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## Report of the Chief Justice's Advisory Committee For An Effective Publication Rule

Chief Justice's Advisory Committee For An Effective Publication Rule

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REPORT OF THE CHIEF JUSTICE'S  
ADVISORY COMMITTEE  
FOR AN EFFECTIVE PUBLICATION RULE

JUNE 1, 1979

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74-7-525

REPORT OF THE CHIEF JUSTICE'S ADVISORY COMMITTEE  
FOR AN EFFECTIVE PUBLICATION RULE

I. INTRODUCTION

Committee Mandate, Composition, and Functioning

Chief Justice Rose Elizabeth Bird appointed the Advisory Committee for an Effective Publication Rule in September 1978, charging it with carefully reviewing all aspects of California's selective publication system and making recommendations to improve its workability.

The 18 members of the committee represent a wide range of viewpoints on the wisdom and effectiveness of selective publication. Many have been interested in the operation of the system for some time.<sup>1/</sup> This experience and diversity of views permitted the committee to conduct its deliberations reasonably expeditiously yet thoroughly.

The committee held two public hearings and solicited comments from the public and from numerous groups and individuals.<sup>2/</sup> The persons who appeared at the hearings or submitted written views included prosecutors, public defenders, other government and private attorneys, bar association representatives, judges, appellate scholars, and representatives of legal publishing houses and a computerized legal research service.

Selective publication, initiated in California in 1963, has more recently been adopted by federal and some state appellate courts. The committee reviewed prior California reports and literature, the rules in other jurisdictions, and the legal literature<sup>3/</sup> on selective publication.

1/ A list of the members which summarizes prior involvement in selective publication may be found in Appendix E to this report.

2/ A list of organizations contacted appears in Appendix D.

3/ This literature reveals selective publication schemes have proliferated, they have also become more varied. Furthermore, the recent trend of legal scholarship seems to be toward increased criticism of these systems.

A bibliography of recent literature on state and federal limited publication schemes appears in Appendix C to this report.

Based on the information gathered from hearings, letters, scholarly literature, and its own members' experience, the committee held a series of discussion meetings to analyze every facet of the system of selective publication.

#### Summary of Conclusions and Recommendations

The major topics addressed in this report are the following:

- Access to Unpublished Opinions  
(Part II, pp. 8-15)
- Citation of Unpublished Opinions  
(Part III, pp. 16-19)
- Publication Standards (Part IV, pp. 20-23)
- Publication Procedures, including Supreme Court Decertification, Initial Publication Decision, and Requests for Publication  
(Parts V and VI, pp. 24-30)
- Partial Publication (Part VII, pp. 31-33)

The committee's initial conclusion is that a return to full publication in official format is impractical because of the great volume of court of appeal opinions. Modifications in the present system are, however, needed to improve its operation and to overcome various practical and theoretical shortcomings of selective publication.

Publication of appellate court opinions serves many purposes. It enables courts, lawyers and litigants to know the law so that they may make uniform and predictable decisions. It also informs the public of the law, giving fair notice of rights and duties. Publication also exposes to public and scholarly scrutiny the philosophical views and analytical abilities of the judges. In short, legal doctrine can best be understood, interpreted, acted upon, criticized, and changed through publication of opinions.

From this perspective, limiting publication of opinions is subject to numerous theoretical and practical criticisms. The former include the contentions that selective publication contributes to popular distrust of the courts; creates

inequality of access to case law by making pertinent unpublished opinions available largely only to institutional and specialized lawyers; limits the Supreme Court's ability to correct inconsistent appellate decisions where there is no petition for hearing; deprives trial judges, lawyers, litigants and members of society of guidance; and decreases trial court compliance with the law, thus contributing to increased appellate litigation.<sup>4/</sup>

California's selective publication scheme is also subject to criticism on the practical grounds that the criteria for publication are applied unevenly; cases that qualify for publication remain unpublished; the citation ban does not neutralize the advantages of privileged access, since it does not prevent the use of the language and the reasoning of unpublished opinions; the procedure for requesting publication works unequally since only the parties and institutional litigants have practical access to unpublished opinions, and they frequently do not have an interest in seeking publication; the Supreme Court frequently decertifies published opinions which qualify under the standards.

Despite these problems, the volume of appellate decisions precludes a return to full publication of all opinions in the current format of the official reports. It is estimated that publication of the entire output of the California Courts of Appeal would increase the number of volumes of official reports issued each year from about 12 to more than 60.<sup>5/</sup> The costs of such a flood of books, in terms of purchasing the books themselves, finding library space to house them, and taking the time to research and read cases, would be prohibitive. Full publication in the present official format is simply impractical.

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4/ Between fiscal 1966-1967 and 1976-1977, the number of majority opinions issued annually by the California Courts of Appeal increased from 2,444 to 6,003, a rise of 146 percent. Judicial Council (1978) Annual Report, Table VIII, p. 71.

5/ Conference Committee Report on 1974 Conference Resolution No. 11-18 (1976) 51 State Bar J. 400, 402.

This is not, however, the end of the matter. Modifications are feasible and desirable to improve California's selective publication system and to correct the problems outlined above.

The major improvement for a more practical and workable system is provision of full and ready access to the entire corpus of unpublished opinions. Allowing interested lawyers, judges, scholars, and members of the public to find and obtain copies of unpublished opinions will help to make the system work more efficiently and fairly. Full access will combat the problem of unequal availability of opinions more effectively than does the noncitation rule; it will facilitate greater and more balanced use of the procedure for requesting publication; it will encourage proper observance of the standards for publication by the courts of appeal in the certification process and by the Supreme Court in the decertification process.

Full access will also help mitigate the harsh side effects of selective publication. It should decrease public suspicions of improperly motivated suppression; in conjunction with proposed citability of unpublished opinions on petition for hearing in the Supreme Court, access will also permit the Supreme Court to detect and correct inconsistencies in unpublished decisions; it will also discourage divergent decisions and save effort by making colleagues' work available to court of appeal justices; trial court, attorney and litigant compliance with appellate law will also be increased; and legal advocacy will be improved.

The remaining committee recommendations also aim to improve workability and to mitigate side effects while retaining the practical advantages of selective publication.

The committee recommends that the noncitation rule be amended to permit citation of unpublished opinions in petitions for hearing in the Supreme Court and citation of unpublished opinions of the appellate departments of the superior courts in those departments and in the municipal

and justice courts in the same county. The standards for publication should, in the committee's view, be amended to include fact cases of first impression, dissenting and reasoned concurring opinions, opinions creating or resolving legal conflicts, and those that make significant research or analytical contributions to the law. The committee recommends that more specific requirements govern the request for publication procedure; that the Supreme Court use decertification only to enforce the standards for publication; that published opinions be retained in the official reports following grant of hearing by the Supreme Court; and that the Court engage in selective review. Finally, the committee recommends testing of proposals for partial publication.

#### Text of the Committee's Recommendations

##### Access

An index to unpublished opinions should be established to provide convenient and inexpensive access to them. Such index and copies of all unpublished opinions should be made available to members of the public, lawyers, judges and scholars at convenient locations throughout the state. An inquiry should immediately be undertaken to identify and evaluate possible methods for providing a convenient and inexpensive indexing and copy storage and supply system for unpublished opinions.

##### Noncitation

A modified noncitation rule should be retained for the present; if an inexpensive, convenient access system proves feasible, the policy of noncitation should be reconsidered. Rule 977 should be amended to permit citation of unpublished court of appeal opinions in connection with petitions for hearing in the Supreme Court, whenever it appears that an unpublished opinion conflicts with the case in which review is sought; to permit citation of unpublished opinions of appellate departments of the superior courts in those departments and in the municipal and justice courts within the

same county; and to require that copies of unpublished opinions intended for citation be furnished in advance to court and all parties. Ethical questions involving noncitation should be addressed to the State Bar.

#### Publication Standards

The publication standards in rule 976, subdivision (b), should be amended to provide for publication of opinions that apply established rules of law to factual situations significantly different from those in published cases; opinions that resolve or create conflicts in the law; opinions in cases involving dissenting opinions or concurring opinions in which reasons are stated; opinions that reverse administrative agency decisions based on a rule of law or interpretation of administrative rules; opinions that make a significant contribution to legal literature by undertaking an historical review of the law or describing legislative history; and opinions that otherwise aid the administration of justice. The presumption against publication should be removed from rule 976, subdivision (b).

#### Supreme Court Procedures

Rule 976, subdivision (c), should be amended to provide that in exercising its power to order opinions published or not published, the Supreme Court shall observe the standards for publication specified in subdivision (b). The Supreme Court should review its former practice of withholding approval of erroneous portions of court of appeal opinions on denial of hearings. Rule 976, subdivision (d) should be amended to delete the language that requires nonpublication of published court of appeal opinions in cases in which the Supreme Court grants review, and the Supreme Court should engage in selective review of specific issues in court of appeal opinions.

#### Requests for Publication

Rule 978, subdivision (a), should be amended to require the court of appeal to send a copy of its recommendation and statement of reasons regarding a request for publication to all parties and to any other person



who has requested publication. Rule 978, subdivision (b), should be amended to provide that the Supreme Court shall dispose of requests for publication promptly and that each party to the action and any other person who has requested publication shall be notified of the action taken by the Supreme Court. Filing systems should be developed in court clerks' offices to insure proper handling of requests for publication.

Partial Publication

Proposals for partial publication of opinions should be given further study, including developing and carrying out pilot projects to test and evaluate them in practice.

DATED: May 15, 1979

RESPECTFULLY SUBMITTED,

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\* I concur in all parts of the committee's report save the recommendation that all cases involving a dissenting or reasoned concurring opinion be published. See minority report, pp. 35-38.

\*\* I concur in all parts of the committee's report save the interim recommendation to retain a modified citation ban. See minority report, pp. 39-43.

\*\*\* I concur in all parts of the committee's report save the recommendation that published court of appeal opinions not be decertified upon grant of hearing by the California Supreme Court. See minority report, pp. 44-48.

## II. ACCESS TO UNPUBLISHED OPINIONS

### Introduction

Selective publication of appellate court opinions necessarily results in unequal access to unpublished opinions. Rule 977 of the California Rules of Court, which prohibits citation of unpublished opinions, was adopted to minimize the advantage of superior access by institutional litigators. For this reason, past discussions of access have primarily focused on noncitation.<sup>6/</sup> However, the issue of access involves problems and solutions beyond citation; consequently, access will be analyzed independently of noncitation.<sup>7/</sup>

The committee concludes that easing access to unpublished opinions would make the work of appellate courts more visible, more understandable and more useful to judges, scholars, lawyers, and to the public generally, and would also improve the workability of the selective publication system. The committee recommends:

AN INDEX TO UNPUBLISHED OPINIONS SHOULD BE ESTABLISHED TO PROVIDE CONVENIENT AND INEXPENSIVE ACCESS TO THEM. SUCH INDEX AND COPIES OF ALL UNPUBLISHED OPINIONS SHOULD BE MADE AVAILABLE TO MEMBERS OF THE PUBLIC, LAWYERS, JUDGES AND SCHOLARS AT CONVENIENT LOCATIONS THROUGHOUT THE STATE.

