

AMENDMENT TO RESOLUTION 09-01-05

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Supreme Court amend California Rules of Court, rule 977:

- 1 Rule 977.
- 2 (a). Unpublished opinion
- 3 Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate
- 4 division that is not certified for publication or ordered published must not be cited or relied on by a
- 5 court or a party in any other action.
- 6 (b). Exceptions
- 7 An unpublished opinion may be cited or relied on:
- 8 (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral
- 9 estoppel, or
- 10 (2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a
- 11 decision affecting the same defendant or respondent in another such action.
- 12 (3) To demonstrate a division among the district appellate courts as a ground for the necessity for
- 13 review in accordance with California Rules of Court, rule 28,
- 14 (c). Citation procedure
- 15 A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a
- 16 computer-based source of decisional law must be furnished to the court and all parties by attaching it
- 17 to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable
- 18 time in advance of citation.
- 19 (d). When a published opinion may be cited
- 20 A published California opinion may be cited or relied on as soon as it is certified for publication or
- 21 ordered published.

(Proposed new language underlined, language to be deleted stricken.)

RESOLUTION 09-01-05

DIGEST

Appellate Opinions: Citation to Unpublished Opinions

Repeals California Rules of Court, rule 977, to allow citation to all state court opinions as persuasive authority.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Related to Resolution 09-02-05.

Reasons:

This resolution repeals California Rules of Court, rule 977, to allow citation to all state court opinions as persuasive authority. This resolution should be disapproved because it is unnecessary and would greatly increase the burden on appellate courts and attorneys.

Currently, while all state court appellate decisions are available through such services as Lexis and Westlaw, only those deemed suitable for publication by the court may be cited in legal memoranda and briefs. The proponent raises a valid concern about the use of unpublished opinions to establish a conflict between district courts of appeal when seeking review in the Supreme Court. However, the proponent provides no reason for permitting the general citation of innumerable appellate decisions which are not deemed suitable for publication.

In the district courts of appeal alone, 11,000 to 12,000 written opinions are issued annually, requiring most justices to author more than 100 opinions each year, as well as participate in double that number being authored by another member of the panel. (Judicial Council of California, "2004 Court Statistics Report.") Because the majority of these opinions are designed to be read only by the interested parties, the justices are able to include only a brief summary of the facts, and feel less need to explain each step in reaching the ultimate conclusion. Should all opinions be made citable, it will greatly increase the work for appellate court judges and justices, who will feel the need to make every opinion clear to all possible readers, including trial court judges, who are not already familiar with the issues and posture of the case.

Similarly, the burden on attorneys will increase. An attorney will risk committing malpractice if he or she does not thoroughly access and review every opinion that touches on the issues of the case. For attorneys who do not have the resources of a large firm, such research will be prohibitively time-consuming and expensive. These costs, in turn, will be passed on to the clients, some of whom may find themselves priced out of the ability to hire counsel.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council repeal California Rules of Court, rule 977:

- 1 ~~Rule 977.~~
- 2 ~~(a) Unpublished opinion~~
- 3 ~~Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate~~
- 4 ~~division that is not certified for publication or ordered published must not be cited or relied on by a~~
- 5 ~~court or a party in any other action.~~
- 6 ~~(b) Exceptions~~
- 7 ~~An unpublished opinion may be cited or relied on:~~
- 8 ~~(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral~~
- 9 ~~estoppel, or~~

10 ~~(2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a~~
11 ~~decision affecting the same defendant or respondent in another such action.~~
12 ~~(c). Citation procedure~~
13 ~~A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a~~
14 ~~computer-based source of decisional law must be furnished to the court and all parties by attaching it~~
15 ~~to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable~~
16 ~~time in advance of citation.~~
17 ~~(d). When a published opinion may be cited~~
18 ~~A published California opinion may be cited or relied on as soon as it is certified for publication or~~
19 ~~ordered published.~~

(Proposed new language underlined, language to be deleted stricken.)

PROPOSER: San Diego Bar County Bar Association

STATEMENT OF REASONS:

Existing Law: Appellate counsel cannot cite to unpublished opinions within the arguments of their motions, writs, or briefs.

Resolution: This resolution would permit counsel to cite to all opinions of the Supreme Court, a court of appeal, or an appellate department of a superior court may be cited by any court for any persuasive value they may have. This resolution is a companion resolution to SDCBA-19 requesting the Legislature to enact Government Code section 68906 permitting the citation of unpublished opinions.

The Problem: Currently, counsel is unable to use as persuasive authority any opinion which has not been certified for publication. The amendment would also clarify counsel's ability to cite to unpublished opinions to demonstrate a division among the district appellate courts as a ground for the necessity for review in accordance with California Rules of Court, rule 28.

Reasons: Unpublished opinions frequently expose a division among the various district courts of appeal, a division within a single district, and/or a trend of decisions made by a superior court judge. The ability to cite to unpublished opinions would permit counsel to argue more effectively and anticipate potential questions from the court.

IMPACT STATEMENT:

This resolution would not affect any other law, statute, or rule.

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RESPONSIBLE FLOOR DELEGATE: Amanda F. Benedict

COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

A similar proposal was withdrawn from the Legislature in 2004, based upon an agreement for the California Supreme Court to study the criteria by which Courts decide to publish cases. A 13-member Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions was established for that purpose. The Committee's report to the Supreme Court is due in June 2005. If Rule 977 of the California Rules of Court were repealed (as proposed in Resolution 09-01-05) and the subject matter were codified in Government Code Section 68906 (as proposed in Resolution 09-02-05), the power of the Court to make determinations on which opinions are to be published will have been usurped by the Legislature. The Supreme Court is accepting responsibility by studying the issue, and the decision making should be left to the Supreme Court.