The Committee for the Rule of Law
1475 Powell Street, Suite 201
Emeryville, CA 94608

Telephone: 510.652.6086; 510.919.9327

October 9, 2015

Hon. Tani G. Cantil-Sakauye
Chief Justice, California Supreme Court and
Chair, Judicial Council of California
350 McAllister Street
San Francisco, CA 94102

Re: Publication of Appellate Opinions:
Publication Status and Citation of Opinions When the Supreme Court Grants Review
Invitation to Comment SP15-05

Dear Chief Justice Cantil-Sakauye:

In response to your request, some comments are offered here regarding your proposed amendment to the California Rules of Court concerning publication of appellate opinions (rule 8.1105(e)(1)) and the citation of opinions (rule 8.1115) - to provide that a published opinion of a Court of Appeal will no longer be automatically depublished after the Supreme Court grants review of the case.

1. <u>The "no-citation" rules, forbidding us to mention in our state courts all unpublished opinions (over ninety percent), should be included as a part of this study now - and/or in another study in your next six-month cycle – and be revoked</u>.

Unfortunately, however, the "charge" or "mandate" outlining the scope of your study does not refer to no-citation rules. Regardless, the no-citation rules should be studied first because it is not unlikely that you will follow the successful example of almost ten years in the federal judiciary - and abandon them. This would obviate the need for study of depublication rules - and save the taxpayers the unnecessary cost of an additional study. The public should be timely and effectively notified of the study of no-citation rules, including by ads in general circulation newspapers, in order to permit you to gather its input. Posting to your website all public comments immediately upon receipt, like many federal agencies do, and providing 60 or more days for response, also immediately posted, would help foster meaningful dialogue.

This would fulfill the commitments by former Chief Justice Ronald M. George to then Senator Sheila Kuehl in 2004, and to then Assemblymember Jared Huffman in 2008:

> "… to accumulate data regarding the new publication rules before *moving* to *charge* a *new follow-up committee* that could *recommend revocation* of the *no-citation rules*…"

(emphasis added, www.nonpublication.com/huffman090508.pdf , p.4, par.2, no.7).

The study should address all the questions and concerns about non-publication and no-citation rules transmitted to the Supreme Court by Assemblymember Huffman's letters dated September 5, 2008 (http://nonpublication.com/huffman090508.pdf) and his August 9, 2011 (http://www.nonpublication.com/huffman110809.pdf) and by the May 8, 2007 letter from then Assemblymember Mervyn Dymally (www.nonpublication.com/dymally.pdf).

2. Our position is that rule 8.1115 (the "no-citation rule") should be eliminated in its entirety.

Rule 8.1105(e)(1) and the balance of Rule 8 have no meaning other than to effect censor of the vast majority of decisions of our appellate courts in the courts themselves - a serious deviation from basic concepts of freedom of speech, active transparency, accountability and the mechanism by which the rule of law is imposed on our state and its judiciary.

There is no purpose for the no-citation rule. The California Supreme Court, through its lawyer, the Attorney General of California, wrote:

> "First, the determinations of the state Supreme Court and the Appellate Division to exclude these opinions from the decisional law of the state do not preclude the Plaintiff from asserting the arguments on the reasoning of those decisions. The California Rules of Court merely prohibit him from attributing to those arguments the weight of published decisional law, a weight the authors of those published opinions decided – for whatever reasons – that these opinions should not have. In other words, Plaintiff can use *the content of the opinions*, he simply cannot attribute to them an authority that the state appellate courts have decided is unwarranted" (*emphasis added*).[1]

The words *"the content of the opinions*" includes the caption, the recitation of facts, the legal analysis, the conclusions, and the signatures of the deciding judges as per Evidence Code, Section 451 (a). That is consistent with: the California Constitution's restriction upon court rulemaking authority that permits only court rules which do not contradict state statutes; the California Constitution's requirement that appellate opinions be written with reasons stated; the *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal 2d 450 (1962) requirement that lower courts are jurisdictionally bound to follow the *decisions* (not limited to the *published* opinions) of the

Courts of Appeal; and the fact that:

[1] Edmund G. Brown, Jr., Attorney General of California, attorney for the California Supreme Court, the Judicial Council of California *et al*,, Opposition to Application for Motion for Injunctive Relief, *Schmier v. Justices of the California Supreme Court*, *et al.*, U.S. Dist. Ct. No. Dist, Cal., Case 3:09-cv-02740, Document 22, pg. 10, lines 5-11, (filed 7-10-09).