### Present Practice

At the present time, more than 85 percent of the court of appeal opinions issued each year are unpublished.<sup>8/</sup> Within each appellate district, unpublished

<sup>6/</sup> See, e.g., Seligson and Warnlof, The Use of Unreported Cases in California (1972) 24 Hastings L.J. 37, 52-53.

<sup>7/</sup> Noncitation is discussed in the next section of this report (pp. 16-19).

<sup>8/</sup> In fiscal 1977-1978, the courts of appeal filed written opinions in 6,093 cases, and 12.9 percent of majority opinions were published. Judicial Council (1979) Annual Report, Tables VIII, p. 54; XV, p. 59.

opinions are made part of the file record of completed cases. When accumulated closed case files exceed the storage capacity of the district clerk's office, they are shipped to the State Records Center or State Archives in Sacramento for permanent storage. In addition, one copy of each unpublished opinion is transmitted to the office of the Reporter of Decisions for the Supreme Court in San Francisco. These copies are stored by district and date of decision. While the Reporter's office can retrieve specifically identified cases on request, it does not have the personnel to perform this service for the general public, and it cannot retrieve cases according to subject matter or code section numbers.

In sum, while the 5,000 or more unpublished court of appeal opinions issued each year are technically available for review by anyone interested in doing so, they are not indexed or organized in a manner which would make them realistically accessible: as a practical matter, they are totally unavailable to most attorneys, judges, scholars and members of the public.

#### Disadvantages of Nonaccess; Advantages of Access

If unpublished opinions are, by virtue of rule 977, not generally citable, what difference does it make whether or not they are indexed and made conveniently available? In other words, why should an effort be made to change the existing situation? There are numerous reasons for providing full access to unpublished cases absent citability. These relate partly to the benefits such access provides to the public and to judges, litigants, and scholars. In addition, full availability is a more effective means than the citation ban for equalizing access to unpublished opinions, and it facilitates operation of all aspects of the selective publication system.

Recent years have brought increasing demands that the work of the courts be opened to public scrutiny and made more understandable to the public, and that the courts

be shown to be accountable for their decisions. One recent response has been for the courts of appeal to compile and begin to publish manuals describing their internal operating procedures and practices. It would be equally desirable to have the end product of the courts' work—their written decisions—similarly opened to convenient and inexpensive scrutiny. Mr. Witkin in his testimony before the committee expressed the view that such practical access to unpublished opinions is part of the program of making appellate court operations generally more open and understandable. Full access can also help demonstrate to the public that the appellate courts are carrying out their responsibility to insure that justice is done at both the trial and the appellate levels.<sup>9/</sup> And development of a practical index system should banish the misconception that unpublished decisions are intentionally suppressed.

In general terms, appellate judges need to know their colleagues' output so as to avoid wasteful duplication of effort and damaging doctrinal conflicts. Trial judges must know the status of controlling principles in order to apply them accurately.<sup>10/</sup> Counsel engaged in planning client conduct, contemplating filing or settling a suit, or preparing an appeal have a similar need; scholars must be able to spot trends that may be visible only through studying groups of routine cases; and litigants are entitled to expect that the courts treat similarly situated persons similarly.

Under the publication standards, an opinion applying an established principle to a routine fact situation

<sup>9/</sup> See Do Unpublished Opinions Hamper Justice? (1978) 64 A.B.A.J. 318 [summary of remarks of Arizona Chief Justice Cameron at A.B.A. mid-year meeting]; Smith, A Primer of Opinion Writing for Four New Judges (1967) 21 Ark. B.A.J. 197, 200-201.

<sup>10/</sup> See Rubin, Views from the Lower Court (1976) 23 U.C.L.A. L.Rev. 448, 451-453.

does not qualify for publication, for it is thought to be of interest only to the trial judges and parties. The fact is that the patterns of such routine applications are of general importance to judges, lawyers and scholars. As one witness before the committee observed, where a decision handed down by the Supreme Court is consistently followed by the lower courts, it will nevertheless appear to have been ignored, for under the present scheme the decisions following it will be unpublished. Thus, there will be no way to follow its citation history. With the passage of years, no one will be able to determine the precise ambit of the lead case or whether its principle has, on the one hand, received rigorous and consistent application by the lower courts and thus is "well settled," or, on the other hand, whether it has been consistently circumscribed and limited, or proved unworkable in application.<sup>11/</sup> Similarly, it will not be possible to identify configurations of decisions that show emerging trends or legal problem areas.<sup>12/</sup>

Lack of access to unpublished opinions works a hardship on appellate attorneys which lessens the quality and usefulness of the written and oral argument presented to the courts of appeal. It is a cardinal principle of effective appellate advocacy to "know the panel" before which a case is presented, that is, to know the views of the member

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<sup>11/</sup> The problem is that, in jurisprudential terms, a single appellate decision, whether or not it purports to, does not establish a broad scale "rule." It stands only for the minimum proposition necessary to explain the outcome of the case. A series of decisions applying a proposition is necessary to develop a rule sufficiently broad to provide guidance for commonly recurring situations. See, e.g., Llewellyn (1960) The Bramble Bush 76-77; Landes and Posner, Legal Precedent: A Theoretical and Empirical Analysis (1976) 19 J. Law and Econ. 249, 249-250; Comment, A Snake in the Path of the Law: The Seventh Circuit's Non-publication Rule (1977) 39 U. Pitt.L.Rev. 309, 311-312; Chilton, Appellate Court Reform: The Premature Scalpel (1973) 48 State Bar J. 392, 470-472.

<sup>12/</sup> Note, Selective Publication of Case Law (1966) 39 So. Cal.L.Rev. 608, 609-611.

judges as expressed in their written opinions. When five-sixths of these opinions are not available, counsel cannot achieve this goal. Appellate counsel should not be placed in the position of having to argue a particular application or interpretation to a court without being able to discover whether that court has decided the precise issue in an unpublished opinion.

Finally, full access will improve operation of the entire selective publication scheme. Private and governmental attorney witnesses before the committee expressed concern, documented with specific examples, that the courts of appeal are not correctly or consistently applying the standards for publication in rule 976. Some committee members and others have found this to be the case in their own experience.<sup>13/</sup> And statistics continue to show significant discrepancies in the publication rate between and among districts.<sup>14/</sup> Providing convenient access to all unpublished opinions would help to solve this problem. It would facilitate operation of this report's proposal (see p. 18) to allow citation of conflicting court of appeal opinions on petitions for hearing to the Supreme Court. It would also permit periodic audits to evaluate application of the standards for publication.

<sup>13/</sup> See, e.g., Kanner, The Unpublished Opinion: Friend or Foe? (1973) 48 State Bar J. 386, 436-442 [identifying "publishable" unpublished eminent domain cases]; Lascher, Lascher at Large (1975) 50 *id.* 36; Weisgall, Stop, Search and Seize: The Emerging Doctrine of Unfounded Decision (1974) 9 U.S.F.L.Rev. 219, 253-254 [publishable unpublished cases in the area of founded suspicion]. Cf. Comment, Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law (1977) 50 So. Cal.L.Rev. 1181, 1188, n. 40.

<sup>14/</sup> See Judicial Council (1979) Annual Report, supra, n. 8, Table XV, p. \_\_\_.

That publishable decisions are sometimes not published is also suggested by the fact that in almost one-third (32.3 percent) of the cases involving opinions that were granted hearing by the Supreme Court in calendar 1978, the court of appeal opinion was unpublished. Staff analysis, copy on file with the committee.

Full access will also do a better job of dealing with unequal availability of unpublished opinions than the noncitation rule. Despite rule 977, counsel privileged to know about relevant unpublished opinions presently has a distinct advantage over his adversary, for nothing is to prevent him from arguing a favorable case's reasoning or even using its very language to the court that decided it. At the same time, he can ignore unfavorable opinions.<sup>15/</sup> In fact, the impact of unequal access is compounded by the publication request procedure (rule 978), for only one who knows about a case is in a position to request publication, but he will do so only when it favors his position. Thus, providing full access will also facilitate fairer and more efficient operation of the publication request system.

#### Practical Approaches to Providing Access

For these reasons, the committee, as noted, has recommended that an indexing and copy storage and supply system be developed for access to unpublished opinions and that the index and copies be made available in a convenient and inexpensive manner in order to minimize the burdens of research and retrieval.<sup>16/</sup> Accordingly, the committee recommends:

AN INQUIRY SHOULD IMMEDIATELY BE UNDERTAKEN TO IDENTIFY AND EVALUATE POSSIBLE METHODS FOR PROVIDING A CONVENIENT AND INEXPENSIVE INDEXING AND COPY STORAGE AND SUPPLY SYSTEM FOR UNPUBLISHED OPINIONS.

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<sup>15/</sup> Based on public hearing testimony from private and government attorneys, the committee is concerned with ethical dilemmas posed by selective publication. For example, what obligation does an attorney have to inform court or adversary of an unpublished opinion the attorney knows to be adverse to his position? The committee recommends:

ETHICAL QUESTIONS INVOLVING NONCITATION SHOULD BE REFERRED TO THE STATE BAR FOR CONSIDERATION.

<sup>16/</sup> In recommending practical access, the committee does not mean to imply that counsel have an obligation to research unpublished cases.

While it is beyond the scope of the committee's charter and resources to recommend an exact format to accomplish these goals, it is appropriate to make the following suggestions based on matters presented to the committee and committee deliberations. There can be great variations in the format, quality and cost of indexing systems. It may be possible to develop a relatively limited and inexpensive index which satisfies the practical needs of bar, bench, academy and public. On the other hand, examination of the above-noted needs and uses of the access system may reveal that a more complex and expensive system is required.<sup>17/</sup> Accordingly, the first order of business should be to define the specific indexing needs of the participants mentioned above. Afterwards, a cost-utility decision can be made as to what type or types of index to develop.<sup>18/</sup>

The committee has received information about several topical indexes for unpublished opinions that are currently in operation. Two handle the unpublished opinions of the Appellate Department of the Los Angeles Superior Court. One is maintained by the court staff on three-by-five cards; the other, covering only criminal cases, is the work of Superior Court Judge Saeta. Both appear reasonably inexpensive and useful. The United States Court of Appeals for the Tenth Circuit also has an index which it mails periodically to interested persons. The committee also notes recent proposals for development of internal indexes in the California Courts of Appeal. If adopted, such indexes should simplify maintenance of a public index.

