a gated community, without a sitter, while she went to work. The court determined there was no other California case on point. Absent AB 1165, this case cannot be cited by other, subsequent "latch key" parents should they face a similar prosecution.
Query: is a parent facing such a criminal prosecution better off paying for more research that yields a specific case forcing exoneration at the arraignment stage? Or is she better off paying the costs of the full legal process, including her incarceration, and trusting that somewhere, somehow, between arraignment and post judgment appeals, the courts will again work out the law to that parent's benefit? Is the state better off? Reasonable minds cannot doubt that access to all decisions is of great value to poorer litigants, and to the courts themselves -- because it allows them to share the benefit of law developed by others.
H. Free Speech, Right to Petition Government for Redress and Equal Protection Far Outweigh Other Considerations
Even if efficiency in resolving cases is obtained by retaining the no citation rule, can that justify an infringement of constitutional guarantees like freedom of speech, or the right to petition government for redress of grievances (here, the equal protection of law used for similarly situated parties)? And, even if "efficiency" would justify such an infringement of constitutional rights, would it be wise to so infringe them?
Ms. Perrochet's letter also draws concern that AB 1165 would "inevitably impact every state and local agency, commission, and department - civil and criminal". Government agencies are presently spending time and money to follow and study unpublished decisions. Therefore, it is hard to see much change for them, let alone significant adverse impact. Regardless, this would not rise to the threat level that legislative acquiescence to the no-citation rule portends. For if the courts can allow themselves to cut off, and be cut off from debate that the mere mention of their prior actions would develop, how will it stop all other agencies from likewise cutting off debate?
We cannot lose sight of the fact that we are dealing with a constitutional protection. Even well-intentioned limitations on such an essential guarantee are to be closely scrutinized. As Justice Bradley observed in Boyd v. United States, (1886) 116 U.S. 616, 625, 6 S.Ct. 524: "It may be that it is [a limitation] in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure… It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon, People v. Kronke (1999) 70 Cal.App.4th 1535, 1573-74.

I. The Impact of the Newly Substituted Language Amending the Bill

Attached is a draft of substitute bill language for AB1165 that simply makes all opinions of the appellate courts of California available and citable. The new language is silent as to the precedential value courts give to prospective decisions of appellate courts. The new language appears to remedy most of Ms. Perrochet's concerns.

For the many reasons stated above, we believe that the quality of the past unpublished decisions of the courts of appeal, made under an expectation that they would never be used as precedent, are inherently unreliable and suspect as law for all. As prior unpublished decisions have not been subject to community review and criticism, it seems appropriate that the legislative prerogative be invoked to limit their precedential authority. This protects the legal system from an untoward effect of these untested decisions. However, consistent with principles of free speech, these decisions could still be cited -- for whatever persuasive value they might have -- but courts at any level would be empowered to reject their holdings, where appropriate.

J. Conclusion

The judiciary is failing in its responsibility to be watchful of the rights of the people -- so it necessarily becomes the duty of the Legislature to exercise appropriate checks and balances -- to redirect the judiciary to turn toward its mark.

The judiciary and other opponents of AB1165 cannot adequately answer at least three important questions:

1. How can you justify a rule that would prohibit a criminal defendant from citing a case that would exonerate him?

2. How can you bring a test case if the court does not have to publish it?

3. How can you have system of equality where a California Supreme Court "de-publication" order can change the law for all of us, except for the affected party?

De-publication permits the judiciary to change the rules for all, without changing the rules for one. Non-publication permits the judiciary to change the rules for one, without changing the rules for all. Aren't de-publication and non-publication but two faces of the same monster?

"Government in the sunshine" is the only effective way to provide clean accountability. The essence of a predictable, reliable judicial system, whose stability we all can depend on and trust, is its retention and use of our collected reason -- not its erasure. Edmund Burke put it well:

The science of jurisprudence, the pride of human intellect, with all its defects, redundancies and errors, is the collected reason of the ages.

The Legislature must stop the judiciary's prohibition that forbids us to use our collected reason.

We appreciate your efforts on behalf of AB1165 as we are certain do the people.

Should you have any questions or wish further discussion, please do not hesitate to contact us.

Sincerely,

THE COMMITTEE FOR THE RULE OF LAW

By: Ken Schmier, Chair

cc: Lisa Perrochet, Esq.

Substitute AB 1165-Amendment

LEGISLATIVE COUNSEL'S DIGEST

AB 1165, as introduced, Dymally. Appellate opinions.
Existing law provides that such opinions of the Courts of Appeal and of the appellate departments of the superior courts as the Supreme Court deems expedient shall be published in the Official Reports, under the general supervision of the Supreme Court.
This bill would require that all opinions of the Supreme Court, the Court of Appeal, and the appellate departments of the superior courts issued on or after the effective date of this act be made available to public and private reporting services, electronically and without cost. The bill would provide that all opinions of the Supreme Court, the Court of Appeal, and the appellate departments of the superior court may be cited to or by any court. The bill would further provide that opinions issued on or before the effective date of this act which have not been designated for publication in the Official Reports shall have no precedential value, but may be cited for any persuasive value they may have, provided that such citations be accompanied by the notation, "(unpublished opinion").

The people of the State of California do enact as follows:

(a) All opinions of the Supreme Court, the Court of Appeal, and the appellate departments of the superior court issued on or after the effective date of this act shall be made available to the public and to private reporting services, electronically and without cost.

(b) All opinions of the Supreme Court, the Court of Appeal, and the appellate departments of the superior court may be cited to or by any court.

(c) Opinions issued on or before the effective date of this act which have not been designated for publication in the Official Reports shall have no precedential value, but may be cited for any persuasive value they may have. Any citation of such an opinion shall be accompanied by the notation, "(unpublished opinion)."
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