

RESOLUTION 09-02-05

DIGEST

Appellate Opinions: Citation to Unpublished Opinions

Adds Government Code section 68906 to allow citation to all state court opinions as persuasive authority.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Related to Resolution 09-01-05.

Reasons:

This resolution adds Government Code section 68906 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 The proponent raises a valid concern about the use of unpublished opinions to establish a conflict between district courts of appeal when seeking review in the Supreme Court.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 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.

This resolution would require reporting services to provide unpublished opinions electronically and without cost, but does not state who would be required to provide this free service, nor how it would be funded. Neither the state nor the courts have the budget to underwrite such a service. The resolution provides that a malpractice action may not be based solely on failure to cite an unpublished opinion. This would not prevent such an action based on allegations that a standard of care was breached by the failure to make arguments or take positions that were suggested by unpublished opinions.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Government Code Section 68906 to read as follows:

- 1 § 68906.
- 2 (a) All opinions of the Supreme Court, a court of appeal, or an appellate department of a
- 3 superior court may be cited by any court for any persuasive value they may have.
- 4 (b) No court, including superior courts, are bound by the ruling set forth in any opinion which
- 5 has not been certified for publication.
- 6 (c) All opinions of the Supreme Court, a court of appeal, or an appellate department of a
- 7 superior court issued on or after the effective date of this section shall be made available to public
- 8 and private reporting services, electronically and without cost.
- 9 (d) The failure to locate, cite, or rely upon an opinion that has not been certified for

10 publication in the official reports does not constitute professional negligence.

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

PROPONENT: San Diego 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 drafted to permit counsel to cite to all opinions of the Supreme Court, Court of Appeal, and appellate departments of the superior court, including unpublished opinions. Unpublished opinions may be cited in any court for any persuasive value they may have. However, unpublished opinions would not be binding upon any court, including lesser courts. This resolution would also require the courts to make unpublished opinions freely accessible to the public. Lastly, the bill would also provide that the failure to locate, cite, or rely upon an opinion that has not been certified for publication in the official reports does not constitute professional negligence. This resolution is similar to legislation introduced in 2004 by Senator Sheila Kuehl of Los Angeles, District 23. [sheila.kuehl@sen.ca.gov], (310) 445-1353; however, the current resolution addresses objections raised in the legislature.

The Problem: Currently, both appellate and trial counsel are unable to utilize the legal analysis and conclusions drawn thereon from the courts of our state when that reasoning is contained within opinions not 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.

IMPACT STATEMENT

This resolution would not affect any other statute. The resolution would affect California Rules of Court, rule 997 which currently prohibits the citation of unpublished opinions.

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RESPONSIBLE FLOOR DELEGATE:

COUNTER ARGUMENT

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.