Two legal publishers and a computerized legal research service made presentations to the committee and

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<sup>17/</sup> Appellate counsel, for example, may need to be able to identify cases by subject matter and identity of panel members. Trial judges may need subject matter access for all areas they handle. Criminal lawyers may need a detailed fact-laden criminal subject matter index.

<sup>18/</sup> In the interests of economy, the committee proposes to exclude unpublished decisions previously issued from the ambit of the index.



expressed active interest in tackling the index/access problem. A preliminary proposal from one of the publishers suggests that it might be feasible to offer a commercial index and opinion service on a relatively inexpensive basis. The committee suggests that this avenue be explored further.<sup>19/</sup>

Finally, the committee notes that modest-priced legal research services have recently become prevalent. Their advent may decrease the overall costs of researching unpublished opinions.

### Conclusion

The committee recognizes that Californians are living in a period of limited funding of government services and that this recommendation will have to contend with worthy projects for a share of scarce resources. Nevertheless, in the interests of improving the administration of justice, the quality of legal practice, the orderly growth and development of this state's decisional law, and operation of the selective publication system itself, the committee believes that providing convenient and inexpensive access to the body of unpublished decisions is highly desirable.

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<sup>19/</sup> More detailed comments on the types of storage/retrieval technology available for legal materials, and a rough cost estimate of their use with unpublished opinions of California courts, are found in Appendix B.

### III. CITATION OF UNPUBLISHED OPINIONS

#### Pros and Cons of Noncitation

Nowhere is the selective publication debate more intense than over the associated ban on citation of unpublished opinions.<sup>20/</sup> The problem of citation is particularly intractable in California, where the courts of appeal decide thousands of cases each year, and opinions must be written in all cases.<sup>21/</sup> The committee recognizes that permitting citation of all unpublished decisions now would give institutional litigants an unfair advantage by reason of their privileged access, and it would impose an impractical research burden on others in view of the general inaccessibility of the opinions.

On the other hand, the committee also recognizes that full citation would improve the administration of justice and the effectiveness of trial and appellate advocacy. For example, in criminal cases and other controversial areas, vindication of the unpopular litigant's position in the trial court may depend on his counsel's being able to find and cite an opinion closely in point on the facts as well as the law; to do so, he must have access to and the right to cite routine unpublished decisions.

The courts also have an interest in bringing forth such opinions, trial courts in order to avoid reversal, appellate courts so as to be spared the need to review and correct lower court decisions rendered in ignorance of binding rulings. And society at large would benefit from citability in such circumstances, for it would mean less

<sup>20/</sup> See, e.g., Carrington, Meador and Rosenberg (1976) Justice on Appeal 36; Richman and Reynolds, The Non-Precedential Precedent—Limited Publication and Non-Citation Rules in the United States Court of Appeals (1978) 78 Colum.L.Rev. 1167, 1179-1180.

<sup>21/</sup> Cal. Const., art. VI, § 14. For a summary of the criticisms that bench, bar and commentators level against issuing decisions without opinions, see Richman and Reynolds, supra, at pp. 1174-1176, and authorities cited.

litigation and fewer appeals<sup>22/</sup> and thus lower institutional costs.<sup>23/</sup>

### Recommendations

In the committee's view, the benefits and costs of noncitation are so closely balanced that no definitive policy recommendation is presently appropriate. The specific exceptions to noncitation proposed below answer some objections. Subject to those exceptions, the committee recommends:

A MODIFIED NONCITATION RULE SHOULD  
BE RETAINED FOR THE PRESENT.

The committee further believes, however, that the possibility of developing an inexpensive and convenient index and copy storage and supply system discussed above (pp. 8-15) may

<sup>22/</sup> Cf. Note, Selective Publication of Case Law (1966) 39 So. Cal. L. Rev. 608, 610: "If written but unreported cases have no precedent value, it is quite likely that very similar cases frequently will reappear in the courts. Parties will not be aware of prior cases in point, and even if the litigants are aware, they will feel free to relitigate fact situations which the courts have already considered. The principle of stare decisis is supposed to preclude the recurrence of similar fact situations and encourage parties to refrain from unnecessary litigation. In short, although fewer cases will be reported, more cases will come to the appellate courts."

<sup>23/</sup> The citation ban decreases the amount of appellate law available to guide litigants, attorneys and judges. From the perspective of public administration, there is reason to fear that this decrease impairs the appellate courts' ability to enforce compliance with the law by lower courts and thus contributes to the law explosion. Courts may be viewed as a specialized form of hierarchical organization, in which appellate courts are supervisors and trial courts are subordinates. The literature of administrative hierarchies stresses the difficulty administrative superiors have in enforcing their orders among subordinates. Appellate judges are in an even more difficult supervisory position. Unlike bureaucratic bosses, appellate judges cannot initiate corrective action; they must wait for litigants to request review. And unlike bureaucratic subordinates, lower court judges cannot go to their superiors for advice on how to interpret a given ruling. See Comment, Courting Reversal: The Supervisory Role of State Supreme Courts (1978) 87 Yale L.J. 1191, 1193-1195.

bear on the desirability of maintaining the citation ban. Making unpublished opinions easily accessible may answer some complaints about noncitation, but it may also remove the objections to full citation. Therefore, the committee recommends:

IF AN INEXPENSIVE, CONVENIENT ACCESS SYSTEM PROVES FEASIBLE, THE POLICY OF NON-CITATION SHOULD BE RECONSIDERED.

The committee specifically recommends:

RULE 977 SHOULD BE AMENDED<sup>24/</sup> TO PERMIT CITATION OF UNPUBLISHED COURT OF APPEAL OPINIONS IN CONNECTION WITH PETITIONS FOR HEARING IN THE SUPREME COURT, WHENEVER IT APPEARS THAT AN UNPUBLISHED OPINION CONFLICTS WITH THE CASE IN WHICH REVIEW IS SOUGHT; TO PERMIT CITATION OF UNPUBLISHED OPINIONS OF APPELLATE DEPARTMENTS OF THE SUPERIOR COURTS IN THOSE DEPARTMENTS AND IN THE MUNICIPAL AND JUSTICE COURTS WITHIN THE SAME COUNTY; AND TO REQUIRE THAT COPIES OF UNPUBLISHED OPINIONS INTENDED FOR CITATION BE FURNISHED IN ADVANCE TO THE COURT AND ALL PARTIES.

The first proposal, to permit litigants to call to the Supreme Court's attention, in petitioning for hearing, the existence of unpublished court of appeal opinions that conflict with the decision or ruling in which review is sought (proposed subdivision (a)(1)), would enable the Supreme Court to fulfill its mandate to eliminate inconsistent lower court rulings,<sup>25/</sup> a responsibility that the Court cannot effectively meet now due to the low visibility of unpublished decisions.<sup>26/</sup>

The second proposed exception to noncitation is to permit citation of unpublished opinions of the appellate departments of the superior courts in those departments and

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<sup>24/</sup> For text of the proposed rule amendments, see Appendix A.

<sup>25/</sup> Cal. Rules of Court, rule 29(a).

<sup>26/</sup> See authorities cited in n. 13, *supra*, for examples of inconsistencies between published and unpublished court of appeal opinions.

in the municipal and justice courts within their territorial jurisdiction. This exception the committee considers necessary to remedy an unanticipated adverse effect of the noncitation rule. Most appellate department opinions are unpublished, so the rule wiped out numerous opinions interpreting local ordinances and rules and those statutes that are applied almost exclusively by the lower courts. This is an important body of law, since such local authorities and statutory applications are not ordinarily construed by the higher courts. The municipal and justice courts responsible for applying statutes locally and enforcing local ordinances must, the committee believes, be allowed to use the appellate department opinions that interpret them.

The committee's final citation recommendation is to require that one who plans to cite an unpublished opinion furnish a copy of the opinion to court and other parties a reasonable time in advance of use (proposed subdivision (c)); this enables adversaries and judges to have time to analyze the opinion. Where an unpublished opinion is cited in a document, a copy of the opinion is to be appended to the document. The committee believes that unpublished opinions appended to petitions for hearing in the Supreme Court or to answers thereto, under proposed subdivision (b)(1) of rule 977, should be excluded from the total number of pages in the petition or answer. Rule 28, subdivision (b)(4) should be amended to so provide.

#### IV. STANDARDS FOR PUBLICATION

##### Introduction

The committee concludes that full-scale publication of the more than 6,000 court of appeal opinions produced each year would be prohibitively costly. It therefore favors maintaining selective publication but with modification of the standards for publication in rule 976.

Witnesses before the committee documented several instances of nonuniform application of the current standards, and some committee members have made similar discoveries.<sup>27/</sup> Some such inconsistency is inevitable when the standards contain a significant subjective element. The committee therefore believes that more objective and precise standards are required. In addition, a review of the publication standards used in the federal courts<sup>28/</sup> and in other states<sup>29/</sup> suggests that additional categories of opinions merit publication in the interests of sound doctrinal development and effective administration of justice. The committee accordingly recommends:

RULE 976(b) SHOULD BE AMENDED<sup>30/</sup> TO PROVIDE FOR PUBLICATION OF OPINIONS THAT APPLY ESTABLISHED RULES OF LAW TO FACTUAL SITUATIONS SIGNIFICANTLY DIFFERENT FROM THOSE IN PUBLISHED CASES; OPINIONS THAT RESOLVE OR CREATE CONFLICTS IN THE LAW; OPINIONS IN CASES INVOLVING DISSENTING OPINIONS OR CONCURRING OPINIONS IN WHICH REASONS ARE STATED; OPINIONS THAT REVERSE ADMINISTRATIVE AGENCY DECISIONS BASED ON A RULE OF LAW OR INTERPRETATION OF ADMINISTRATIVE RULES; OPINIONS THAT MAKE A SIGNIFICANT CONTRIBUTION TO LEGAL LITERATURE BY UNDERTAKING HISTORICAL REVIEW

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<sup>27/</sup> See references cited in n. 13, supra.

<sup>28/</sup> For a description and analysis of the federal standards, see, e.g., Note, Unreported Decisions in the United States Courts of Appeals (1977) 63 Cornell L.Rev. 128, 129-135.

<sup>29/</sup> See Chanin, A Survey of the Writing and Publication of Opinions in the Federal and State Appellate Courts (1974) 67 Law Library J. 362, 367-375.

