The Committee for the Rule of Law
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December 4, 2015

By e-mail (attachment)

Assemblymember Anthony Rendon
Attn: Ms. Carrie Cromwell, Chief of Staff
California Assembly

Re: Author Request: Justice, Transparency, Accountability and Corruption in our Courts

Dear Assemblymember Rendon:

The December 7, 2015 meeting, opened to all legislative staff, with Speaker Toni Atkins' Deputy Chief of Staff and General Counsel, Fredericka McGee, and California Supreme Court Principal Attorney, Carin Fujisaki, was to address the need to revoke legislatively, or otherwise, California Court Rule 8.1115, which forbids citation of those California Appellate Court decisions (90%+) ordered "not to be published" by the judges that author them. "Unpublished" appellate court opinions cover all manner of the people's issues, including many of first impression – and, by this "no-citation" rule, are forbidden to be mentioned in our state courts (See generally: www.NonPublication.com (including "News").

This is about access to justice, transparency, accountability, and corruption.

We recently contacted Assemblymembers Rob Bonta (Jim Oddie, Dist. Office) and Tony Thurmond (Opio Dupree, COS) seeking this legislative revocation. Like most of our inquiries and efforts made over the years concerning this revocation, our current requests seem to have been systematically funneled to Ms. McGee.

McGee advised on November 18 that she had posed questions to Ms. Fujisaki for written answer by November 23, not received to date. Although McGee has not fully reported the questions she posed to Fujisaki, from the little McGee revealed, they seemed to have nothing to do with the many unanswered questions posed in letters to the Supreme Court from former Assemblymembers Jared Huffman [2008, 2011] and Mervyn Dymally [2007] (www.nonpublication.com/huffman090508.pdf; www.nonpublication.com/huffman110809.pdf; www.nonpublication.com/dymally.pdf).

In our discussions, McGee has repeated years-old Supreme Court arguments for maintaining its ban on plenary citability, whose supporting foundations have long ago slipped away. McGee recited the Supreme Court objections to ending its prohibition which repeated those in the 2011 Supreme Court letter signed by then Principal Attorney, Beth Jay (See: www.nonnpublication.com/casc101811.pdf). As such, these very arguments have all been dismissed by the Federal Judicial Center (FJC) 2004 report, by the federal Alito Committee, by

nearly 10 years of successful federal experience after the 2006 restoration of plenary citability in all federal courts and by the good experience of over half the states that have all restored and returned our traditional historic right to cite unpublished opinions.

We summarize and refute the California Supreme Court objections to ending its prohibition on citation of unpublished opinions, as related by Fujisaki through McGee, as follows:

1. Costs and Inadequate Staff. The California Supreme Court seemed to center on Judicial Council manpower and costs entailed in both (a) conducting a study of the no-citation rule, and also (b) manpower and costs involved if the no-citation rule were revoked. No costs known to us were incurred in the revocation of the federal no-citation rule almost 10 years ago – only substantial savings including from avoiding repetitive litigation of issues previously decided and published. I asked McGee how many staff personnel, hours and dollar costs the study, and the implementation of a rule revoking the prohibition against citation would require? McGee said she had no idea.

2. Advance sheet expense and lack of manpower. In addition to the costs, the California Supreme Court claims that allowing citation of some 9,100 unpublished decisions annually would require manpower to compile advance sheets. This assertion ignores that legal services already report and index all of these decisions, totally vacating its premise. Moreover not one word about this issue has been reported as to the federal experience.

3."Summary dispositions" by other judiciaries (irrelevant). The California Supreme Court claims that we cannot compare the federal system and those of many other states, where some opinions are written in short, sometimes one to four page "memoranda", sometimes called "summary dispositions", and the California system with its Constitution requirement (Art. VI, section 14) that opinions that determine causes be "in writing with reasons stated". We disagree. We are aware that some federal and other state decisions are done by short "memoranda", but see no relevance of this to restoring the right to cite unpublished opinions. Despite constitutionally required written reasons, California practice is much the same as the practice in the federal and most states' judiciaries. The written reasons requirement was not used to justify the limitation on citation imposed during the 1970's, and did not preclude citation of all opinions before the no-citation rules were adopted. How would they impair citation now?

4. "Separation of powers" doctrine. . The California Supreme Court claims that the "separation of powers doctrine" and the California Constitution do not permit the legislature to tell the judiciary what the judiciary must do. The argument is refuted by the existence of the entire Code of Civil Procedure as well as all other codes, as well as California Constitutional provision that empowers the California judiciary to make only rules not inconsistent with statutes. Government Code section 68902, the 1904 constitutional provision that gives the Supreme Court the power to determine which appellate opinions shall be physically published neither governs, limits, nor mentions a judicial power to preclude the appropriate citation of decisions. Nor does it preclude the legislature from directing judicial conduct, as is most appropriate. The evidence code, the probate code, the code of civil procedure and countless others which the legislature frequently and routinely changes year to year by legislative statute all bear this out.

5. Procedure (non-existent) to request permission to cite unpublished opinions. McGee said that (apparently) according to Fujisaki, there is a procedure in the law by which lawyers or litigants can request permission to cite unpublished opinions, so there was no harm or detriment inflicted by the no-citation rules. We are unaware of any such procedure, do not believe it exists, and have asked for the statute, rule or case cite(s) so providing. McGee said she did not know these citations, but would soon furnish us with them. We have never seen such law

6. The Court wrongly contends that if no new principle of law appears enunciated in an opinion, there is no reason to cite it. For starters, the mere volume of application of preceding law is new law, in-and-of itself. McGee said and if an appellate decision squares "on all fours (legs)" with previous cited decision(s), there is no reason to make the new opinion citable, because no new law was developed. For the reasons set forth in great detail in the 2004 federal Alito and FJC reports, we strongly disagree with her. And further, we wonder: does this mean that McGee and the Supreme Court would agree with us that all decisions that make new law (as vast numbers do) must be citable?

7. Supreme Court incorrectly claims that the study expense and effort are wasted if no-citation rules are not revoked. McGee said the California Supreme Court doesn't want to spend state taxpayer money and stress its inadequate staff in these tight budget times on a study if it might not revoke its rules forbidding citation of opinions marked by their author-judges to be unpublished. Are studies only appropriate where the procuring authority already knows the point it desires to be supported? We thought the purpose of the study was to determine whether or not it is best for the people to revoke the rule not allowing them to cite. Justice Samuel Alito wrote that no citation rules "cannot be justified". In contrast, there are scores of reasons no-citation rules devastate the rule of law and the democracy. Whether or not the rule is revoked, the taxpaying public seems far better served by a study, than by no study.

We believe it is a very important role of the legislature to check the operations of the other branches of government. If the consequence of the no-citation rule over time is a credible threat to the rule of law, as noted by the federal judiciary, it would seem appropriate that the legislators move to protect their constituencies from that threat.

The California Supreme Court may correct this on its own, saving the need for legislative intervention (just as the federal judiciary did over ten years ago), but has not. There has been interest expressed both in the Assembly and Senate offices in possible authorship of another ameliorative bill following the work of former Senator Sheila Kuehl in 2004 (SB 1655). We ask you to lead this effort, and carry the bill.

Thank you.

Sincerely,

Michael Schmier, Director
Committee for the Rule of Law