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03-AP-468

February 11, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: *Opposition to proposed FRAP Rule 32.1*

Dear Mr. McCabe:

I write to oppose the adoption of proposed Rule 32.1.

I am a full-time appellate lawyer—certified as a specialist in appellate law by the California Board of Legal Specialization, a member of the California Academy of Appellate Lawyers, and a fellow of the American Academy of Appellate Lawyers.

I have devoted much time and thought to the subject of the citability of unpublished opinions. As the then chair of the Los Angeles County Bar Association's Appellate Courts Committee, I participated in preparing the committee's opposition to California legislation proposed in 2003 that would have allowed universal citability of California Court of Appeal decisions, and I joined six other members of the California Academy of Appellate Lawyers in co-authoring a separate letter opposing the legislation (copy enclosed). I have also written an article that addresses the subject in the context of increasing caseloads in the state and federal system. *Appellate Law: Bearing the Burden of Increasing Caseloads*, Los Angeles Lawyer, March 2002 (copy enclosed).

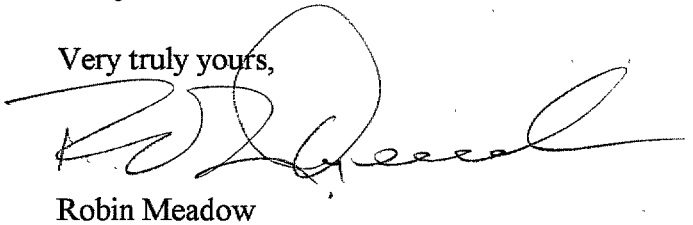
Just recently, I experienced first-hand the problems that lawyers would face with universal citability. I was starting to draft a supplemental brief in a pending appeal in light of two recent decisions, and I wanted to survey the field since the filing of the reply brief in October. On just one topic and for *just two months*, November and December, an online search for California cases retrieved the two published cases I knew about and *over 30 unpublished decisions*. And in the federal appellate courts, of the 33 opinions retrieved by the same search, 18 were unpublished—again, for *just two months*. I found it chilling to think of how many decisions one would have to read to do original research at the outset of an appeal. That's *have* to read, and have to

read *carefully*, not *might* have to read—universal citability would require this as a matter of ordinary prudence.

I recognize that as an abstract proposition, universal citability has obvious appeal. Who could fail to agree that our system of *stare decisis* would work best if counsel could present, and the court could consider, the entire range of decisions involving a particular fact pattern? But the reality of today's legal practice makes such a goal impossibly distant. Perhaps if lawyers had unlimited time to write their briefs and judges had unlimited time to read them, both might be able to harness the monstrous body of decisional law that universal citability would make them responsible for knowing. But they don't have unlimited time, or anything like it. The same litigation environment that generates so many decisions also generates the pressure to move cases ever more quickly on both sides of the bench. Even without universal citability, presenting and resolving cases at a reasonable pace requires unceasing diligence. Universal citability could shut the system down.

I strongly urge the committee to reject this ill-advised idea.

Very truly yours,



Robin Meadow

RM:pl
enclosures

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May 5, 2003

Honorable Ellen Corbett, Chair
California State Assembly Committee on Judiciary
State Capitol, Room 313
Sacramento, CA 95814

Re: *Assembly Bill 1165—Appellate Opinions*

As experienced appellate lawyers who have serious reasons to be concerned, we urge the Committee to reject Assembly Bill 1165.

All of us are attorneys who devote our entire practices to appellate law, and each of us has been in practice for at least 25 years. We are all members of the California Academy of Appellate Lawyers and fellows of the American Academy of Appellate Lawyers, elective organizations that require not only extensive appellate experience but also subject the work of prospective members or fellows to rigorous review. We are all certified as Appellate Law Specialists by the State Bar of California Board of Legal Specialization. The issues that AB 1165 proposes to treat are matters we are called upon to deal with every day of our professional lives.

We recognize that these issues are serious; they have been a subject of constant discussion among appellate lawyers. However, we strongly disagree with AB1165's attempted solution, and we particularly disagree with the attempt to impose a solution by legislation. We firmly believe that AB 1165 will create more problems than it will solve—it is the proverbial use of a cannon to kill a fly.

We have reviewed other materials submitted to the committee, including the letter on behalf of the Appellate Courts Committee of the Los Angeles County Bar Association and the responses to that letter by Mr. Kenneth Schmier and Professor Stephen Barnett. We do not believe that Mr. Schmier's or Professor Barnett's arguments answer the basic problems the Los Angeles County Bar Association has pointed out. We would like to add several additional points.

The use of selective publication of appellate opinions is partly a function of population. As California's population has grown, so has the volume of litigation and the number of appeals that are decided. For the first 60 years of our history, all appeals were decided by the California Supreme Court. All of its opinions for those six decades were contained in ____ volumes of Official Reports.

