CA Justices Carve Exception To No-Cite Rule

By Kenneth J. Schmier and Michael K. Schmier

Fifty California appellate justices, more than half the bench, were caught violating the same court rule they insist on enforcing against litigants — the rule prohibiting reliance on unpublished appeal decisions. The Judicial Performance Commission (CJP) must now decide whether to sanction them.

Non-published cont. from p. 31

published and considered precedential without restriction. This restoration of precedentiality to all opinions should not be delayed. Innocent people are being mistreated by the judiciary every day that non-published and non-precedential decisions are allowed to be issued.

Note: This is an edited version of the complete article that omits many endnotes not associated with a direct quote or reference to a statistic.

Endnotes:

1 Ronald Dworkin, *Taking Rights Seriously* (1977), p. 113.
2 Richard B. Cappalli, The Common Law's Case Against Non-precedential Opinions, Southern California Law Review, Vol. 76:755, 774- 775 (2003).
3 Joshua R. Mandell, Trees That Fall In The Forest: The Precedential Effect Of Unpublished Opinions, Loyola of Los Angeles Law Review, 34:1255, 1259, April 2001.
4 *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens. J., dissenting).
5 U.S. Court of Appeals - Judicial Caseload Profile (2000-2005), at, http://www.uscourts.gov/cgi-bin/cmsa2005.pl
6 Percentage of Majority Opinions Published Courts of Appeal, Fiscal Year 2003–04 Table 9, 2005 Court Statistics Report (California), p. 29, at, http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf.
7 For an analysis of the Republican partisanship of the five justices who voted with the majority in Bush, see, see Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Thunder's Mouth Press 2001).
8 *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 8-22-2000).
9 Richard B. Cappalli, 772.
10 *Id*., at 764, note 52, and also note 53.
11 Joshua R. Mandell, supra, 1264.
12 Tim Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals, Federal Judicial Center, June 1, 2005.
13 *Id.*
14 *Id.*
15 Richard B. Cappalli, *supra* at 789.
16 *Id.* at 790.
17 *Id.* at 760. (citation omitted)
18 See, David R. Dow; Bridget T. McNeese, Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions; *Texas Journal on Civil Liberties & Civil Rights*; 2004.
19 Richard B. Cappalli, *supra* at 787.
20 *United States v. Thunder*, No. 04-3780 (8th Cir. 02/22/2006); 2006.C08.0000279 ¶12 <http://www.versuslaw.com>
21 William Reynolds and William Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the Untied States, 78 Colum. L. Rev. 1167, 1175 (1978).
22 Richard B. Cappalli, *supra* at 769-770, note 71.
23 See, Melissa M. Serfass and Jessie Wallace Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions: An Update, *The Journal of Appellate Practice and Process* (Fall 2004).
24 U.S. Court of Appeals – Judicial Caseload Profile (2000-2005), http://www,uscourts.gov/cgi-bin/cmsa2005.pl. This includes direct federal criminal appeals and state and federal habeas corpus petitions (including 28 USC §§2254 and 2255 petitions.)
25 Summary of Filings Courts of Appeal, Fiscal Years 1994–95 Through 2003–04 Table 4, , 2005 Court Statistics Report (California), p. 24, at, http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf.

The embarrassing violations of Rule 977(a) came to light when the Supreme Court Advisory Committee on Rules for Publication ("Werdegar Committee") released its preliminary report in mid-October 2005. A survey taken by the committee revealed that 58 percent of 86 justices responding rely upon "unpublished" appellate opinions when drafting their opinions. California's "no-citation" Rule 977 says unpublished opinions "must not be cited or relied on by a court or party."

California appellate courts have repeatedly rejected challenges to Rule 977. Rule 977 and other no-citation rules have spawned a great deal of controversy over the past decade. Many high ranking judicial officers have argued that no-citation rules must be rescinded.

Flouting The Law

Nonetheless the California judiciary, its chief justice, its Judicial Council, the attorney general and, most importantly, the appellate courts, have resolutely defended the validity of Rule 977. To paraphrase the late Johnnie Cochran, if the rule is fit, the appellate bench too must submit.

But half are not submitting. A comment included in the Werdegar Committee's report said, "Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division." Justices are deciding cases by relying upon unpublished decisions in the same way they would use decisions marked "Certified for Publication" — except without citation. Apparently the admission escaped the attention of the committee's chair, Justice Kathryn Mickle Werdegar, and the members of her committee specially chosen by Chief Justice George.

We are the ones who complained to the Commission on Judicial Performance that justices are violating Rule 977. Given the poor regard in which we hold Rule 977, why did we do so? We invoke the rule of law to attack it. The rule of law requires that law — bad or good — be applicable to all, including the appellate bench. If the appellate bench finds abiding by Rule 977 awkward, the rule of law forces the bench to change it. It is not acceptable that judges, who made and enforce the rule that forbids us to rely on unpublished decisions, secretly violate the same prohibition.

"Violating rules relating to court administration" constitutes judicial misconduct, according to the CJP. But is the CJP sufficiently independent of the judicial establishment to issue charges?

We are giving the CJP an opportunity to prove its rectitude. The complaint is not frivolous; there is great harm in what the justices are doing.

Clandestine reliance upon unpublished decisions deprives litigants and attorneys of any opportunity to argue against their validity. Worse, these decisions have never been vetted before the tens of thousands of court watchers, incentivized by citability and stare decisis, who monitor published appellate decisions. Among these court watchers is vast expertise regarding all manner of issues that come before appellate courts. Vetting decisions before them serves as a realistic and vocal quality control mechanism for the enormous volume of appellate dispositions.

But court watchers, and justices too, have been misled by Rule 977 into believing unpublished decisions do not influence the determination of future cases, and rarely criticize them. Unpublished opinions lack the crucial dignity of standing for something. They are not supposed to count, except for the parties, who are often shocked, and many devastated, by their "result orientation." The warranty of rightness is stripped when unpublished opinions circumvent court watcher inspection. Yet the Werdegar Committee report reveals that these opinions are calcifying into decision-determining lines of secret precedent anyway.

Our strategy depends upon the CJP to enforce Rule 977. Will it? It's already waffling. Its executive secretary, Bernadette Torivino, responded to our complaint the day it was received. She wrote that the investigation will not go forward until we name the justices and "specify exactly, what action or behavior of each judge is the basis for your complaint." When 50 of 101 justices have admitted a serious violation in writings held by a Supreme Court advisory committee, it is hard to believe the CJP does not have enough information to move forward. Sounds like evasive bureau-speak to us.

We cannot identify the specific justices because, despite open government Proposition 59, the committee met in secret and will not release to us the survey responses or other records of their meetings. We have sued the Judicial Council to gain access, but the Judicial Council, represented by Morrison & Foerster, aggressively defends its questionable right to hold all of its policy-making subcommittee meetings in secret and to keep their papers from the public.

So we shall name all of the appellate justices and rely upon the CJP to use its investigative powers to defend the rule of law, and hope for the best.