<sup>30/</sup> For text of proposed rule amendments, see Appendix A.

OF THE LAW OR DESCRIBING LEGISLATIVE HISTORY; AND  
OPINIONS THAT OTHERWISE AID THE ADMINISTRATION OF  
JUSTICE.<sup>31/</sup>

Proposed New Standards

One new standard provides for publication of opinions that apply established legal rules to substantially new factual situations (proposed addition to subdivision (b)(1)). The rationale for this proposal is perhaps best stated by Mr. Witkin, who has noted that legal practitioners are "constantly on the lookout for applications of old doctrines to new situations."<sup>32/</sup> He further observed that "the difference between an old rule applied to a novel set of facts and a new rule devised for such a set of facts is one of degree," and that courts have difficulty drawing the line.<sup>33/</sup>

Like nonaccess generally (see discussion pp. 16-19), nonpublication of fact cases of first impression deprives people of necessary guidance on important issues. In addition, appellate advocacy is impaired, for it relies largely on argument by analogy, and without publication of first impression fact cases, many examples of judicial analogical reasoning are inaccessible.

Proposed new subdivision (b)(4) would provide for publication of opinions that resolve or create conflicts in the law. This standard is largely a reformulation of the last sentence of footnote 2 and all of footnote 3 of the

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<sup>31/</sup> The proposed amendments to the standards also incorporate into text the substantive comments now contained in footnotes to the rules, to the extent they are not affected by the proposals. Substantive legal rules should not, the committee believes, be relegated to footnote status.

<sup>32/</sup> Witkin (1977) Manual on Appellate Court Opinions 30.

<sup>33/</sup> Id.

Publication of fact cases of first impression is also supported by the A.B.A., see American Bar Association Commission on Standards of Judicial Administration (1977) Standards Relating to Appellate Courts, Standard 3.37(b)(1); and by the District of Columbia Circuit. See District of Columbia Circuit Plan, paragraph e, reprinted in Spaniol, Report on the Operation of Circuit Opinion Publication Plans for 1977, Appendix C.

present rule. Resolution of real or apparent legal inconsistencies contribute significantly to the administration of justice, and creation of such conflicts has equally significant implications. The rules of the federal Fourth, Seventh, Eighth, Ninth and Tenth Circuits and of New Jersey contain similar provisions.<sup>34/</sup>

The committee next recommends publication of all opinions in cases involving dissenting opinions or concurring opinions in which reasons are stated (proposed subdivision (b)(5)). This standard has the advantage of objectivity, and since dissenting opinions necessarily disagree with the majority's views of the law, they come close to qualifying for publication independently, under the existing standard mandating publication of opinions that criticize existing law (rule 976, subdivision (b)(3)). This criterion is also supported by the American Bar Association,<sup>35/</sup> the Advisory Council for Appellate Justice,<sup>36/</sup> and as to dissents, the State Bar of California.<sup>37/</sup> And because the number of unpublished cases involving dissents and concurrences is relatively small (about 120 in fiscal 1978),<sup>38/</sup> the committee's view is that this standard will not substantially add to the volume of published opinions.

The committee also proposes authorizing publication of opinions that reverse administrative agency decisions

based on a rule of law or interpretation of administrative  
<sup>34/</sup> See Reynolds and Richman, supra, n. 20, at p. 1176 [federal court rules]; State of New Jersey (1974) Standards for Publication of Judicial Opinions, Standard B.7(d).

<sup>35/</sup> A.B.A. Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, supra n. 33, Standard 3.37(b).

<sup>36/</sup> National Center for State Courts (1973) Standards for Publication of Judicial Opinions: Report of the Advisory Council on Appellate Justice, Part II, para. 2.

<sup>37/</sup> Conference Committee Report on 1974 Conference Resolution No. 11-18 (1976) 51 State Bar J. 400, 404.

<sup>38/</sup> In fiscal 1978, a total of 151 dissenting opinions and 148 concurring opinions were filed by the courts of appeal. Of these, 64 cases with dissents, 42 cases with concurrences, and 16 cases with opinions concurring and dissenting were published. Analysis by members of the committee.



rules (proposed subdivision (b)(6)). Recognizing the growing importance of administrative agency decisions in daily life, this standard seeks to insure full compliance with authoritative judicial rulings that run counter to prior agency policy.

Opinions that make significant contributions to legal literature by engaging in historical reviews of the law or describing legislative history (proposed subdivision (b)(7)) also merit publication, in the committee's view. This criterion recognizes the value to the legal community of publicizing thoroughgoing research and analysis in difficult areas. Researching historical and legislative materials is particularly difficult and time-consuming, and provision for publication will make its fruits available to all. The federal Fourth and Seventh Circuits and the State of New Jersey have similar rules.<sup>39/</sup>

The final additional standard provides for publication of an opinion that otherwise aids the administration of justice (proposed subdivision (b)(8)). This residual category will give the system sufficient flexibility to permit publication of individual opinions believed to further development of the law, to promote justice, or otherwise to improve the administration of justice. For example, the committee believes that opinions invoking generally neglected rules of law or statutes aid the administration of justice and deserve to be published although they do not strictly fit within the parameters of present rule 976.

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<sup>39/</sup> See Chanin, supra n. 29, at pp. 376-379; State of New Jersey, Standards for Publication of Judicial Opinions, supra n. 34, Standard B.7(a), (b).

V. PROCEDURES: SUPREME COURT DECERTIFICATION  
OF PUBLISHED OPINIONS

Current Practice

The committee is of the view that the California Supreme Court's current use of its power to "decertify"—order unpublished—court of appeal opinions is undesirable and should be brought to an end. It is understandable that the Supreme Court may on occasion differ with a court of appeal panel as to the extent to which a particular opinion falls within the standards for publication in rule 976(b). Nevertheless, empirical evidence and analysis suggest that in fact the Supreme Court decertifies court of appeal opinions that are within the publication criteria, particularly by virtue of their novelty (rule 976(b)(1)) or their criticism of existing law (rule 976(b)(3)).<sup>40/</sup> Mr. Witkin hit the mark squarely when he charged that in reality the Supreme Court's practice of decertification has become a "distinct form of [substantive] review."<sup>41/</sup> Indeed, Mr. Witkin's criticism finds support in statements of the Supreme Court itself,<sup>42/</sup>

<sup>40/</sup> See, e.g., Comment, Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law (1977) 50 So. Cal. L. Rev. 1181, 1188-11890 n. 40 [collecting decertified opinions appearing to "come within the parameters of rule 976"].

<sup>41/</sup> Witkin (1977) Manual on Appellate Court Opinions § 22, p. 35.

<sup>42/</sup> Of particular interest is a letter from the Supreme Court addressed to Ms. Mary K. Gillespie, dated May 14, 1975, regarding Chaffin v. Chaffin [sic] 2 Civ. 43862 [opn. pub'd. sub. nom. Chaffin v. Frye (1975) 45 Cal. App.3d 39], rejecting her request for decertification on the following grounds:

A petition for hearing was filed and received by this court. That petition was denied. You are now, in effect, asking the court to shape the constitutional law by suppressing publication of an opinion. It appears that to so act would be law by elimination rather than by elucidation.

A copy of the letter is on file with the committee.

while the former Chief Justice has candidly acknowledged this use of decertification:

The . . . opinions ordered to be nonpublished are those in which the correct result has been reached by the Court of Appeal but the opinion contains language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the law but would be likely to mislead judges, attorneys and other interested officials. If such an opinion appears . . ., [w]e can grant the petition for hearing for the purpose of writing an opinion which would reach the same result but which would eliminate the erroneous language or rule. . . . The other course open to us is to order the opinion to be nonpublished and thus eliminate possible confusion by members of the bench and bar.<sup>43/</sup>

#### Restoring the Integrity of the System

The committee is concerned to protect the integrity of rule 976 and to discourage its use as a mechanism for substantive review by the Supreme Court. Accordingly, it recommends:

RULE 976, SUBDIVISION (c) SHOULD BE AMENDED<sup>44/</sup>  
TO PROVIDE THAT IN EXERCISING ITS POWER TO ORDER  
OPINIONS PUBLISHED OR NOT PUBLISHED, THE SUPREME  
COURT SHALL OBSERVE THE STANDARDS FOR PUBLICATION  
SPECIFIED IN SUBDIVISION (b).

The committee recognizes that adoption of the suggested amendment would exacerbate the Supreme Court's workload problem by removing a method for dealing expeditiously with court of appeal opinions that in terms of outcome appear correct, and thus do not warrant a plenary grant of hearing, yet contain what the Supreme Court considers erroneous or improvident language likely to cause problems in future litigation. To handle such cases, the committee recommends:

THE SUPREME COURT SHOULD REVIVE ITS

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<sup>43/</sup> Letter from retired Chief Justice Donald Wright to author of Comment, Decertification of Appellate Opinions, supra n. 40 reproduced id. at 1189 n. 20, 24.

<sup>44/</sup> For text of the proposed rule amendments, see Appendix A.

FORMER PRACTICE OF WITHHOLDING APPROVAL FROM  
ERRONEOUS PORTIONS OF COURT OF APPEAL OPINIONS  
ON DENIAL OF HEARINGS.<sup>45/</sup>

This can be accomplished either by the Supreme Court's reviving the practice on its own initiative, or by adoption of a new subdivision to rule 29<sup>46/</sup> specifying that on denial of hearing of a published court of appeal opinion, the Supreme Court may expressly withhold its approval or otherwise comment on parts of the opinion, and that its comments are to be published in conjunction with the opinion.

Finally, the committee considers "substantive" use of decertification to be symptomatic of the Supreme Court's difficulty in handling its rapidly growing caseload<sup>47/</sup> with inflexible hearing and review procedures. It believes that the preferred long-term solution to this problem would be to do away with the current procedure by which the Supreme Court, on granting hearing, automatically transfers the entire cause to itself for a de novo appellate hearing on the entire record and all issues, and vacates the court of appeal opinion, treating it as though it never existed.<sup>48/</sup> The Supreme Court's "takeover" procedure, should, the committee believes, be brought into line with the nationally prevailing practice whereby a court of last resort reviews the decisions of intermediate appellate courts rather than of the trial courts and deals with only those issues requiring review.<sup>49/</sup>

<sup>45/</sup> For a description and defense of the former practice, see 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 622, p. 4544.

<sup>46/</sup> For text of the proposed rule amendment, see Appendix A.

