

Oakland Tribune

Court rule change on citations moves forward

Federal advisory committee votes to let lawyers point to unpublished appellate opinions

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Thursday, April 15, 2004 - A controversial change in how federal appeals courts work -- an especially hot issue in California -- moved one step closer to reality this week.

The Advisory Committee on Appellate Rules of the Judicial Conference of the United States -- the administrative decision-making body of the federal courts -- voted Tuesday in Washington, D.C., in favor of a new rule that would let lawyers cite "unpublished" opinions when arguing their cases.

Many judges claim unpublished opinions, which are made public but aren't binding precedents in similar cases, are vital because they keep the courts' huge caseloads flowing. But, they say, they shouldn't be citable because they're not worded carefully enough to apply to cases beyond those in which they're issued.

Many critics claim banning citation of these opinions promotes sloppy rulings and judicial laziness, free of public or legislative scrutiny.

About four out of five opinions issued by federal appeals courts in recent years have been unpublished, and nine of the nation's 13 judicial circuits already permit their citation, giving them varying degrees of weight.

But the San Francisco-based 9th U.S. Circuit Court of Appeals, which covers California and eight other Western states, doesn't allow such citations, and many 9th Circuit judges -- led by Alex Kozinski of Pasadena -- have lobbied against having to do so.

The rule adopted Tuesday by the advisory committee would force all federal appeals courts to allow citation, although they wouldn't have to consider them binding on future rulings.

Among those who testified in favor of the rule Tuesday in Washington was University of California, Berkeley Boalt Hall School of Law Professor Stephen Barnett, who noted the absence of any significant complaints or warnings from circuits already permitting citation.

"I'm delighted," Barnett said Wednesday. "I think the committee showed courage in seeing through the smoke and proposing the only rule that's defensible on its merits."

Kozinski disagreed. "There are more steps in the process and I'm quite confident this rule is not going to be enacted," he said Wednesday, adding several people who eventually will have to vote on it have already said they oppose it.

The advisory committee voted in May to propose the rule, and the Judicial Conference's Committee on Rules of Practice and Procedure approved its publication in June. With the committee's vote Tuesday to continue supporting it, the rule still needs four more green lights before adoption: another from the 13-member Committee on Rules of Practice and Procedure, then from the 28-member Judicial Conference, then from the Supreme Court and then from Congress.

Also present at Tuesday's hearing was Emeryville attorney Kenneth Schmier, who with his brother, attorney Michael Schmier, has crusaded for years to allow citation of unpublished decisions. Michael Schmier made the issue the centerpiece of his 1998 and 2002 Democratic primary candidacies for attorney general; his 2000 primary candidacy for U.S. Senate; and his run for governor in 2003's recall election.

This is an issue in state appeals courts, too -- 22 states, not including California, allow citation of unpublished opinions. State Sen. Sheila Kuehl, D-Santa Monica, introduced a bill in February to make all future state Court of Appeal and state Supreme Court opinions citable. The bill is pending before the Senate Judiciary Committee; the Assembly Judiciary committee killed a similar bill last year.

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