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April 17, 2003

The Honorable Mervyn M. Dymally
California State Assembly
State Capitol
P. O. Box 942849
Sacramento, CA 94249-0052

Re: ***AB 1165***

Dear Mr. Dymally:

We are writing on behalf of the Los Angeles County Bar Association Appellate Courts Committee to comment on Assembly bill 1165.

Introduction

Under existing law, opinions of the Court of Appeal and appellate divisions of the superior courts are citable as precedent only if the court issuing the opinion (or the Supreme Court) has designated it for publication. (See California Rules of Court, rules 976-979.) AB 1165 modifies existing law by requiring that *all* opinions of the Court of Appeal and appellate divisions of the superior courts shall "constitute precedent under the doctrine of stare decisis the same as opinions published in the official reports."

The Judicial Council reports that in fiscal year 2000-2001 (the most recent fiscal year for which statistics are currently available), approximately six percent of the Court of Appeal's 13,000 written opinions were published. Thus, approximately *780* published opinions and approximately *12,220* non-published opinions were filed in fiscal year 2000-2001.

If AB 1165 had been enacted and in effect in fiscal year 2000-2001, all 13,000 cases filed by the Court of Appeal – some *sixteen* times the number of opinions that were published – would be available for private publication and could be cited as precedent.

For the following reasons (discussed in detail in the section which follows), the Committee respectfully opposes AB 1165:

a. AB 1165 is unconstitutional, in violation of the Separation of Powers doctrine. The California Constitution vests the Supreme Court with the ultimate authority to determine which cases should be published (i.e., citable as precedent). In mandating that all opinions of the Court of Appeal be citable as precedent, AB 1165 would effectively negate the Supreme Court's authority under the Constitution to determine which appellate opinions are appropriate for publication.

b. AB 1165 will be extremely costly, at a time of severe budgetary constraints. The drafting of appellate opinions will become much more time-consuming as justices and their staff spend more time laboring over all opinions to assure that each is suitable for citation as precedent. Moreover, with a total of some 12,000 additional new opinions each year, the added research burden on the courts and other public entities will further exacerbate the state's budget crisis. The private sector will likewise be forced to cope with additional costs arising from the added research burden imposed by AB 1165.

c. Apart from its tremendous costs, AB 1165 will have many other adverse consequences. The quality of opinions discussing important issues of law will suffer because the justices of the Court of Appeal will have to devote more time to drafting opinions in the many routine cases that raise only issues that are governed by settled legal principles. The proposed legislation will also lead to a profusion of bad law, i.e., results that, while correct on the unique facts of a particular case, should not be extended to other cases. Delays in the processing of appeals will become common as courts struggle under the burdens imposed by AB 1165. These and other problems discussed below will far surpass any marginal benefits arising from the enactment of AB 1165.

d. While we are sensitive to the principal objectives behind AB 1165 – a desire to increase access to the courts and to enhance public confidence in the appellate system – we believe legislation such as AB 1165 is not needed to achieve these objectives. In fact, these objectives have already been achieved through the private publication of all Court of Appeal opinions (including those designated as not for publication) on internet websites and through commercial services such as Westlaw and Lexis. The ready availability of all Court

of Appeal opinions has made the court's reasoning and analysis in all appeals available to interested parties.

Analysis

A. AB 1165 is unconstitutional.

AB 1165 violates the basic constitutional concept of the separation of powers among the three coequal branches of the government. The Separation of Powers clause in the California Constitution vests the California Supreme Court with the right to conduct judicial functions. (See Cal. Const., Art. III, § 3.) Article VI, Section 14 of the California Constitution in turn specifically provides that it is for the Supreme Court to determine which decisions are appropriate for publication. (See *ibid*. [Legislature is "to provide for prompt publication of *such decisions* of the Supreme Court and courts of appeal *as the Supreme Court deems appropriate*" (emphasis added)]; *People v. Superior Court* (1994) 22 Cal.App.4th 1541, 1547.)

The Supreme Court, through the Judicial Council, has delegated to the Court of Appeal the authority to make the initial determination of which cases are appropriate for publication, pursuant to California Rules of Court, Rule 976. [1] The power given by the Court of Appeal under Rule 976 is, however, subject to the Supreme Court's constitutional authority to determine whether the Court of Appeal has properly exercised its discretion to determine whether specific opinions should be published. The Supreme Court's right of review of the Court of Appeal's decisions on the issue of publication of appellate opinions is effected through (i) Rule 979, which permits the Supreme Court to order depublication of opinions the Court of Appeal has ordered published; and (ii) Rule 978, which permits the

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1/ 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; (2) resolves a legal issue of continuing public interest; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to 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."