<sup>47/</sup> The growth is dramatized by comparing statistics for 1965-1966 with 1976-1977. During the 1965-1966 fiscal year, the Supreme Court received 1,205 petitions for hearing and granted 127. During 1976-1977, these figures had increased to 2,927 (up 143%) and 231 (up 82%), respectively. Judicial Council (1978) Annual Report, Table IV, p. 64.

<sup>48/</sup> See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 617, p. 4540.

<sup>49/</sup> See, e.g., Alabama Rules of Appellate Procedure, rule 39, Review of Decisions of Courts of Appeal, specifying that Alabama Supreme Court review of intermediate court opinions is by writ of certiorari addressed to specific questions or to classes of cases.

Such a change would lighten the Supreme Court's workload by empowering it to focus on specific issues warranting its attention rather than dealing with entire cases, some aspects of which may have been correctly decided by the court of appeal.

Retention of Court of Appeal Opinions on Grant of Hearing

To make this system work, the committee further recommends:

RULE 976(d) SHOULD BE AMENDED<sup>50/</sup> TO REMOVE THE LANGUAGE THAT MANDATES NONPUBLICATION FOR COURT OF APPEAL OPINIONS IN CASES IN WHICH THE SUPREME COURT GRANTS REVIEW.<sup>51/</sup>

Mechanically, the notation of grant of hearing would appear at the end of the court of appeal opinion, the way denial of hearing now does. Should the case be

50/ For text of the proposed rule amendment, see Appendix A.

51/ It is generally believed that the de novo plenary take-over procedure and automatic deletion of court of appeal opinions are constitutionally required under the "transfer" language now in article VI, section 12, which provides in pertinent part "The Supreme Court may, before decision becomes final, transfer to itself a cause in a Court of Appeal." (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 617.) The cases do not entirely support this view. One line holds that the order granting a hearing empowers the Supreme Court to decide all issues. (E.g., *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 541, n. 1; *Martin v. Howe* (1922) 190 Cal. 187, 188.) Another holds that by reason of the grant of hearing, court of appeal opinions "become a nullity and are of no force and effect, either as a judgment or as an authoritative statement of any principle of law therein discussed." (E.g., *Knouse v. Nimocks* (1937) 8 Cal.2d 482, 483-484.) The first proposition is not necessarily inconsistent with selective grant of hearing, for the Supreme Court may choose to exercise less than its full review power; nothing requires it to address all issues. Thus, no constitutional amendment would appear necessary to accomplish selective review. (See Chilton, Appellate Court Reform: The Premature Scalpel (1973) 48 State Bar J. 393, 467.) The rule that grant of hearing supersedes the court of appeal opinion is more difficult to work around, but it is exclusively a rule of interpretation, for nothing in the constitutional text states that nullification of the entire court of appeal opinion is a necessary consequence of a Supreme Court grant of hearing.

reversed, that would be noted in Shepard's Citations, as is the practice in most jurisdictions.

The committee is mindful that retention of court of appeal opinions after transfer to the Supreme Court would depart from past practice, as noted in one of the minority reports. The mere existence of change, however, is not considered an unanswerable argument against accomplishing it.

The committee believes that maximum information and exposure is the road to maximum good; every other Anglo-American jurisdiction with a multitiered appellate structure exposes to permanent public view the reports of the entire progress of an appeal, rather than pretending that a major portion of that process never occurred. Under any circumstances, the committee believes there would be benefit for both the public and the judiciary in increasing awareness of the interaction between our courts of appeal and Supreme Court. The court of appeal opinions in question by definition qualify for publication, and they therefore are especially carefully drafted and well-reasoned and of interest to attorneys and scholars. One cannot help noting that these intermediate opinions are already published, in the advance sheets of the official reports, and in the advance sheets and bound volumes of the West Publishing Company's California Reporter. To express concern over "subscribers [who] pay for many pages of [superseded] decisions" is unrealistic; at present, the only difference is which set of reports a particular subscriber takes—and preference between commercial suppliers does not appear a valid distinction.

Finally, the present system is uneconomical, for it forces the Supreme Court to duplicate the court of appeal's efforts for parts of opinions that are correctly decided and adequately expressed. Indeed the Supreme Court occasionally refers to correct court of appeal rulings, apparently neglecting to recognize that with the current system there is no longer any court of appeal opinion to refer to.<sup>52/</sup>

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<sup>52/</sup> See, e.g., *People v. Hidalgo* (1978) 22 Cal.3d 826, 828; "Defendant's attacks upon the revocation proceeding were fully considered by the Court of Appeal and we agree they lack merit."]

VI. PROCEDURES: INITIAL PUBLICATION DECISION  
REQUESTS FOR PUBLICATION

The committee proposes the following changes in the procedure for initial publication of appellate opinions. The initial publication decision would still be made by the panel that decides the case, but the committee recommends:

RULE 976(b) SHOULD BE AMENDED<sup>53/</sup> TO  
REMOVE THE PRESENT PRESUMPTION AGAINST  
PUBLICATION.

The committee believes that as the standards necessarily involve subjective judgments, a more neutral approach will produce greater consistency in their application. The committee also notes that the new standard requiring publication of dissents and reasoned concurrences (proposed rule 976(b)(5)) is quite objective, so that publication under it should be automatic.

The committee believes that fair and efficient operation of the procedure for requesting publication is currently severely hampered by limited and unequal access<sup>54/</sup> and would benefit significantly from adoption of the unpublished opinion index-access system proposed earlier in this report (see p. 8). At present, it is practically impossible for most people to obtain copies of opinions, particularly within the time limits for requesting publication, and persons with access may request publication only of opinions favorable to them. Adoption of the committee's recommendations regarding opinion access will significantly improve the fairness and efficiency of the requesting procedure.

Witnesses before the committee found fault with access and with other aspects of the request procedure.

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<sup>53/</sup> For text of the proposed rule amendment, see Appendix A.

<sup>54/</sup> That unequal availability of unpublished opinions gives institutional and habitual litigants an unfair advantage under the request procedure has been noted in other jurisdictions as well. See, e.g., Reynolds and Richman, The Non-Precedential Precedent—Limited Publication and Non-Citation Rules in the United States Courts of Appeals (1978) 78 Colum.L.Rev. 1167, 1179.

Requests are sometimes not acted upon promptly, and requesters sometimes are not informed of their disposition by the courts of appeal. The committee therefore recommends:

RULE 978(a) SHOULD BE AMENDED<sup>55/</sup> TO REQUIRE THE COURT OF APPEAL TO SEND A COPY OF ITS RECOMMENDATION AND STATEMENT OF REASONS REGARDING A REQUEST FOR PUBLICATION TO ALL PARTIES AND TO ANY OTHER PERSON WHO HAS REQUESTED PUBLICATION. RULE 976(b) SHOULD BE AMENDED TO PROVIDE THAT THE SUPREME COURT SHALL DISPOSE OF REQUESTS FOR PUBLICATION PROMPTLY AND THAT EACH PARTY TO THE ACTION AND ANY OTHER PERSON WHO HAS REQUESTED PUBLICATION SHALL BE NOTIFIED OF THE ACTION TAKEN BY THE SUPREME COURT.

Some committee witnesses also complained that requests for publication are not handled systematically by court clerks. The committee accordingly further recommends:

FILING SYSTEMS SHOULD BE DEVELOPED IN COURT CLERKS' OFFICES TO INSURE PROPER HANDLING OF REQUESTS FOR PUBLICATION.

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<sup>55/</sup> For text of the proposed rule amendment, see Appendix A.



## VII. PARTIAL PUBLICATION

Partial publication is the practice of publishing part but not all of an opinion under a selective publication scheme; it would be used when only part of an opinion meets the criteria for publication, and only that portion would be published. Although not authorized by rule 976 or in use in any United States courts at present, partial publication enjoys support among judges and commentators. Witnesses before the committee favored it, some 40 Court of Appeal justices at a 1974 workshop sponsored by the Judicial Council unanimously approved the idea, the Chief Justice's Special Committee on Appellate Practices and Procedures recommends it, and opinions from nearly every district have lamented its unavailability.<sup>56/</sup>

Legal authors<sup>57/</sup> and the Advisory Council for Appellate Justice have also recommended partial publication.<sup>58/</sup>

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<sup>56/</sup> See *Golden Gate Bridge Dist. v. Muzzi* (1978) 83 Cal. App.3d 707, 714 [First District, Third Division]; *People v. Collins* (1975) 44 Cal.App.3d 617, 623 [Third District]; *People v. Johnson* (1978) 82 Cal.App.3d 183, 189 [Fourth District, Second Division]; *People v. Superior Court (Hulbert)* (1977) 74 Cal.App.3d 497, 414-415 [Fourth District, Second Division]; *People v. Muse* (1978) 5 Crim. 2884 [unpublished decision of Fifth District; author prepared a "fictitious" published opinion for the one issue warranting publication; copy on file with committee]. See also *People v. Moore* (1971) 15 Cal.App.3d 851 [Second District, Division II], an actual opinion that is partially published. For an example of a wholly published opinion that, according to its author, contains unpublishable material, see *Meyser v. American Bldg. Maintenance, Inc.* (1978) 85 Cal.App.3d 933; the "unpublishable" part runs from p. 938 through p. 941.

<sup>57/</sup> E.g., Witkin (1977) *Manual on Appellate Court Opinions* § 23, p. 37; Goodwin, Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer (1979) 19 Santa Clara L.Rev. 53.

<sup>58/</sup> *Standards for Publication of Judicial Opinions, Part II*, section II, paragraph 4, reprinted in part in Leflar (1974) *Appellate Judicial Opinions* 318.

However, the State Bar Conference Committee on Publication of Opinions in 1976 voted against the idea.<sup>59/</sup>

#### Claimed Advantages and Committee Uncertainties

Supporters of partial publication contend that it is needed to deal properly with opinions that contain both publishable and unpublishable material, opinions which must now be either published in full—adding needless pages to the reports—or not published—depriving bench, bar and academy of useful judicial rulings. The committee, however, is uncertain as to the overall impact of partial publication. Its use would seem to require more discriminating application of the publication criteria than the present system, and this may not be possible given the vagueness and subjectivity of the standards. Upon reviewing the above-cited opinions that separated out "unpublishable" materials, some committee members found that the "unpublishable" sections in fact sometimes met the standards for publication. Also, some members, noting that all but one of the above-cited cases involved criminal law, expressed concern that partial publication will further reduce the number of published criminal rulings, to the prejudice of defendants.

