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BY FEDERAL EXPRESS

Mr. Clifford Alumno
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: *Proposed Amendments to Rule 976 of the
California Rules of Court*

Dear Mr. Alumno:

The California Academy of Appellate Lawyers submits this letter in response to the Advisory Committee's request for comments on its report addressing the standards for publication of Court of Appeal opinions and recommending certain changes to California Rules of Court, rule 976. To the extent the Advisory Committee's proposals clarify the intent of the current rule, the Academy supports the proposed amendments and has no alternate or additional language to suggest.

Although we support the proposed amendments, we suggest the Advisory Committee expand the recommendations for future action that appear at the conclusion of Section X of the Committee's report, in the following two respects:

1. In Point 3, the Committee recommends that the Supreme Court "[r]eevaluate at a future time whether the rule 976 presumption against publication should be changed to a presumption in favor of publication." We suggest that this proposal be amended to read "reevaluate at a future time whether the rule 976 presumption against publication *should be amended to provide that an opinion should be published if it meets one of*

the criteria published in the rule.” We believe that amending the rule in this fashion will serve the goal of ensuring that all Divisions apply the publication criteria in a consistent fashion, thereby decreasing the number of decisions that are not published, but should be.

Under current Rule 976, there is a widespread perception among practitioners that the publication criteria are not being applied in consistent ways. According to a survey conducted by the Committee, 73 percent of attorneys believe they have been involved in cases that satisfied the publication criteria but were not published. (Report at p. 26.) We believe this problem is in part attributable to the fact that the current rule is indifferent toward the publication of opinions that meet the publication criteria. While the rule prohibits the publication of opinions that do not meet the criteria, it says nothing about when opinions *should* be published. Such indifference does not appear to be in accord with the universal understanding that it is useful, indeed vital, to the development of the law that certain opinions be published.

The Advisory Committee’s amended rule offers a partial solution to the perception among practitioners that many opinions satisfying the publication criteria are not being published. The amended rule addresses the problem by listing certain factors that panels should not take into account in deciding whether to publish their opinions. However, the amendment still expresses no preference that opinions that meet the listed criteria *should* be published. As long as panels retain the arbitrary authority to choose not to publish opinions regardless of whether they satisfy these criteria, merely identifying the factors that courts should not take into account will not eliminate the perceived problem that panels are applying the publication criteria in inconsistent ways. Amending Rule 976 to provide that all opinions meeting one or more of the criteria for publication should be published would go a long way towards ensuring that opinions that satisfy the publication criteria are treated in a consistent fashion.

2. In Point 5 of Section X of its Report, the Advisory Committee recommends that the Supreme Court consider appointing a future committee to: (a) consider the feasibility of procedures whereby the Supreme Court could order partial publication or partial depublication of Court of Appeal opinions; (b) evaluate the possibility of expanding the circumstances under which parties may draw the Supreme Court’s attention to unpublished opinions; and (c) review and make recommendations concerning the publication of opinions of the appellate divisions of the superior court. We endorse these recommendations. In particular, we support an amendment to Rule 977 that would allow parties to cite unpublished opinions in petitions for review, since it appears that the

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Supreme Court itself regularly considers such opinions in deciding whether to grant review, and there is anecdotal evidence that some appellate practitioners are already using such decisions in petitions for review for the sole purpose of showing that there is a conflict in the law. (Report at p. 11.) A study of these rule changes, and the rule change proposed in point one above, should begin as early as possible.

In addition to the foregoing actions, however, the Academy recommends adding to the list those additional issues the Supreme Court charged the Committee with considering but that were not addressed in the Committee's Report. Specifically, we suggest the Committee recommend that the Supreme Court appoint a committee that would:


- (a) "consider what weight the Supreme Court should accord to the preferences of the authoring court when acting upon a request for publication" (Report at p. 6, fn. 2);
- (b) "consider . . . whether the criteria applied by the Supreme Court for ordering publication should be the same as those applied by the Court of Appeal" (*ibid*);
- (c) "consider whether doubts as to whether or not an opinion should be certified for publication should be resolved in favor of publication by the Court of Appeal initially, and by the Supreme Court when entertaining a request for publication" (*ibid*);

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- (d) consider “whether a procedure under which the Supreme Court would transfer a matter to the Court of Appeal for purposes of editing for publication should be available in instances in which the Supreme Court concludes that publication would be appropriate” (*ibid.*).

We thank the Advisory Committee for the opportunity to offer these suggestions.

CALIFORNIA ACADEMY OF APPELLATE LAWYERS

By 
Robin Meadow
President

RM:pl

cc: Frederic D. Cohen, Esq., Chair, Committee on Publication of Opinions
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