Today there are six appellate districts. Three of them are broken into divisions with three to four justices each. Counting each division as an appellate court, today there are _____ intermediate appellate courts, plus the California Supreme Court, issuing over 13,000 opinions a year from ____ justices. There are now more than ____ volumes of Official Reports, with approximately 15-20 new volumes each year.

As early as 1968, the federal circuit courts of appeal, aware of the burgeoning volume of appellate decisions, began selectively publishing cases, allowing citation of only those opinions published in the official Federal Reports. Today, *every* federal circuit court of appeals and at least 22 states selectively publish only a small portion of their opinions

Just two years ago, in March 2001, the Appellate Process Task Force organized by the Chief Justice and composed of appellate attorneys, justices and law school professors, issued a White Paper on Unpublished Opinions of the Courts of Appeal authored by Professor Clark Kelso. The Task Force concluded that the current rules for selective publication should not be changed, but that nonpublished decisions—which are, after all, public records—should be more readily available on the internet. That recommendation has been fully implemented.

Turning to the issue of citation of appellate opinions, regardless of whether universal citeability might be desirable as a matter of abstract policy, such a system would be unworkable in California. The April 29 amendment to AB 1165, which would make nonpublished decisions persuasive rather than binding, does not help: Even if nonpublished opinions were merely persuasive authority, no lawyer could safely ignore nonpublished cases, because he or she could not afford to overlook the one particular opinion whose "persuasiveness" might drive a court's decision. Apart from the risk to individual clients, lawyers at all levels of practice will face enhanced malpractice risks as the standard of care quickly rises to require complete review of all citeable decisions. Courts, already facing unprecedented budget cuts, will have to cope not only with a fifteen-fold increase in citeable decisional law, but also with a flood of new litigation testing the limits of malpractice liability.

Professor Barnett is wrong in stating that "When you are researching a civil case, you aren't much bothered by precedents in criminal or juvenile cases, and vice versa." The statement reflects a fundamental misunderstanding of what trial and appellate lawyers do in day-to-day practice. There are constant crossovers between civil and criminal cases on important questions of trial procedure, evidence admissibility and jury practices, in addition to crossovers on substantive matters, as reflected in several California Supreme Court decisions issued just last month. (*Teter*

v. City of Newport Beach (4/28/03) __ Cal.4th __, 2003 WL 1957116 [rejection of equal protection claim]; *Cruz v. PacifiCare Health Systems, Inc.* (4/24/03) 30 Cal.4th 303, fn. 8 [waiver of argument not raised in trial court]; *County of Riverside v. Superior Court* (4/21/03) 30 Cal.4th 278, 290 [application of collateral estoppel]; *Bonanno v. Central Contra Costa Transit Authority* (4/7/03) 30 Cal.4th 139, 148 [interpretation of legislation].)

Professor Barnett's complaint about the "numbers game" ignores another important fact: California's caseload vastly exceeds that of any of the states that he claims now allow universal citeability, as well as that of the Ninth Circuit Court of Appeals, which is the largest federal circuit. The total decisional output for these jurisdictions for the calendar year 2002, as reported in each jurisdiction's "all cases" databases on Westlaw, was:

Ninth Circuit	4,646
Alaska	390
Iowa	1,406
Michigan	5,493
Minnesota	1,545
New Mexico	552
Ohio	9,653
Oklahoma	266
Tennessee	1,871
Texas	8,436
Utah	649
Virginia	1,062

It is important to note that "decisions" in some of these jurisdictions—Michigan, New Mexico and Ohio—include orders that are not accompanied by opinions of any kind, but are merely brief, summary rulings that dispose of motions, granting or denying review, etc. Our Westlaw research indicates that Ohio's decisions include over 3,000 of these non-opinion orders. After adjusting for these orders, appellate courts in Ohio actually issue fewer than 6,600 opinions a year.

In contrast, our Article VI, § 14 of the California Constitution requires that all decisions of our Supreme Court and courts of appeal "shall be in writing with reasons stated." To put what this means into quick perspective: California's annual output of 13,000-plus appellate opinions is almost as large as the opinion output of the next two largest jurisdictions, Ohio and Texas, combined. The experience of those jurisdictions is not comparable to California's situation in any rational way.

The Appellate Process Task Force also strongly recommended against allowing citation of non-published opinions in its White Paper:

> The task force is convinced that allowing all opinions to be citable as precedent would do substantial damage to the appellate system in California. If all appellate court opinions were citable, there would be increased potential for conflict and confusion in the law, which would, in turn, increase the cost of legal representation, as well as appellate workload and appellate delay. This damage would not be offset by any practical advantages gained through making unpublished opinions fully citable as precedent.