Supreme Court to order the publication of Court of Appeal opinions that the Court of Appeal has ordered not to be published.

Few tasks could be more characteristic of the judicial function than determining which cases may be cited as precedent. (See *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703.) As explained by the Court of Appeal in *Schmier*:

> "The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) 'the expense, unfairness to many litigants, and chaos in precedent research,' if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions."

(*Schmier*, *supra*, 78 Cal.App.4th at p. 708; see also *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1180 (*Hart*) ["[t]he common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not"].)

By giving precedential effect to *all* Court of Appeal opinions, the proposed legislation would effectively nullify the Supreme Court's authority under Article VI, Section 14. It would be a pointless act for the Court of Appeal and Supreme Court to select Court of Appeal cases for publication in the official reports if all written opinions are citable as precedent. It would be an equally pointless act for the California Supreme Court to order depublication of Court of Appeal opinions if the depublished opinions "constitute precedent under the doctrine of stare decisis *the same as* opinions published in the official reports." (See *Schmier, supra,* 78 Cal.App.4th at p. 709 [if Supreme Court were unable to preclude citation of depublished opinions, it "would seriously compromise" the court's "ability to control the direction of appellate precedent"].)

Because the appellate courts' authority to select opinions for publication emanates from an express Constitutional provision and because permitting citation of unpublished opinions would negate the court's authority to determine which opinions are citable as

precedent, the only legally valid method of achieving the result effected by AB 1165 is a constitutional amendment. In the absence of such an amendment, AB 1165 is an invalid encroachment by the Legislature upon a constitutionally-protected judicial function.

B. AB 1165 is costly.

1. AB 1165 will drastically increase the cost of preparing appellate opinions.

AB 1165 would greatly increase the workload of courts, generating significant costs at a time when they and other public entities are already attempting to operate within constraints imposed by budgets that have undergone dramatic reductions in response to an unprecedented fiscal crisis.

The process of preparing an opinion that is suitable for citation as precedent is a much more time-consuming (hence, costlier) process than is the process of preparing a non-published opinion. A non-published opinion is directed to a limited audience: the parties to the case and their attorneys, all of whom are familiar with the record in the case. Consequently, in preparing an opinion not intended for publication, 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. This is especially appropriate in the great many routine appeals raising only issues governed by settled law.

An opinion that can be cited as precedent, in contrast, requires considerably more time and effort because the court must make certain that it has included enough background facts and procedure to make its discussion of the law meaningful to third parties who know nothing more about the record than appears from the face of the opinion. (See *Hart*, *supra*, 266 F.3d at p. 1178 ["'the judicial time and effort essential for the development of an opinion that is to be published for posterity and widely distributed is necessarily greater than that sufficient to enable [the court] to provide a statement so that the parties can understand the reasons for the decision"].)

Making all opinions citable as precedent will also induce the writing of more concurring and dissenting opinions, as justices seek to limit the *stare decisis* effect of portions of opinions with which they disagree. (See *Hart, supra,* 266 F.3d at p. 1178

["Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases," and hence "[u]npublished concurrences and dissents would become much more common" were all opinions citable as precedent].) Additionally, appellate courts are, justifiably, much more concerned about matters of style when it comes to preparing an opinion that will be quoted and have precedential effect.

For all the foregoing reasons, AB 1165 would require appellate courts to devote significantly more time and effort (all at a cost to taxpayers) to the task of drafting opinions that would not be deemed suitable for publication under current standards established by California Rules of Court, Rule 976.

2. AB 1165 will increase the cost of research for courts and other public entities.

While the additional cost attributable to the preparation of opinions for publication will be significant in itself, that cost is no doubt surpassed by costs attributable to the tremendous additional *research burden* that will arise from treating all written opinions as precedent.