A second area of committee uncertainty involves the appropriate mechanics of partial publication. Should the published part of an opinion summarize omitted material or simply indicate deletions? The former system would preserve overall case contents, which may be important in criminal cases, particularly where prejudicial error is at issue; the latter would save space and perhaps time. Should citation be permitted to unpublished or summarized portions of partially published opinions? Should summarized parts be indexed/digested? How should Shepard's Citations handle partially published opinions where, e.g., a case is reversed on an unpublished point? Should it be possible to request publication of parts of unpublished opinions? If so, how should

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<sup>59/</sup> Conference Committee Report on 1974 Conference Resolution No. 11-18 (1976) 51 State Bar J. 400, 404. The California Academy of Appellate Lawyers supported the Conference Committee Report. Letter of August 22, 1976 from Ellis Horvitz to Robert Seligson, copy on file with committee.

deletions or summaries be prepared in such cases, and by whom? And should such a rule be made retroactive?

In any event, selecting and drafting factual and legal material so as to make a partially published opinion both accurate and intelligible in itself also appears to be a delicate problem.<sup>60/</sup> Perhaps, absent judicial experience, appropriate approaches can be discovered in legal casebooks, which routinely must face comparable problems in excerpting appellate opinions for use by law students and professors.

#### Recommendation

In sum, the committee is aware that partial publication enjoys substantial support. The committee is, however, concerned at the number and gravity of the unanswered questions in the realms of both policy and practical implementation. For this reason, the committee recommends:

PROPOSALS FOR PARTIAL PUBLICATION OF  
OPINIONS SHOULD BE GIVEN FURTHER STUDY, IN-  
CLUDING DEVELOPMENT AND CARRYING OUT OF  
PILOT PROJECTS TO TEST AND EVALUATE THEM  
IN PRACTICE.

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<sup>60/</sup> See Smith, The Selective Publication of Opinions: One Court's Experience (1978) 32 Ark.L.Rev. 26, 28 ("The Arkansas rule omits a provision of the model rule permitting only a part of an opinion to be published, the [Arkansas Supreme] Court's thought being that the occasional usefulness of partial publication would be more than offset by the difficulties inherent in any attempt to write an opinion intended for dissection").

MINORITY REPORTS

## MINORITY REPORT

The present wide disparity in publication rates between the various divisions of the Courts of Appeal establishes rather conclusively that the present standards are not being applied uniformly. The desirability of more objective standards is manifest. However, the creation of an arbitrary standard which has no relevance to the precedential value of the case is no answer. Therefore, I must part company with the rest of the committee in its recommendation that all cases in which a concurring or dissenting opinion with reasons given be published.

While I lean to the school of thought that the major vice under present publication practices is overpublication rather than underpublication, I have, with some reservations, gone along with the recommendations of the committee as to most of the suggestions for amendments to Rule 976b. Frankly, I think most of them are rather more cosmetic than substantive and I seriously doubt that they will change present publication practices. However, if these changes will make the critics of the present situation happy, I have little hesitation in joining with the majority as to most of these recommendations.

However, I must part company with the committee in its recommendation b-4 that all cases be published in which a dissenting or concurring opinion in which reasons are stated be published. In an effort to establish objective standards, I

submit that the committee has recommended an arbitrary standard which has no relationship to the ultimate goal, i.e., the publication of appropriate opinions and the nonpublication of inappropriate opinions.

The idea that an opinion with a dissent somehow has gained precedential value is simply wrong. The five, free-thinking, independent-minded justices of my own court dissent regularly, vigorously and enthusiastically and often as not in cases of absolutely no precedential value. The bare fact of a dissent does not elevate the case to the status of a publishable opinion. Most dissents arise from a difference of opinion as to the exercise of discretion on the part of the trial court, whether substantial evidence supports a judgment or order, or whether an error is of prejudicial proportion. Publication of these opinions will merely clutter up the books and will add nothing to the corpus of the law. These are judgment calls, pure and simple.

The idea of publishing all cases in which concurring opinions are filed is even worse. A concurring opinion merely means that one member of the panel agrees with the result but not with the analysis of the majority, or one justice may take issue with some of the language of the majority, or one justice may choose to reach the same result via another analysis. None of these have anything to do with the value of the case as precedent.

Additionally, this rule would open the door to an abuse

of the system. It will allow the author of the opinion, rather than the court, to make the decision re publication by the simple expedient of filing a concurring opinion with his own majority opinion. This committee very properly rejected the concept that the author of the opinion be the sole judge as to publication. Any reader of the Advance Sheets must be quite aware that a very large number of published opinions are authored by a rather limited number of justices. Somehow these justices seem to find specks of gold in each of their opinions which specks of gold the rest of us are too obtuse to discover in our own opinions. The only restriction on these over-enthusiastic authors is the fact that the decision as to whether to publish is a court decision and not that of the individual. Thus, it is possible to circumvent this safety valve by the simple expedient of writing a concurring opinion to go with one's majority opinion.<sup>1/</sup>

I am not nit-picking. Out of 5,959 majority opinions filed in the fiscal year 1977-1978, 297 fell into this category, 146 with concurring opinions and 151 with dissenting opinions. Since the average volume of Cal.App. 3d contains about

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<sup>1/</sup> In this respect, I am indebted to fellow committee member, Gideon Kanner, for the priceless case of Alevizos v. Metropolitan Airport Commission, etc., 216 NW 2d 651, 666, where the author of the majority opinion dissented in part from his own handiwork.

200 opinions, we are talking about a volume and a half of opinions. I'll admit that of the above figures, some are already being published but when I see that almost 300 opinions are going to experience instant publication regardless of merit, I am disturbed.

Therefore, I must respectfully dissent from that portion of the committee report which recommends that opinions containing dissents or concurrences with reasons stated be published.

Actually, the inability of those of us on the Courts of Appeal to police ourselves persuades me that some agency or entity other than the court writing the opinion should make the decision regarding publication. However, when this idea was presented to the committee, it failed dismally. Nevertheless, if the present abuse of both overpublication and underpublication continues, something of this nature looms in our future.

DATED: May 15, 1979

RESPECTFULLY SUBMITTED,

ROBERT GARDNER  
CHARLES M. SEVILLA



MINORITY REPORT ON THE NON-CITABILITY RULE

The undersigned members of the committee endorse the affirmative recommendations of the majority report and (with the exception to be noted) join in the majority's decision to refrain from recommending other action. In particular, we are greatly encouraged by the recommendation that steps be taken to devise and effectuate practical means of access to the body of unpublished decisions of Courts of Appeal, including exploration of contemporary technology and alternate media for disseminating the contents of such decisions. The latter is a realistic and principled step toward public accountability for judicial product and respect for the time-honored function of stare decisis.

However, we cannot subscribe to the majority's failure to come to grips with the irrationalities, illogic and (we believe) constitutional infirmities of continued adherence to the ban which Rule 977 imposes on citing certain decided cases. We believe that courts make law by what they say and do, and not just by the form of expression they choose. Consequently, we believe it unsound to act as if certain judicial action did not occur, when manifestly it did.

The Committee heard no defense of a ban on citation in terms of either principle or philosophy; even those who advocate retention of the practice admit they cannot justify it on such grounds. We are told, however, that it must be

retained for reasons of sheer expediency from either (or both) of two standpoints: (1) the "system" will simply "choke itself" if litigants are allowed freedom to tell courts what other courts have done; (2) allowing reference to previous decisions not contained in the official reports will give some lawyers an "unfair advantage" over others.

We are not persuaded. Vivid characterization is simply not an argument, nor do we see the judicial process as a game in which handicapping is necessary to insure that each player has an equal chance at winning. It is entirely possible that denying the existence of immutable fact does make life easier for some lawyers, but we doubt that is an acceptable rationale. If there is any area of our body politic in which expedience should not be exalted over principle, we believe it to be the judicial process.

We cannot condone the anomaly inherent in depriving generations of litigants who would be affected, the benefit of pertinent prior decisions, and then exhorting the goodness inherent in providing access to them.

Specifically, there are two fundamental problems with the majority's endorsement of perpetuation of the non-citability rule.

First, the majority appears oblivious to the fact that it simply cuts across the grain of the sense of fairness of a principled society that a litigant who is before a court and who desires to be treated by that court in the same way that other, similarly situated litigants have been

treated in the past, is commanded to keep quiet instead. No degree of expediency, or administrative convenience, or supposed "unfairness", can outweigh the preceding consideration.

Second, the discussions of the majority completely ignore the Constitutional aspects of the problem, of which there are two:

1. Equal protection and due process problems inherent in non-citation would appear obvious.
2. In addition, First Amendment problems are involved. Aside from possible freedom of speech aspects, we refer to the provisions of the First Amendment which guarantee the right to petition the government for redress of grievances. If the grievance on which relief is sought is a petitioner's claim that the law is not being uniformly applied in the courts, because there is a lack of even-handedness in the treatment of himself and other classes of litigants, he is deprived of an effective opportunity to do so.

In connection with the latter point, it was disturbing to hear some of the testimony presented to the Committee that there seems to be a claimed pattern of unevenness in the publication of opinions in criminal prosecutions involving sex related activities. We are not able, nor do we seek to verify or dispute the accuracy of such charges. Our point is that, as long as such charges are made, there ought to be a ready means of verifying their merits or lack thereof in cases where they are made and in which a litigant feels aggrieved.

Permitting parties making such charges to cite pertinent unpublished opinions, would seem to be an appropriate way of dispelling the doubts otherwise cast on the administration of justice.

The majority, of course, recognizes some of these problems implicitly, because it recommends an exception to the non-citability rule to permit citation of unpublished opinions in support of petitions for hearing in the Supreme Court. This exception provides relief to aggrieved litigants only before the one Court that is not required to listen to them; i.e., before the Supreme Court, which has full discretion to deny hearing. Meanwhile, opportunity to make the same argument, and correct the same flaw in the law before the courts that must hear any aggrieved litigant, and presumably must resolve the issue presented by him (in the case of the Court of Appeal, "in writing with reasons stated"), is simply denied.

Finally, we commend to the majority its own exhortation of the benefits to be derived from access to the body of unpublished decisional law. If judges, lawyers, and scholars are to have access to this material, and this access is to be the source of the benefits so highly thought of by the majority, then we are at a loss to understand why this same benefit should not be available to the courts and the litigants when they most need it: in the midst of litigation that gives rise to an issue precisely the same as that decided in other [unpublished] cases.

Therefore, we would recommend repeal of Rule 977 and (1) substitution of a rule requiring adequate advance notice of an intent to rely upon an unpublished opinion, together with supplying of a copy thereof to all affected; and (2) a request to the State Bar that it recommend to the Supreme Court a Rule of Professional Conduct articulating the duty of attorneys aware of unfavorable (or potentially unfavorable) unpublished opinions to disclose such cases to the tribunal, along with the favorable ones.