"[F]ifty eight percent [58%] of the justices stated that they have *relied* on *unpublished* opinions when drafting opinions,"

a judicial ethics and rule-forbidden practice - which affords litigants no chance to refute these clandestine references.[2] .

The no-citation rule defeats the mechanisms by which the democracy is informed, and by which the people have opportunity to correct the law, discussed *infra*. It destroys the legal system's intrinsic warranty, namely: that cases are not decided arbitrarily, but rather, according to law applicable to all. It fosters judges' efforts to avoid criticism, a fundamental part of the legal system, and thus turns many into timorous recreants, discussed *infra*.

Moreover, there are other, albeit generally ignored consequences of the no-citation rule including the unseemly contortions an otherwise respectable judicial system uses to maintain this rule: 1) the standards for publication allow substantially unfettered discretion (*e.g*. the use of the word "should" (not "must") in Rule 8.1105); 2) the meaning of the word "precedent", i.e. that which was done in the past, is re-written to select, parse-out and revise history prospectively; 3) the re-definition of "published" to be only those opinions chosen by their author-judges to be physically included and bound into the published volumes, and excluding all others - even though they are all available online and indexed by legal services; 4) the fact that the no-citation rule and *Auto Equity Sales, supra,* combine to give published cases a prospectivity not unlike statutes, while allowing deviations of all kinds to be made under the cover of darkness provided by unpublished decisions; 5) the idea that a litigant may inform a court of logical argument made by an appellate court, but cannot say it was done by an appellate court; and 6) the fact that the rule prevents criminal defendants and other litigants from citing cases that would exonerate and help them.

The no-citation rule is unnecessary. The federal judiciary has eliminated it. In the nine years since its 2006 adoption, Federal Rule of Appellate Procedure ("FRAP") 32.1 has been working successfully. As far as we are aware, there has been no criticism.

We do not argue that any judge must, at any time, blindly follow prior decisions of the California judiciary at any level. This may suggest that *Auto Equity Sales, supra,* was wrongly decided. It interferes with the use of individual logic by individual judges. The sole requirement for the use of judicial power is that its rationale be articulated and intended to resolve future similar conflicts in the same way.

In all events, judges need to be free *no*t to follow precedent – but must correctly articulate the facts, the prior existing law and the logic and reasons supporting their decision not to follow precedent – in opinions which are citable. This is the healthy process called the "development of the law." Its key is citability. The unworthy alternative in achieving the desired result forces judges intentionally to misstate, truncate, obfuscate and/or omit matters in their recitation of facts, law and logic, and use the dark censorship of no-citation rules to cover-up. This destroys

[2] California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee") 2006 Report adopting California Rules of Court 8.1100 *et seq.,* pg. 41, Graph 21, emphasis added, http://www.nonpublication.com/sc_report_12-7-06.pdf .

reliability, disrespects and dishonors the humanity of the litigants and transmits unpredictable shock and devastation.

Generally the doctrine of *stare decicis* will suggest following prior decisions of a similar issue. But *stare decisis* has limits. It must be understood in light of the fundamental difference in the law-making power of the judiciary on the one hand, from that of the legislature on the other. Subject to constitutional limitations, the legislature may make rules of permanent prospectivity because it has substantial practices and procedures, unavailable to the judiciary, to inform its use of that power.

Judicial law-making is generally done by panels of three judges who cannot be expected to be sufficiently knowledgeable about the vast variety of issues that may arise in the future and to contemplate all the intended or unintended consequences of the rules they make. Appellate opinions may be imperfect for many reasons - that is why they are called 'opinions' of the law. These opinions face a host of problems, including error and mistake as to law or fact. They are often the product of less than three active judges, and sometimes, unfortunately, are even produced by one assistant staff attorney, or a young law clerk.

A recent example occurred when Governor Jerry Brown, Attorney General Kamala Harris, the State Water Resources Control Board, the Howard Jarvis Taxpayers Association and numerous others urged either that the Supreme Court depublish, or refrain from depublishing, a recent drought related Fourth District Court of Appeal opinion resolving *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (S226906; G048969). This decision determined the validity of tiered water price structures intended to discourage water use. These approaches to the Supreme Court breached the separation of powers doctrine, bringing the practice of lobbying to judicial decision-making, without the many procedural processes employed by the legislative branch before it uses its legislative power.

