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## **KUEHL JOINS FIGHT FOR THE RIGHT TO CITE**

The Schmier brothers' quest to use unpublished opinions has a better chance this year.

**By Linda Rapattoni**  
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SACRAMENTO - Two brothers who practice law in Emeryville have fought a quixotic battle to win the right to cite unpublished cases in California's courts.

Their efforts in the Legislature and the courts have been rebuffed, even after a law professor rallied to their cause four years ago.

This year, however, Michael and Kenneth Schmier have persuaded a powerful legislator to carry their flag. They think their forces are stronger than they have ever been, especially with lawyers debating the issue nationwide.

Describing the pair, Boalt Hall professor Stephen Barnett once wrote: "If ever a couple of legal crackpots - disgruntled litigants - were tilting at windmills only they could see, those brother lawyers from Emeryville ... might be the ones."

But he supports their cause.

"There's a pronounced trend among states," Barnett said earlier this week.

"California is getting lonelier and lonelier in clinging to its unciteable rule. So I think judges are feeling increased pressure to give up their hard line against citation."

Michael Schmier practices labor law, while his brother Ken is founder, CEO and general counsel of Nextbus Information Systems Inc., which uses satellite technology to provide public transit agency scheduling information.

The Schmiers have persuaded Sen. Sheila Kuehl, D-Santa Monica, a former Assembly speaker and former chairwoman of the Assembly Judiciary Committee, to carry legislation that would allow lawyers to cite appellate decisions for their persuasive value.

The bill would not be retroactive. Current court rules prohibit the citation of unpublished opinions.

The Committee for the Rule of Law, founded by the Schmiers, sent lawmakers a letter in February seeking an author for a new bill to allow broader citation.

Kuehl said that several years ago, while preparing for a speech before a group of judges, she listed several procedural issues she felt were undermining the rule of law in California. One was the inability to cite cases as precedent.

"Although I had no specific cases in mind, conceptually it bothered me that a court can choose which should be cited and which not," Kuehl said. "A few years later, I got a letter from a committee indicating they'd like to see legislation require the publication of all these opinions. It was sent to all judicial committee members to see if they could get a nibble. And I nibbled."

Kuehl's bill, SB1655, would require all appellate decisions be made available to public and private reporting services for free. Unlike a similar bill, AB1165, last year by Assemblyman Mervyn Dymally, D-Compton, Kuehl's bill provides a safe harbor for lawyers who fail to cite an unpublished opinion so they cannot be sued for negligence.

Kuehl said that since introducing her bill last month, she has heard from many appellate court attorneys and judges concerned about how "many trees would have to die, or hours would have to be put in to find precedent, neither of which [argument] I found pressing."

The Senate Judiciary Committee is scheduled to hear the bill April 30.

Michael Schmier said he believes his cause has a better chance of succeeding this year because of the safe harbor provision for lawyers, and because there's an effort on the national front to allow citation of unpublished opinions in federal courts.

The Committee on Rules of Practices and Procedures, part of the Administrative Office of the Courts for the U.S. Courts in Washington, D.C., is considering Federal Rule of Appellate Procedure 32.1, which would allow unpublished memorandum decisions to be cited. A hearing is scheduled April 13.

One 9th Circuit judge has contended the circuit is overwhelmingly opposed to the proposed rule, while another claims the circuit is divided with possibly a slight majority favoring it. The rule would have to withstand several votes between now and June and even if it makes it past the Supreme Court and Congress, it would not take effect until late 2005.

"I think it's going to have an enormous effect on Sen. Kuehl's bill," Michael Schmier said. "I don't see how California can justify not doing this if the feds do it."

Nevertheless, California Chief Justice Ronald M. George remains opposed to citation of unpublished decisions, as do the district attorneys, Attorney General Bill Lockyer and the California Judges Association. They all helped defeat Dymally's bill and, before that, AB2404 by former Assemblyman Lou Pappan, D-Millbrae, in 2000.

Opponents say the bill would increase the costs of litigation as lawyers have to do more research of unpublished decisions to cite for their cases.

Proponents argue that giving judges the power to decide which cases should be available for citation increases the potential for corruption.

A lawyer should be able to cite any case that could help him free a client from prison, Kenneth Schmier said.

"It's a very hot topic now because of the proposal under the federal rules of appellate procedure," said appellate lawyer Paul Fogel, a partner at Crosby, Reed in San Francisco.

"I'm not in favor of citing unpublished California Court of Appeal cases," Fogel said. "I think the rules work very well. I don't see a problem with them. I don't agree with critics that the judges try to hide behind unpublished opinions."

Since the California courts started putting unpublished opinions on the Internet, lawyers can use the reasoning in those, even if they cannot cite them, he said, echoing others' arguments.

Kuehl said she believes the issue deserves a full debate.

"It may be there's no new law or ground being broken in a case, and there's no reason to publish it, but how do I know that's the cause for it not being published?" she asked. "What's getting buried here? If it's absolutely nothing then that's an answer I want to hear. That's why I wanted it debated."