Only in this way will there be an effective mechanism for the correction of unintentional lapses or intentional abuses of the non-publication process.

DATED: May 15, 1979

RESPECTFULLY SUBMITTED,

EDWARD L. LASCHER  
GIDEON KANNER  
MICHAEL M. BERGER

Chief Justice's Advisory Committee  
For an Effective Publication Rule

Minority Report

In Opposition to the Advisory Committee's  
Recommendation Relative to Subdivision (d)  
of rule 976 of the California Rules of  
Court.

## Minority Report

### Relative to Proposed Subdivision (d) of Rule 976

The Advisory Committee for an Effective Publication Rule recommends the addition of subdivision (d) to rule 976 of the California Rules of Court to provide that: "(d) [Superseded opinions Effect of grant of hearing] Regardless of the foregoing provisions of this rule; no opinion superseded by the granting of a hearing; rehearing or other judicial action shall be published in the Official Reports. Published Court of Appeal opinions in cases in which the Supreme Court grants a hearing shall remain published in the Official Reports, and a notation of grant of hearing shall immediately follow such opinions."

It is felt that the foregoing proposed subdivision calling for the retention of Court of Appeal opinions in the Official Reports following the granting of hearings is inconsistent with the judicially declared status of such opinions as nonentities and is otherwise counterproductive as hereafter noted. The subdivision therefore ought not to be adopted.

#### Background and Reasoning:

By 1903 the judicial business of California had grown to such a degree that the Supreme Court no longer could handle the load. Accordingly, in 1904 the Constitution was amended to provide for District Courts of Appeal and for Supreme Court review of the new district courts' decisions. (Then Cal. Const.,

art.VI, § 4.) The applicable clause provided: "The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of district courts of appeal shall become final upon expiration of thirty days after the same shall have been pronounced."

The purpose of granting the Supreme Court the power of transfer after decision in the district courts (now Courts of Appeal) was "'to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform decision throughout the state, a correct and uniform construction of the constitution, statutes and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law.'" (In re Wells (1917) 174 Cal. 467, 472.)

By virtue of the foregoing constitutional provision substantively carried forward to present article VI, section 12, the Supreme Court was given power to vacate a district court decision and order the cause transferred to its own calendar for argument and fresh decision. (In re Wells, supra, at pp. 472-473.) Over the years the Supreme Court has consistently spelled out the effect of such a transfer. Witkin summarizes the court's position to be: "The case is then



'at large,' i.e., to be decided on the entire record and all the issues, as if originally appealed to the Supreme Court, regardless of the ground relied upon in granting the hearing." (6 Witkin, Cal. Procedure (1971 ed.) Appeal, § 617, p. 4540.) In Knouse v. Nimocks (1937) 8 Cal.2d 482, 483, the Supreme Court held: "The opinion and decision . . . by our order of transfer, have become a nullity and are of no force or effect either as a judgment or as an authoritative statement of any principle of law therein discussed." A more recent affirmation of this holding appears in Menchaca v. Helms Bakeries, Inc. (1968) 68 Cal.2d 535, 541, footnote 1: "Although plaintiffs did not raise the issue of negligent equipage in their petition for hearing, the question was briefed by both parties and may be reviewed by this court. An order granting a petition for hearing transfers the entire cause here [citations], and the case is then to be decided on all issues, as if originally appealed to this court, regardless of the grounds relied on in the petition. [Citations omitted.]"

Given the foregoing background and the repeated rulings of the Supreme Court that the cause is at large in all respects upon transfer, it becomes clear that the significance of the lower court's decision is reduced to the point that it is unworthy of publication in the Official Reports. To publish the opinion under these circumstances is to encourage pure "speculation" as to the reason or reasons why the Supreme Court granted the hearing. The Supreme Court may reach issues not even raised in the petition for hearing. (Menchaca v. Helms

Bakeries, Inc., supra, 68 Cal.2d 535, 541.) The Supreme Court may adopt the decision of the Court of Appeal verbatim, reverse it partially or in whole, or affirm it on radically different theories. To encourage speculation by publishing such superseded decisions is counterproductive and opposed to the Supreme Court's clear holding relative to the judicial worth of such decisions. Until the court retreats from its holding on the subject, publication appears to be inappropriate. In fact, proceeding with the publication of such decisions automatically violates the standards of publication that the committee recommends should control publication and guaranties the publication of the unworthy opinion.

Additionally, to continue such opinions in the Official Reports will require subscribers to pay for many pages of decisions that possess no vitality either now or for the future.

In view of the foregoing background and considerations it is respectfully suggested that the committee's recommendation relative to the adoption of subdivision (d) of new proposed rule 976 not be followed.

DATED: May 15, 1979

RESPECTFULLY SUBMITTED,

ROBERT E. FORMICHI  
ELLIS J. HORVITZ  
LEONARD SACKS

APPENDIX A  
PROPOSED AMENDMENTS TO CALIFORNIA RULES OF COURT

Rule 976. Publication of appellate opinions

(a) \* \* \*

(b) [Standards for opinions of other courts] No An opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless if such opinion: (1) establishes a new rule of law, *applies an established rule or principle to a factual situation substantially different from that in published cases,* or alters or modifies an existing rule,<sup>1</sup> (2) involves a legal issue of continuing public interest<sup>2</sup> *to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group,* or (3) criticizes existing law,<sup>3</sup> (4) *resolves or creates an apparent conflict in the law,* (5) *is a partial or complete dissenting opinion, or a concurring opinion in which reasons are stated, or is accompanied by such an opinion,* (6) *constitutes a reversal of an administrative*

1/ This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation.

2/ This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

3/ This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature.

agency decision based on a rule of law or interpretation of administrative rules, (7) constitutes a significant and nonduplicative contribution to legal literature either by a historical review of the law or by describing the legislative history of a statute or ordinance, or (8) otherwise aids the administration of justice.

(c) [Publication procedure]

(1) [Courts of Appeal and appellate departments]

Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies, prior to the decision becoming final in that court, that it meets one or more of the standards specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.

(2) [Supreme Court] Notwithstanding paragraph (1), an opinion certified for publication shall not be published in the Official Reports, and an opinion not so certified shall be published in the Official Reports, upon an order of the Supreme Court to such effect. In exercising its power to order opinions published or not published, the Supreme Court shall observe the standards for publication specified in subdivision (b) of this rule.

(d) [Superseded opinions Effect of grant of hearing]

Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports. Published Court of Appeal opinions in cases in which the Supreme Court grants a hearing shall remain published in the Official Reports, and a notation of grant of hearing shall immediately follow such opinions.

(e) \* \* \*

Rule 977. Citation of unpublished opinions prohibited;  
exceptions

(a) [General rule] An opinion of a Court of Appeal or of an appellate department of a superior court that is not published, certified for publication, or ordered published in the Official Reports<sup>\*</sup> pursuant to rule 976 shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent as provided in subdivision (b) of this rule.

(b) [Exceptions] An opinion not published, certified for publication, or ordered published in the Official Reports may be cited in another action in the following situations:

(1) In connection with a petition for hearing proceeding before the Supreme Court whenever it appears that an unpublished opinion of a Court of Appeal conflicts with the decision or order in which a hearing is sought.

(2) When the opinion of an appellate department of the superior court is relevant to an action or proceeding before that appellate department, or before a municipal or justice court within the same county;

(3) When the opinion is relevant under the doctrines of the law of the case, res judicata, or collateral estoppel;

(4) When the opinion is relevant to a criminal action or disciplinary proceeding involving the same party or a member of the State Bar.

(c) [Citation procedure] A copy of any opinion citable under the exceptions specified in subdivision (b) of this rule shall be furnished to the court and all parties by attaching it to the document in which citation is made, or, if the citation is to be made orally, then within a reasonable time in advance of citation.

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\* This rule shall not apply to an opinion certified for publication prior to its actual publication.

Rule 978. Requesting publication of unpublished opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication in the Official Reports of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the criteria for publication in rule 976. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court may, and at the instance of the person requesting publication shall, transmit the request and a copy of the opinion to the Supreme Court with its recommendation for appropriate disposition and a brief statement of its reasons therefor. *The transmitting court shall also send a copy of its recommendation and statement of reasons to each party to the action or proceeding and to any other person who has requested publication.*

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court ~~from the court that rendered the opinion~~ pursuant to subdivision (a) of this rule the Supreme Court shall either order the opinion published or deny the request. *Such requests shall be acted upon promptly, and each party to the action or proceeding and any person who has requested publication shall be notified of the action taken by the Court.*

(c) \* \* \*

Rule 29. Grounds for hearing in Supreme Court; *comment on denial of hearing*

(a) - (b) \* \* \*

(c) [Comment on denial of hearing] *Upon denial of hearing in a Court of Appeal case in which the opinion is published the Supreme Court may expressly withhold its*

*approval of or otherwise comment on the whole or any part of a Court of Appeal opinion, provided that the failure of the Supreme Court to do so shall not be deemed an approval thereof. Such expressions and comments shall be published in the Official Reports, and shall appear immediately following the Court of Appeal opinion to which they are addressed.*

## APPENDIX B

### STORAGE/RETRIEVAL TECHNOLOGIES FOR UNPUBLISHED OPINIONS

Two legal publishers and a computerized legal research service made presentations to the committee concerning storage/retrieval technologies now available for legal materials. At least two major types of storage/retrieval equipment are currently available—miniaturizing technologies like microfilm/microfiche and computer memory systems. The former system is used for storage of full text federal tax letter rulings in the IRS Letter Rulings Reporter published by Commerce Clearing House, Inc., of Chicago. In this system, subscribers receive weekly mailings in full-size print; these include the full-text rulings and topical indexes and citators. When his binder is full, the subscriber may replace the full-size text of the rulings with "microfiche" or "ultrafiche" copies. This reduces storage volume to 1/42 (microfiche) [42X] or 1/75 (ultrafiche) [75X] of the originals. Indexes and citators are retained in full-size format for ease of access.<sup>1/</sup>

A representative of NILS Publishing Company made a presentation comparing different microform formats. In his opinion, 75X is not standard and is hard to read. He favors 48X, or even 24X. Assuming about 56,000 pages of unpublished opinions a year, one year's output could be stored on 56 75X fiches (1,000 pages per fiche), or 134 48X fiches (420 pages per fiche).