The research burden on the Court of Appeal would be significant, because appellate panels are not bound to follow other panels' decisions. This means that in the absence of a dispositive Supreme Court decision, there is no such thing as controlling case law – *all* decisions are merely persuasive authority. Accordingly, if all unpublished opinions may be cited as precedent, there will be no practical difference between a published opinion and a "non-published" opinion that may be cited as precedent with the same effect as an opinion published in the official reports. The unavoidable result would be that since *any* unpublished decision may be "persuasive," *all* unpublished decisions would have to be researched by litigants and court staff. Researching a case would therefore require wading through libraries that, over time, will become many times larger than those containing currently citable California decisions. The research burden would be all the greater because the cases citable as precedent, but not published in the official reports, would probably have much less sophisticated search tools than those available for published opinions (e.g., there may be no reliable publisher's headnotes, digests, or other cross-indexing).

Of course, it is not the Court of Appeal alone that will bear the additional research burden of AB 1165. Courts at all levels, whether a trial court attempting to resolve a demurrer or the California Supreme Court attempting to resolve an important issue of law, will have to read and analyze many more appellate opinions than they currently do.

AB 1165 will also inevitably impact *every state and local agency, commission, and department – civil and criminal.* In every case in which a public entity is a party, the attorneys representing the public entity, whether they are state employees or retained counsel, will face a much greater research burden because the number of new opinions issued each year that could impact the outcome of each case will increase by a factor of more than fifteen. These same attorneys will likewise be required to spend a much greater portion of their day monitoring new cases, to keep abreast of new developments in the law.

The additional research burden attributable to AB 1165 extends beyond litigation. Virtually all public entities, to one extent or another, must monitor case developments on an on-going basis to assure compliance with existing laws. The amount of time required by attorneys charged with monitoring developments in the law on behalf of the state is incalculable, but it will no doubt be significant, like all the other costs attributable to AB 1165.

3. AB 1165's costs for private entities is also staggering.

The foregoing represents only a summary, in the broadest of terms, of some of the direct fiscal impacts on *public* entities. As significant as that impact would be, the collective impact on *private* parties is even more severe. Countless hours will be wasted as private parties spend money (money that otherwise could have been directed toward productive endeavors) researching and monitoring thousands of new appellate opinions. Across the state of California, attorneys will not be able to write briefs without undergoing the time-consuming effort of researching cases citable as precedent (but not published), for fear of missing key cases and being charged with malpractice. Likewise, attorneys charged with assuring their clients' compliance with state law would face an inordinate amount of additional research if AB 1165 is enacted. (See *Hart, supra,* 266 F.3d at p. 1179 [once cases are citable as precedent "they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason"].)

The impact of the rising cost of appellate representation will likely fall disproportionately on litigants with relatively small disputes and limited resources. These litigants will be least able to pay for appellate counsel to sift through the chaff of opinions that the authoring justices do not deem worthy of standing as precedent.

C. Apart from enormous costs, AB 1165 will have numerous adverse consequences.

There are many ancillary negative effects from AB 1165, over and above its fiscal impact:

1. One of the first casualties of AB 1165 would no doubt be the quality of the Court of Appeal's opinions. Because the appellate justices would, upon enactment of AB 1165, be preparing more opinions suitable for citation as precedent, the result will inevitably be that the courts have less time to devote to those opinions that are deserving of publication under the criteria set forth in Rule 976. (See *Hart, supra,* 266 F.3d at p. 1179 ["Maintaining a coherent, consistent and intelligible body of case law is not served by writing more opinions; it is served by taking the time to make the precedential opinions we do write as lucid and consistent as humanly possible"].)

2. Treating all opinions as precedent will also no doubt lead to a profusion of "bad law." There must be at least a kernel of truth in the adage, "bad facts make bad law." We suspect that those cases with "bad facts" are prime candidates for disposition by unpublished opinion. The "bad law" in such an opinion – i.e., a result that is correct on the unique facts of the case, but should not be extended to other cases – should remain uncitable. (See *Hart, supra,* 266 F.3d at p. 1179 ["Judges have a responsibility to keep the body of law 'cohesive and understandable, and not muddy[ ] the water with a needless torrent of published opinions.'" (Citation.)].)

3. In other cases deemed inappropriate for publication, the appellate justices may recognize that a limited factual record, lack of input from affected parties, or low quality of briefing deprives the court of sufficient opportunity to explore the complexities of an important issue. Such limitations will not appear on the face of the opinion, but the author who is aware of such circumstances should retain discretion to determine that, for one reason

or another, the opinion should not be given any persuasive value beyond the effect on the parties to the particular case.

