FIRST DISTRICT

JOHN T. RACANELLI
ADMINISTRATIVE PRESIDING JUSTICE

STATE OF CALIFORNIA
Court of Appeal
STATE BUILDING—CIVIC CENTER
SAN FRANCISCO

October 3, 1986

Chief Justice Rose E. Bird
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Dear Chief Justice:

At a regularly scheduled meeting of the justices of this court, a resolution was unanimously adopted requesting the initiation of proceedings by the Supreme Court pursuant to its constitutional authority to amend rule 976(d) of the California Rules of Court, as amended (effective May 6, 1985).[1]

The members of this court propose that the rule be amended to read as follows:

> "A Court of Appeal opinion certified for publication shall remain published in the official reports if the Supreme Court grants review thereof and issues an opinion, and a notation of grant of hearing shall immediately follow such Court of Appeal opinion."[2]

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1. Rule 976(d), as amended, currently provides: "Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part."

2. See next page.

EXHIBIT "A"

The following reasons are submitted in support of the proposed change:

1. Where a Court of Appeal certifies for publication an opinion in a case thereafter accepted for review by the Supreme Court, publication of the Court of Appeal opinion will not only enhance the correcting function of the appellate process and preserve a more complete history of Supreme Court cases, but will often facilitate fuller comprehension of the meaning and implications of the ultimate judicial decision. For example, an understanding of the decision of the United States Supreme Court opinion in Press-Enterprise Co. v. Superior Court of Cal. (1986) ___U.S.___ [106 S.Ct. 2735], is improved in a variety of ways by a reading of the California Supreme Court opinion in that case (reported at 37 Cal.3d 772) even though the latter opinion was reversed by the former. The improvement of understanding may be equally great, of course, where the penultimate opinion is reversed in part or affirmed. (See, e.g., Keating v. Superior Court (1982) 31 Cal.3d 584, revd. in part sub nom. Southland Corp. v. Keating (1984) 465 U.S. 1 and Fisher v. City of Berkeley (1984) 37 Cal.3d 644, affd. (1986) ___ U.S. ___ [106 S.Ct. 1045].)

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2. The proposed rule would constitute an exception to rule 976(c)(2), which provides that: "An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect." In order to make it consistent with the amendment to rule 976(d) here proposed, rule 976(c)(2) should be modified by adding to it the words: "except as provided in rule 976(d)."

2. The presumptive depublication of a Court of Appeal opinion accepted for Supreme Court review demeans the function of the intermediate appellate courts of this state without any of the justifications that arguably attend selective depublication in cases not accepted for review, and will tend to discourage painstaking judicial research and writing in cases deemed likely to be accepted by the Supreme Court. Thus, depublication of such opinion disserves the interest of the Supreme Court, which arguably would profit from the thorough analysis and explication by the intermediate appellate courts in these cases.

3. Publication of the Court of Appeal opinion in such cases would permit the Supreme Court or a concurring or dissenting member of that court to refer to the language and reasoning of the intermediate appellate opinion without need to resort to citation of an unofficial reporter (see, e.g., Jones v. H. F. Ahmanson & Co. (1969) 1 Cal.3d 93, 121; see also, Taylor v. Centennial Bowl, Inc. (1966) 65 Cal.2d 114, 127) and without the need of extensive quotation (see, e.g., Taylor v. Board of Trustees (1984) 36 Cal.3d 500, 510-516 (dis. opn. of Mosk, J.)) or the risk of inadequate explanation (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."]).

4. The proposed rule change would not significantly increase the size or number of bound volumes of the official reporter. In the majority of cases in which the Supreme Court grants review and issues its own opinion (which, incidentally,

excludes cases retransferred to the Court of Appeal for reconsideration), there is not a Court of Appeal opinion certified for publication.[3] The miniscule increase in the size of bound volumes that would result from the proposed rule change[4] is more than offset by the benefits hereinabove described.

5. The fact that under the proposed rule change the opinion of the Court of Appeal might theoretically be cited while the case is pending in the Supreme Court is no reason to prevent publication. It is a matter of public record that a petition for review has been granted and, under the proposed rule, a notation of the grant of review would follow the bound volume report of the Court of Appeal opinion. The granting of review by the Supreme Court would inhibit reliance upon the Court of Appeal opinion by competent counsel[5] and the lower

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3. During the first six months of 1983 (the most recent period in which cases then accepted by the Supreme Court have now been fully disposed of by that court), the Supreme Court accepted 83 cases for review. Forty-two of these cases, or roughly half, involved a published Court of Appeal opinion. However, 14 of these 42 cases were retransferred to the Court of Appeal or dismissed without an opinion of the Supreme Court. Therefore, the Supreme Court issued an opinion in only 28 cases -- 33 percent of those accepted for review -- in which there had been a published Court of Appeal opinion.

4. The 28 Court of Appeal opinions referred to in the preceding footnote, which averaged 8.9 pages in length, collectively total 251 pages. This number of pages in the California Appellate Reports is 3/8 of an inch thick. If this figure, which represents a typical six-month period, is doubled, we find that the proposed rule change would enlarge the bound volumes by less than an inch per year.

5. Rules of Court should not, of course, be fashioned for the purpose of accommodating the inadequacies of incompetent counsel; if they were, a massive re-writing of the present rules would be required.

courts, much as now occurs in the federal system and virtually all other jurisdictions with a multitiered appellate structure, in which published opinions of intermediate appellate courts remain published notwithstanding a grant of review. Moreover, California Courts of Appeal are far less likely than the California Supreme Court to announce new rules of law. Since no apparent problem has resulted from publication of overruled opinions of the California Supreme Court, many of which fashioned new legal principles (see, e.g., Justice Mosk's opn. in Bakke v. Regents of University of California (1976) 18 Cal.3d 34, revd. (1978) 438 U.S. 265), still less of a problem would arise from publication of intermediate appellate opinions. In any event, it is anomalous that a Court of Appeal opinion certified for publication is ordinarily depublished if reviewed by the California Supreme Court but remains published if reviewed by the United States Supreme Court. (See, e.g., People v. Ciraolo (1984) 161 Cal.App.3d 1081, revd. sub nom. California v. Ciraolo (1986) 476 U.S. ___ [106 S.Ct. 1809]; People v. Trombetta (1983) 142 Cal.App.3d 138, revd. sub nom. California v. Trombetta (1984) 467 U.S. 479.)

6. If the Supreme Court believes, contrary to experience elsewhere, that publication of the intermediate appellate opinion during the pendency of Supreme Court review might create confusion, the most reasonable solution would be simply to delay publication of the Court of Appeal opinion until after decision of the Supreme Court as now permitted, but not required, by existing rule 976(d).

Representatives of this court are prepared to provide any additional relevant information the Supreme Court may require.

Very truly yours,

John T. Racanelli
Administrative Presiding Justice
First Appellate District

cc: Associate Justices
of the Supreme Court