Committee For The Rule Of Law

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Justice Kathryn M. Werdegar
Chair, Supreme Court Advisory Committee on
Rules for Publication of Court of Appeal Opinions
C/O Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4712

January 9, 2005

Dear Justice Werdegar and Members of the Committee:

We were pleased to read of your appointment as chair of the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, as we were of the establishment of the committee itself.

The Committee for the Rule of Law was formed in 1996 to eliminate Court Rule 977 which purports to make some 93% of appellate court decisions unmentionable in our judicial system and to seek reform of court rules 976-979 related to publication of California Appellate Court opinions. Many of our members have worked for decades to see reformation of these rules and hold strong feelings that publication and no-citation rules not only contravene our Constitutions, but also significantly debase processes essential for the survival of the democracy.

We sponsored AB 2404 (Papan 2000) which resulted in judicial agreement to publish all prospective "unpublished" opinions electronically. We also sponsored AB 1165 (Dymally 2003) and SB 1655 (Kuehl 2004) which resulted in the formation of this committee. We obtained hearing before the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet which has resulted in proposed Federal Rule 32.1. making all federal opinions citable. We maintain www.Nonpublication.com which is a virtual library of materials on this subject.

Because all opinions are now published online we find the charge of the Chief Justice to this committee an obfuscation. Since all opinions are now publicly available, and *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450 (1962), establishes (rightly or wrongly) that trial courts are jurisdictionally bound to follow such opinions,

the only effect any change in publication rules your committee will recommend will be to change the composition of the set of opinions which may be mentioned in our courts. If, for instance, rule 977 is unconstitutional or other cause is found to invalidate 977 as wrong, then the committee's work has no practical effect because all opinions would then be citable. Conversely, should the committee find Rule 977 inappropriate, it may make the rule nugatory by determining that all opinions should be published. Thus the committee should take up Rule 977 notwithstanding the limited charge of the Chief Justice.

Through five separate litigations related to the validity of the no-citation rule, in three of which the California Judiciary was the defendant, the California Judiciary has made clear that it holds a strong institutional bias against reform or even publicly addressing the issues raised. In the cases where it was the defendant, it refused to recuse itself for bias, unlike the 9th Circuit. Its unpublished opinion in *Schmier v. The Supreme Court of California* A101206 (12/16/03) purporting to resolve the free speech issue ignores all constitutional analysis, referring to a prior opinion that does not address the issue *at all*.

Instead of considering the issues raised by no citation rules according to well established judicial methodology, the judiciary used its raw power to quash any open inquiry into its practices. In doing so it evidenced that it may not be trusted to judge itself. Worse still, it seems evident that the various levels of the defendant judiciary communicated "advice" to the judges hearing the case.

Such wagon circling and stonewalling are disappointing, coming from a judiciary in service to a free society, and if continued, will compromise the authority of the judiciary. We are hoping that under your leadership, this committee will take an approach more appropriate to the aspirations of the people. But, despite the enormous size of the community that find rules 976-979 wrong, the committee roster does not appear to include anyone who can be expected to voice challenge to these rules.

Our Committee believes that the courts are institutions owned and operated by and for the people. While we respect the need for courts to deliberate in private regarding determination of any particular case, we believe that we, the people, have an appropriate right to observe and participate in all significant forums where the manner of operation of the judiciary is discussed or determined.

This is particularly true in this case, where the issue is whether or not the age old doctrine of *stare decisis,* with its many fundamental implications for the right to petition government, equal protection, and the rule of law itself, is to be operative in our judicial system.

We believe we are entitled to hear all of the arguments made for and against proposals dealing with such a fundamental element of our judicial system, to determine whether such arguments are based in truth, the extent to which such

arguments are embraced within the judiciary, the need for legislative action, and the evaluation of judges for retention.

The judicial institution has no need for secrecy as to administrative policy determination. It is not a political administration that needs to present a united front. It is not to be a univocal organization. It is merely an institution set up by the people to judicially determine cases and controversies for the benefit of the community, implicating law by the recording of reason used by many separate panels. The judiciary is not a legislature.

There is no need to cover up or obscure practices that might embarrass the judiciary. If there exist procedures of the appellate courts that will disappoint or shock the people, the solution is to openly examine those practices so that the people may knowingly ratify the practices or otherwise determine the level of service the people expect from the judiciary. If the inquiry results in the opportunity for convicts or others to reopen cases, such is the price we pay to live in a society committed to providing its people the highest level of justice humanity can attain. Nothing is served by leaving any judicial practice secret from the people.

Accordingly we respectfully request that you advise us of the complete calendar and agenda of this committee, that we be given opportunity to hear and observe the committee, opportunity to address the committee, and opportunity to call and examine witnesses, judicial and otherwise, before the committee.

We note that our requests are within both the letter and spirit of Proposition 59, enacted last November. That provision now enshrines in the California Constitution the principle that "the meetings of public bodies . . . shall be open to public scrutiny." In the words of the Legislative Analyst, Prop. 59 "create[s] a constitutional right for the public to access government information."

Please advise us if we will be allowed these calendars, agendas and opportunities, or otherwise state the judiciary's intentions as to our participation.

Sincerely,

Kenneth J. Schmier
Chairman, Committee for the Rule of Law