We are concerned citizens who took no position on the underlying wisdom or rightness of the *Capistrano* case resolution, but who attempted to ask the Supreme Court to abandon permanently its depublication and no-citation rules, policies and practices.

Seeking depublication, often thought by attorneys to increase the slight, approximately one percent, chance of obtaining Supreme Court review, has become a part of the "gamesmanship" - and has become voluminous. The Supreme Court Clerk has advised receiving an average of ten requests for depublication per day, *cf. [requests unrelated to review], e.g. Nevada County (Sheriff) et al. v. S.C. (Siegfried*), S227745, S227265 (8-19-15), [3DCA C074504].

As indicated above, "depublication" is not defined in any legal or other dictionary known to us, but refers to the practice of the California Supreme Court, unique among the states,[3] of erasing published decisions of the California Court of Appeal from the body of precedential decisions of the California state courts. California Court Rule 8.1105, which you promulgated, then prohibits us from citing such decisions in California state courts.

[3] More than ninety percent (90%) of California appellate decisions are ordered unpublished by their author judges. The number of the few published decisions is further reduced by Supreme Court depublication orders. No judiciary, neither the federal nor any state – except California, depublishes opinions previously published.

We are forbidden – not allowed to rely on, or even to mention – unpublished or depublished opinions in our state courts. This prohibition, a violation of our free speech rights, is troubling for at least three reasons: 1) citation of prior decisions is certainly appropriate in courts of law; 2) the interference with an essential freedom emanates from this very Supreme Court, whose purpose includes the protection of that right; and most importantly, 3) the practice works to defeat the process by which our democracy clarifies and improves our law. It is this third concern upon which we now focus.

As stated above, the U.S. Supreme Court in 2006 abandoned the federal judiciary's experiment with no-citation rules. In the nine years since, as indicated above, we are aware of no reports of any adverse consequences.[4]

We preliminarily observe that the options for appellate courts to issue unpublished decisions, or for the Supreme Court to depublish appellate court decisions without replacing them with other decisions, discourages concerned citizens from bringing test cases to resolve the law because the unpublished decisions do not stand "citable" and do not count as law - and thus do not merit the effort needed to criticize them. Test cases are well recognized as essential to our system of law. The unpublished or depublished opinions allow courts to avoid meaningful determinations of law to be applied equally to all prospective litigants similarly situated (hence called: "selective prospectivity"). This thus protects judges from the criticism which otherwise attends every decision presently *or when the issue is raised at some time in the future,* thus encouraging courts to engage in functionary group-think. It removes the need for judges to use extreme care. Such results waste the effort of those that bring such a case, those that argue

---

[4] Our traditional historical right to cite all appeal court opinions was restored in all federal courts in 2006 when Federal Rule of Appellate Procedure (FRAP) 32.1 was adopted by the United States Supreme Court. The judiciaries of over half the states (not including California) have followed. Authors of FRAP 32.1, including the **Hon. Samuel Alito**, now **United States Supreme Court Justice**, and the **Hon. John Roberts**, now **Chief Justice of the United States**, wrote:

> **"A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment [Free Speech] concerns: But whether or not no-citation rules are constitutional…they cannot be justified as a policy matter."**

www.nonpublication.com/alitomemo2.pdf , nb. pg. 4, lines. 1-10; pg. 6, l. 39 – pg.7, l. 9; pg. 12, last par. – pg. 13, l. 2; [see, e.g.: **"*No-Citation Rules as a Prior Restraint on Attorney Speech*"** by Martha Brooke Tusk, 103 Columbia Law Review 1202 (2003)]. **Chief Justice Roberts**, then a member of the federal advisory committee on rules, said:

> **"A lawyer ought to be able to tell a court what it has done."**

Legal Times, Tony Mauro, 4-15-04, par. 10, http://www.nonpublication.com/USJudConf.htm or *op cit.* "Press Clippings" #89

against it, and those who decide it. Judges would find far better protection from criticism by carefully considering many perspectives, and carefully deciding issues.

An order to depublish an appellate decision implies that the three judges of an appellate court are not capable of finally resolving the issue of the subject case. It says that the people are better off without any opinion in the case, rather than the work of the appellate court. Depublication is an order against enlightenment. It presumes that the seven judges of the California Supreme Court have some special ability, not shared by the judges of the appellate panel, to "get it right" with an eraser – without giving the public any detailed explanation of their reasoning.

