SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 94102

October 18, 2011

Hon. Jared Huffman
California State Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0006

Dear Assemblymember Huffman:

Thank you for your letter of August 9, 2011. Chief Justice Cantil-Sakauye has referred it to me for a response. She would be happy to discuss the issue with you further when she is in Sacramento.

We appreciate your interest in the citation practice used in California's appellate courts. In considering the myriad questions that you have raised, we hope that the following response, which provides a discussion of some of salient aspects of California precedent and practice, will be of assistance.

As you know, the California Supreme Court appointed a committee in 2004 to study the issue of the publication of Court of Appeal opinions in order to consider, as it has regularly over the years, whether its approach to publication was serving the bench, the bar, and the public effectively. As the committee's report explains, publication of Court of Appeal opinions has been a matter of constitutional oversight since the beginning of our state.[1] Two clauses are key to today's circumstances. First, as originally adopted in a provision arising out of the Constitutional Convention of 1879, the opinions of the Supreme Court and the Courts of Appeal "that determine causes shall be in writing with reasons stated." (Cal. Const., Art. VI, § 14) Second, since 1904, the constitution grants to the Supreme Court the power to determine which appellate opinions shall be published. (Ibid; see Rule 8.1105, California Rules of Court.) This provision is repeated in Government Code section 68902.

[1] The report may be found online at http://www.courts.ca.gov/documents/sc_report_12-7-06.pdf.

Selective publication of appellate opinions began in 1964 as the number of such opinions began to rapidly increase. Over the years, the presumptions for and against publication, and the standards for publication, have been modified and changed. The present rule, adopted by the Supreme Court following the 2006 recommendations of the court's advisory committee, changed the existing standards to state that opinions "should" be published unless certain factors existed, and modified the relevant factors used to determine whether publication is appropriate. Previously, the rule established a presumption against publication and there was less guidance concerning the bases for deciding whether publication was appropriate. The new factors were developed to help ensure publication of cases that added to the development of the law, addressed laws or rules of law not recently considered, or newly interpret or construe constitutional provisions, statutes, ordinances, or court rules.

In its work, the committee adopted and discussed then-newly-adopted rule 32.1 of the Federal Rules of Appellate Procedure, which permitted citation to all unpublished federal cases, as well as the practice in some of the states across the nation that publish all opinions by their intermediate courts of appeal. As the report noted, at that time only nine states published all of their opinions, had no rules barring citing unpublished opinions, or permitted unpublished opinions to be cited as precedent. Another 12 states allowed unpublished opinions to be cited only for persuasive value, and not as precedent. (See, California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Report and Recommendations, Nov. 2006, p. 13.).

The report also explained a substantial and significant practical difference between California and other jurisdictions: California's requirement that decisions that determine causes be decided "in writing with reasons stated" is virtually unique. As a result, California's Courts of Appeal may not employ summary disposition to determine cases, a practice common in other states, including New York. The Federal Rules of Appellate Procedure continue to give individual federal courts the ability to decide cases with or without written opinions: thus individual federal courts may decide cases by an order, a memorandum and order, or an opinion.

These differences and their resulting impact are discussed in the committee's report at pages 14-15. As noted, in New York, the courts historically publish a small ratio of published opinions to memorandum opinions: 301 full opinions to 10,085 memorandum opinions in 2003. In one year, the memorandum decisions were published in a total of 10,132 pages — or approximately one per page. The 301 full opinions appear in a total of 1,988 printed pages — or an average of slightly less than 7 pages per opinion. One would be hard pressed to find any opinion by a California Court of Appeal,

published or unpublished, that would fit on a single printed page in a case book — and that is because more than an order or simple memorandum is required in each case.

These differences among jurisdictions still exist. Moreover, it also may be of interest to you that the changes to the Federal Appellate Rules have not resulted in uniformity and consistency, because the various Courts of Appeals in the federal system have adopted a variety of rules addressing when unpublished opinions and orders will and will not be treated as precedent or citable. I am attaching a copy of a 2010 article from the Journal of Appellate Practice and Process that explains the recent status of the application of Rule 32.1 in the various federal circuits.

The issue of publication of Court of Appeal decisions is one that the Supreme Court will continue to monitor and oversee to provide effective guidance to practitioners without unduly burdening the courts. As noted, the requirement on California's courts to provide decisions in writing with reasons stated remains the same as when the subject was last studied. Given the recent budget reductions to the judicial branch, imposing a greater burden on the Courts of Appeal in terms of ensuring that every opinion becomes "citation-ready" and available as precedent — as opposed to simply focusing on deciding the particular case at hand — becomes even more of a problem. As you may be aware, the Courts of Appeal suffered a 9.7 percent budget cut in the current year, and continue, for the third year, to impose a one-day-per-month furlough on their employees in order to preserve experienced staff and continue to provide the highest possible level of service to the public even with substantially diminished resources. Thus, this would not be an opportune time to make any changes, even if the Supreme Court were to determine, pursuant to its constitutional authority, that changes were desirable.

Thank you again for your interest. I hope that this information is of assistance to you. If you have further questions or wish additional information, please feel free to contact me.

Sincerely,

Beth J. Jay
Principal Attorney to the Chief Justice

BJJ/kl
Attachment