Viewers for microfiche are estimated to cost around \$200-\$300, and viewer/printers capable to producing full-sized

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<sup>1/</sup> At the committee's request, CCH prepared a rough estimate of the cost of such a subscription to unpublished California Court of Appeal opinions. Assuming 1,000 subscribers, a full-sized topical index and citators, and full-sized opinion text running to 56,000 pages/year issued biweekly and replaced periodically by microfiche or ultrafiche, a subscription would cost roughly \$400 annually. With microfiche opinion text only, the subscription would cost about \$200. Each year's output would fill about 50 fiches at 75X.



copy of a microform document cost between \$1,500 and \$3,000.<sup>2/</sup>

Computer data storage and retrieval is exemplified by the LEXIS Service of Mead Data Central, two of whose representatives made a presentation to the committee. This system uses no index/lexicon. Rather, the user chooses any word, phrase, or group of words, and the computer identifies all opinions containing the word(s)/phrase and for each presents to the user a block of text surrounding any such use (including a number of words before and after the target words). The user can also get the computer to print out the entire text of any opinion.<sup>3/</sup>

The committee's tentative impression is that the microform technology is more promising than computers for handling unpublished opinions. Microform appears cheaper to both government and users. It can also reproduce the actual text of unpublished opinions, thereby giving a guarantee of authenticity that is not available in a computer printout. (The problem of authentic copies may be serious in the unpublished opinion field, for there is no official report to turn to for easy confirmation.)

Nevertheless, in the committee's judgment there is much uncertainty, and more thorough study of these matters is required.

2/ In the opinion of the NILES Publishing representative, a service with full-text opinions and indexes, with the opinions replaceable after one year with microfiche, would cost roughly \$1,250 per year on a subscriber base of 6,000.

3/ The Mead representatives estimated that the unpublished output of the California Courts of Appeal could be keyed and loaded into the LEXIS memory for about \$200,000 per year, assuming 60,000 pages per year, and stored as a "private library" for about \$20,000 a year. Each user would presumably rent a terminal, and there would be charges for this and for use to search and retrieve opinions. (There is one public LEXIS terminal, in Kansas, which charges up to \$50 per use.)

The NILES Publishing representative predicted that micro-computers with tape and an index system will soon be available and be far less costly to the user than on-line systems like LEXIS.

APPENDIX C

SELECTED BIBLIOGRAPHY

I. Authorities that Generally Favor One or More Aspects of Selective Publication

American Bar Association Commission on Standards of Judicial Administration (1977) Standards Relating to Appellate Courts (see pp. 62-65) [state and federal courts] [opposes noncitation]

California State Bar, Conference Committee Report on 1974 Conference Resolution No. 11-18 (1976) 51 State Bar J. 400 [Cal. state courts] [contains some criticisms]

California State Bar (1973) Supplemental Report of the Special Committee on Appellate Courts: The Citation of Unpublished Opinions [Cal. state courts]

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Committee on Selective Publication of Appellate Court Opinions (1971) Report [in support of amendments to rule 976] [Cal. state courts]

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Joiner, Limiting Publication of Judicial Opinions (1972) 56 Judicature 195 [state and federal courts]

Leavitt, The Yearly Two-Foot Shelf (1973) 4 Pacific L.J. 1 (see pp. 22-26) [Cal. state courts]

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Leventhal, Appellate Procedures: Design, Patchwork and Managed Flexibility (1976) 23 U.C.L.A. L.Rev. 432 (see pp. 436-439) [federal courts]

Seligson & Warnlof, The Use of Unreported Cases in California (1972) 24 Hast. L.J. 39 [Cal. state courts]

Smith, The Selective Publication of Opinions: One Court's Experience (1978) 32 Ark.L.Rev. 26 [Ark. state courts]

B. Witkin, Manual on Appellate Court Opinions (1977) (see pp. 23-38) [Cal. state courts] [includes criticism of standards]

## II. Authorities that Generally Oppose One or More Aspects of Selective Publication

P. Carrington, D. Meader, M. Rosenberg, Justice on Appeal (1976) (see pp. 35-41) [state and federal courts]

Comment, A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule (1977) 39 U.Pitt.L.Rev. 608 [federal courts]

Comment, Publish or Perish: The Destiny of Appellate Opinions in California (1973) 13 Santa Clara Lawyer 756 [Cal. state courts]

Do Unpublished Decisions Hamper Justice? (1978) 64 A.B.A.J. 318 [state and federal courts]

Coleman, To Publish or not to Publish—That is the Question, Sexual Law Reporter, March/April 1976 [Cal. state courts]

- Gardner, The Ninth Circuit's Unpublished Opinions: Denial of Equal Justice? (1975) 61 A.B.A.J. 1224 [federal courts]
- Goodwin, Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer (1979) 19 Santa Clara Lawyer 53 [Cal. state courts]
- Jacobstein, Some Reflections on the Control of the Publication of Appellate Court Opinions (1975) 27 Stanford L.Rev. 791 [state and federal courts]
- Kanner, The Unpublished Opinion: Friend or Foe? (1973) 48 State Bar J. 386 [Cal. state courts]
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- Newbern and Wilson, Rule 21: Unprecedented and the Disappearing Court (1978) 32 Ark.L.Rev. 37 [Ark. state courts]
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Doctrine of Unfounded Suspicion (1974) 9 U.S.F.L.Rev.  
219 (see pp. 253-254) [Cal. state courts]

Walther, The Noncitation Rule and the Concept of  
Stare Decisis (1978) 61 Marquette L.Rev. 581  
[Wisconsin state courts]

## APPENDIX D

### ORGANIZATIONS AND BUSINESSES CONTACTED

The committee invited the following groups and concerns to present their views concerning selective publication:

#### Judges, Judicial Personnel, Judicial Administration Centers

Selected Presiding Justices and Administrative  
Presiding Justices of the California Courts  
of Appeal

California Judges Association

Selected Superior Court Judges

Judicial Attorneys of California

Selected Clerks of Courts of Appeal

Municipal Clerks Association

Trial Court Administrators Association

Selected judicial administration centers

#### Executive and Legislative Bodies

Governor's Legal Affairs Office

Selected Legislative Committees

Department of Consumer Affairs

County Supervisors Association

Los Angeles Consumer Affairs Department

Office of Criminal Justice Planning

#### Lawyers, Public Interest Firms, Bar Associations

California State Bar Section Chairpersons, and selected  
Committee Chairpersons

Legal aid, legal assistance and legal services  
offices throughout California

Presidents of county bar associations, specialized bars,  
and geographical bar associations

California Academy of Appellate Lawyers

California Trial Lawyers Association

Publishers, Research Services, Data Processing Concerns,  
Computer Companies, Microfilm Services, Etc.

A. B. Dick Company  
Ampex Memory Products Division  
Attorneys Printing Supply  
BDS Computer Corporation  
Braegen Corporation  
Bureau of National Affairs, Inc.  
C.E.S. Corporation  
The Cambridge Systems Group  
Commerce Clearing House, Inc.  
Continuing Education of the Bar  
Datagraphix  
Devoke Company  
George Lithograph Company  
Hewlett Packard  
Informatics, Inc.  
Information Access Corporation  
Information Handling Services  
International Data Corporation  
Jurisearch, Inc.  
Matthew Bender & Co., Inc.  
Memorex  
NILS Publishing Company  
Parker & Sons Publication, Inc.  
Prentice-Hall, Inc.  
The Service Bureau Company  
Sperry-Univac Mini-Computer Operations  
3M Company  
University Microfilm, Inc.  
Varian Graphics  
Wang Laboratories, Inc.  
West Publishing Company  
WSI Micrographics

Prosecutors and Defenders

Attorney General  
Appellate Defenders, Inc.  
State Public Defender  
California Public Defenders Association  
California Attorneys for Criminal Justice  
California District Attorneys Association

Law Schools and Law Libraries

Law schools throughout California  
Selected law school libraries  
State Law Library  
Selected county law libraries  
American Association of Law Librarians

Legal and General Press

Legal newspapers throughout California  
California and major national dailies and  
periodicals  
Judicial administration publications

Citizen Groups

California Labor Federation  
League of Women Voters  
Consumer Federation of California  
League of California Cities  
California Citizens Action Group  
California Taxpayers Association



APPENDIX E

MEMBERS OF THE CHIEF JUSTICE'S ADVISORY COMMITTEE FOR AN  
EFFECTIVE PUBLICATION RULE

The parenthetical entries indicate members' prior public involvement, if any, in the specific subject of selective publication.

Hon. Thomas W. Caldecott, Co-Chairperson

Presiding Justice, Court of Appeal, First Appellate District, Division Four (member of Committee on Selective Publication of Appellate Court Opinions created in 1970 by Chief Justice Wright).

Mr. Sheldon Portman, Co-Chairperson

Public Defender, Santa Clara County (member of State Bar Publication Review Committee and proponent of Santa Clara County Bar Association recommendations re publication of criminal cases, Supreme Court decertification).

Hon. Robert Gardner

Presiding Justice, Court of Appeal, Fourth Appellate District, Division Two (author of The Perils of Publication (1977) 4 Orange County Bar J. 7).

Hon. Bernard S. Jefferson

Associate Justice, Court of Appeal, Second Appellate District, Division Four (author of separate opinion in People v. Valenzuela (1978) 86 Cal.App.3d 427, 433, dealing with validity and wisdom of rule 977 as applied to unpublished opinions of the Appellate Department of the Los Angeles Superior Court).

Hon. Vaino H. Spencer

Judge of the Superior Court, Los Angeles County.

Hon. Homer B. Thompson

Judge of the Superior Court, Santa Clara County.

Mr. Michael M. Berger

Attorney at Law, Santa Monica.

Rev. William G. Cunningham

Past Professor of Law, University of Santa Clara.

Ms. Gloria deHart

Deputy Attorney General, San Francisco.

Mr. Robert Formichi

Reporter of Decisions, San Francisco. (One of staff to Committee on Selective Publication of Appellate Court Opinions created in 1970 by Chief Justice Wright.)

Mr. Joseph Freitas, Jr.

District Attorney, City and County of San Francisco.

Mr. Ellis J. Horvitz

Attorney at Law, Encino (member of State Bar Special Committee on Appellate Courts that prepared Supplemental Report (1973) Citation of Unpublished Opinions).

Mr. Myron Jacobstein

Law Librarian, Stanford University (author of Some Reflections on the Control of Publication of Appellate Court Opinions (1975) 27 Stanford L.Rev. 791).

Mr. Gideon Kanner

Professor, Loyola of Los Angeles Law School (author of The Unpublished Opinion: Friend or Foe? (1973) 48 State Bar J. 386; Chairperson of State Bar Publication Review Committee)

Mr. Edward L. Lascher

Attorney at Law, Ventura; former State Bar Vice President (author of comments on selective publication in column Lascher at Large, e.g., (1975) 50 State Bar J. 36.

Mr. Roderick Rose

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