In truth, only special interests benefit from depublication orders. For the rest, they create uncertainty, confusion and anarchy. Depublication artificially and capriciously obliterates our law, and causes the revision and re-writing of history.

For example, how would depublication of the *Capistrano* case, *supra*, guide water districts? If they rely on the depublication order as *indicia* of the law approving a tiered rate structure, they risk having their budgets devastated should a subsequent decision reach the same result as *Capistrano*. If they ignore the depublication and follow *Capistrano*, they cannot make use of the tool of tiered water rates to discourage water use and protect the public during the extant drought and beyond. By depublication, the Supreme Court obfuscates, rather than clarifies the law. And, depublication eviscerates the judicial role in the development of law.

Our democracy cannot presume that any panel of judges has sufficient knowledge, wisdom, or experience to resolve correctly every issue coming before it, and it does not do so.

Rather, the duty of the bench at any level is to resolve the issue as best it can. In doing so it is to reconcile its decision with prior decisions - what we call *stare decisis* (the precedent stands). This is often misunderstood to relieve judges of the painful task of creative thought. *Stare decisis* does not, and should not, insist upon absolute forward authority of any precedent. The fallibility of judges, or even panels of judges, is a reason that judicial decisions, unlike statutes, ultimately have no conclusive authority to bind future courts - other than the authority conferred by strength of reasoning.

What is important is that the judiciary resolve the issue with the *present* intent to resolve future similar issues in the same way. Along with this resolution, we require the panel to justify its action in a manner reminiscent of the scientific method: truthfully and carefully recording the facts, conclusions, considerations and reasoning it has used to arrive at its decision. The issue between the parties is resolved so that, hopefully, they can quickly return to productive activities. This process may not result in the best, or even a "right," precedent. It is here that the secret of our democracy lies. The process of developing the law wisely does not require the judiciary to be "right." It only requires that the judiciary provide an initial resolution of the issue presented.

Once a final decision is made by the judiciary, the law correction machinery of the democracy is invoked and engaged - including courts, legislatures and the voices of concerned citizens. This is most critical. Articles are written arguing the reason(s) that no court should

follow a particular decision in the future. This spreads light. If the decision is unpublished and not citable, darkness prevails because, as stated above, beyond the case parties, the decision does not count - so there is no interest, nor market in writing or reading about it.

Appellate judges have said that published decisions rarely bring praise but often provoke harsh criticism. That is as it should be, for it is criticism that encourages judges to regard their reasoning from the multiple perspectives that geometry knows to be necessary to find *rightness*.

It is dissatisfaction with a decision that ensures that those who appreciate the consequences of any particular decision will then bring their expertise and political power to bear and inform judges and politicians - so that the law may be constantly improved. Depublished and unpublished decisions hide bad law, and sedate the concern of those who would otherwise be affected by such decisions. There is no pressure on judges to follow the law, and hence, judicial arbitrariness and no law obtain, but "not counting", this warrants little attention. The problems are unaddressed and the healthy development of the law is greatly skewed, and seriously chilled.[5]

As Sacramento Bee columnist Dan Walters recently wrote:

> "The situation cries out for rational resolution to create more uniformity and less legal gamesmanship."

(www.nonpublication.com/walters.pdf or *ibid* "Press Clippings" #3, 7-27-15).

We respectfully request the Supreme Court to revoke and abandon permanently its depublication and no-citation rules, procedures and practice, and California Court Rules sections 8.1105 *et seq*.

Sincerely,

The Committee for the Rule of Law

Kenneth Schmier,   Chairman

Michael Schmier, Director

---

[5] See Federal Judicial Center ("FJC") *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report* April 14, 2005 by Tim Reagan *et al*., http://www.nonpublication.com/fjcprelim.pdf , pgs. 1-135; also (232) "*Press Clippings*" and (156) "*Law Review Articles*" [all inter-active]; photocopies and a history of three ameliorative bills and related documents in the California legislature in reverse chronology (Kuehl SB 1655, 2005, www.nonpublication.com/SB1655.htm; Dymally AB1165, 2003, www.nonpublication.com/1165introduced.htm , and Papan AB2404, 2000, http://www.nonpublication.com/2404introduced.htm), all also accessible beginning from "News and Events" at home-page at www.nonpublication.com .