4. Given that AB 1165 will greatly add to the time involved in the Court of Appeal's resolution of cases before it (by requiring the courts to read and analyze briefs that will contain discussion of numerous additional cases citable as precedent; devote more time to research and analysis of more precedent; and spend more time writing opinions suitable for citation as precedent), AB 1165 will also result in tremendous *delays* in the processing of appeals, impacting not only the courts, but the rights of the litigants who are awaiting resolution of cases. In some districts, parties already wait for years between the time a notice of appeal is filed until the Court of Appeal's opinion is filed. By increasing the time that the Court of Appeal will devote to opinion preparation and research in *each* case before it, AB 1165 can only further delay the time for resolution of appeals.

5. With the publication of 13,000 or more opinions annually, it takes little imagination to envision the explosion in the volume of paper filed in trial and appellate courts. There is already too much paper and too little place to store it in the libraries of courts, universities, colleges, and other institutions. The impact on these entities (and to our dwindling forests) is hard to estimate, but it would certainly be substantial. (See *Schmier, supra,* 78 Cal.App.4th at p. 712 [publishing all Court of Appeal opinions "would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein"].)

D. The benefits from AB 1165 are marginal and are more than outweighed by its adverse consequences.

1. AB 1165 will not contribute meaningfully to the development of common law.

Litigants already have a vast body of Court of Appeal opinions upon which to draw. Moreover, under existing law, litigants will continue to have more and more opinions to cite each year because, under Rule 976, the Court of Appeal continues to publish those opinions that offer a meaningful contribution to the development of common law.

The development of the common law will not be enhanced by AB 1165. The opinions designated by the Court of Appeal as inappropriate for publication typically involve issues that are either routine or so unique that they do not merit publication. (See *Hart, supra,* 266 F.3d at p. 1179 ["Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions" and would thus constitute "redundant and . . . unhelpful authority."].)

It is undeniable that on occasion, some courts fail to publish opinions that are appropriate for publication. But any benefit from treating those relatively few opinions as precedent would be dwarfed by the tremendous costs and other adverse consequences associated with review and analysis of an additional 12,000 or more opinions each year by courts and litigants, the vast majority of which would have little to add to development of the common law.

While it may be theoretically true that the ability to cite non-official opinions would create a greater chance of finding factually similar cases, the reality is that difficult legal questions would remain just as difficult to decide. The only change would be to increase the burden of reaching a result by the need to parse innumerable opinions in an attempt to analogize, harmonize, and/or distinguish them. This enormous burden would not, however, significantly add to the development of common law.

2. AB 1165 will not add to the insights into the Court of Appeal already provided by private publication of opinions on the internet.

We recognize some proponents of AB 1165 contend publication of all Court of Appeal opinions will make it easier for litigants to gain insights into particular appellate districts and divisions. Likewise, some litigants contend publication will prevent courts from hiding judicial bias and refusing to apply precedent.

These arguments had little persuasive impact even *before* the advent of the internet and the private publication of Court of Appeal opinions. Even then, enough opinions were published that litigants could gain more than adequate insights into particular appellate districts and divisions. It also seems highly doubtful to us that publication of additional opinions would have provided any more insight into judicial bias than would be apparent

from published opinions. Similarly, we doubt that publication of more opinions would have revealed any greater refusal to apply precedent than is already reflected in published opinions. In fact, when appellate courts believe a prior decision is incorrectly decided, they are typically eager to publish opinions distinguishing the prior decision and thereby limit it to its facts.

With the advent of the internet and the private publication of all Court of Appeal opinions, published and non-published, the arguments in support of AB 1165 are *moot*. The internet permits access by the vast majority of interested parties to *all* opinions, published and non-published. The posting of these opinions permits parties to gain insights into particular appellate districts and divisions. It likewise reveals all judicial bias that would be revealed by the publication of opinions as required by AB 1165. Finally, it precludes any surreptitious refusal to apply precedent. Thus, the availability of opinions on the internet undercuts virtually all arguments in favor of AB 1165.

Conclusion

Given that AB 1165 is unconstitutional, would result in enormous costs to the state, and would have only marginal benefits that are outweighed by the negative impact, we respectfully oppose AB 1165.

Thank you for your consideration of our comments.

By: _____
Lisa Perrochet
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Appellate Courts,
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