Id. at 5.

In short, if all appellate decisions were citeable, the relatively small number of opinions that make a significant contribution to the law would be buried under the avalanche of inconsequential opinions having no effect on anyone but the litigants in those particular cases.

We recognize that the current system is not perfect. The question is how the system's imperfections should be addressed. Professor Barnett's observations about practices elsewhere glosses over a crucial fact: According to Professor Barnett, in every other jurisdiction his letter cites the publication/citeability practice has been accomplished through court rules or court decisions. We strongly believe that legislation is too cumbersome and inflexible to deal with problems that call for carefully tailored experimentation. To the extent any action is needed, it should come through the Judicial Council's rule-making process.

This is at least the second time this proposal has been before the Legislature. Assembly Member Papan introduced a similar bill, AB 2024 in the 1999-2000 regular session. The bill passed out of this Committee, then died. It was strongly opposed by organizations across the entire spectrum of legal practice—the California Judges Association, the Judicial Council, the District Attorneys Association, the Public Defenders Association, Consumer Attorneys of California, California Defense Attorneys, Western Center on law and Poverty and the Attorney General.

Although many of these organizations have divergent, even adversary, interests and views on many subjects, they were united in their opposition to this proposal. There is no greater need or justification for the proposal today than there was three years ago.

We urge you to reject AB 1165.

Respectfully,

Victoria J. DeGoff and Richard Sherman,
DeGoff & Sherman

Richard Derevan,
Snell & Wilmer LLP

Jay-Allen Eisen
Jay-Allen Eisen Law Corporation

Wendy Lascher,
Lascher & Lascher

James C. Martin,
Reed Smith Crosby Heafey LLP

Robin Meadow
Greines Martin Stein & Richland

JAY-ALLEN EISEN
Law Corporation

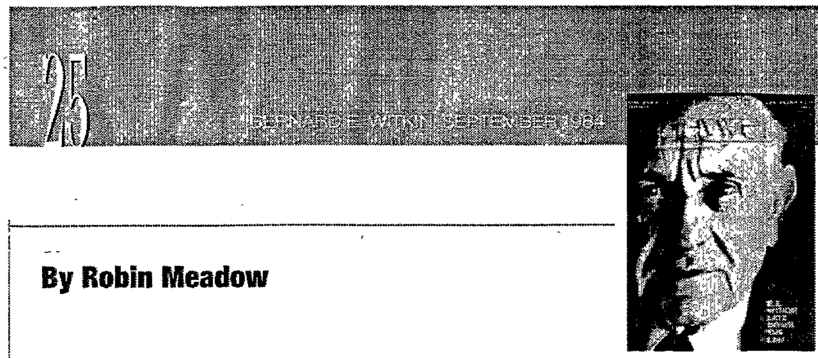
By Jay-Allen Eisen

cc: Assembly Judiciary Committee Members
Honorable Mervyn Dymally
Honorable Hannah-Beth Jackson

2 *Id.* at 610.
3 Reiter v. Sonotone, 422 U.S. 330 (1979).
4 *Id.* at 343.
5 The Supreme Court in recent horizontal price-fixing cases has found violations, in Catalano, Inc. v. Target Sales, 446 U.S. 693 (1980, per curiam) and FTC v. Superior Ct. Trial Lawyer's Assoc., 493 U.S. 411 (1980), the latter case involving appointed indigent counsel who conspired to increase their rates from the $20 per hour they were being paid.
6 United States v. Hoffman-La Roche et al., 6 C.C.H. Trade Reg. Rptr., cases 4438-40, 4465, and 4467-69, ¶45,099 (N.D. Tx. 1999).
7 18 U.S.C. §3571.
8 United States v. General Dynamics Corp., 415 U.S. 486 (1974).
9 *See* 15 U.S.C. §18.
10 Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
11 Sherman Act §1, 15 U.S.C. §1.
12 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).
13 *Id.* at 764 (citing Edward J. Sweeney & Sons v. Texaco, 637 F. 2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).
14 *See, e.g.*, Super Sulky, Inc. v. United States Trotting Assoc., 174 F. 3d. 733 (6th Cir. 1999).
15 Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).
16 *Id.* at 726-27.
17 *Id.* at 726.
18 State Oil Co. v. Khan, 522 U.S. 3 (1997).
19 Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 472 U.S. 585 (1985).
20 *See* 15 U.S.C. §2.
21 *See* 15 U.S.C. §§1 and 14.
22 Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992).
23 Lest one think the consumer is forgotten in the single-firm context, the U.S. Supreme Court in Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993), continued to beat the consumer welfare drum in dismissing a Sherman Act claim for attempted monopolization, observing:

> The purpose of the Act is not to protect businesses from the working of the market, it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Id. at 892.
24 Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
25 The Robinson-Patman Act, 15 U.S.C. §13(a).
26 Brooke Group, 509 U.S. at 224.
27 *See, e.g.*, Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F. 3d 256 (2d Cir. 2001).
28 Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977).
29 *See, e.g.*, Pool Water Prods. v. Olin Corp., 288 F. 3d 1024, 1033-35 (9th Cir. 2001).
30 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
31 Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 495 U.S. 519 (1983).
32 *See, e.g.*, RSA Media, Inc. v. AK Media Group, Inc., 260 F. 3d 10 (1st Cir. 2001).
33 *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).
34 United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001).
35 United States v. Microsoft, 253 F. 3d 34 (D.C. Cir. 2001, en banc).



By Robin Meadow

Appellate Law

Bearing the burden of increasing caseloads

On October 1, 2001, the California Court of Appeal launched a historic experiment: It began posting on the Internet all the opinions that were previously invisible to public view because they were "not certified for publication."[1] That means that in very short order, the number of court of appeal opinions available online will jump by 1,700 percent.[2] Is this the most important development in appellate law practice of the last quarter-century? Probably not. But the nature and magnitude of the event point toward something that does qualify for that title: the unrelenting increase in the caseloads of the appellate courts.

This trend is not limited to California; it mirrors the experience of other courts throughout the country. The effects have been far-reaching and problematic, and there is no obvious solution. But there have been some helpful developments.

Twenty-five years ago, 11,173 appeals and writ petitions were filed in California's courts of appeal.[3] By last year, the number had risen to 24,943.[4] But this increase conveys only an approximation of the court's workload. More relevant is the number of opinions written.

In 1975-76, 50 court of appeal justices wrote 5,943 opinions—118 per justice during that year. That's not a relaxed pace, since on average it means every justice was authoring about 10 opinions a month, as well as participating in twice as many opinions authored by other justices and writing concurrences and dissents. But since the pace of new judicial appointments has not nearly matched the pace of the increasing caseload, the statewide number grew to 153 opinions per justice in 1997-98.[5] And during that year, justices in the Second District in Los Angeles pumped out significantly more decisions—more than 200 per justice for Divisions 1 and 5, with the other divisions close behind.[6]

What this means is that every week in the Second District, each sitting justice must, on average, author four opinions and review and participate in another eight opinions—two for every working day. And all this at a salary ($152,260) that is about the same as what a first-year lawyer could earn during the recent (though short-lived) upward trend in starting salaries.

It would be hard to exaggerate the impact of this phenomenon, which will not go away. American society's perpetual love affair with litigation, coupled with its traditional stinginess in paying taxes, will see to that. As San Francisco appellate lawyer Peter Davis puts it, "The public wants high quality justice in the blink of an eye but does not want to pay for it, or at least their elected representatives don't."[7]

Probably the single most significant effect of this trend crystalizes when one considers that, while the size of the court of appeal has doubled in the last 25 years, the size of the California Supreme Court has not increased (and probably cannot significantly increase) its own caseload. It consistently issues about 100 opinions a year, so the percentage of petitions for review it grants has steadily declined.[8] What this means is that for an ever-increasing number of litigants, the court of appeal is the court of last

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resort—its decision, regardless of correctness, is the final word. Even patent error on an important legal question in a published opinion is not enough to guarantee supreme court review, since the court can instead exercise its prerogative to depublish the opinion.[9] To put this in perspective, it means that of the 13,000 opinions issued by the courts of appeal in 2000-01, fewer than 1 percent will be decided on the merits by the supreme court.

The courts of appeal must therefore be the principal focus of anyone challenging the results of a trial court decision. And that is where the ever-increasing caseload raises some of its most serious problems.

The Impact of Case Overload

One perennial problem is the courts' reliance on their power not to certify an opinion for publication.[10] The wisdom and legality of allowing unpublished opinions is, itself, highly controversial.[11] But the impact of unpublished opinions is well understood in the appellate bar. In theory, unpublished opinions should decide cases that do not present novel or difficult questions of law, but the reality is that those issues often find their way into unpublished opinions. One cannot write off this reality as merely losing-party sour grapes, because the supreme court grants review of a substantial volume of nonpublished opinions.[12] Since supreme court review is limited to cases "where it appears necessary to secure uniformity of decision or the settlement of important questions of law,"[13] those cases necessarily meet the publication criteria of Rule 976. That they were not published unavoidably raises certain concerns about the decision-making process and the accountability of the courts of appeal.[14]

One cannot expect nonpublished opinions to receive the care and scrutiny given to published opinions. Since they cannot be cited as precedent, and since the court is speaking only to the parties, the court can abbreviate its discussion of the facts and the law. This approach offers a quick way of getting a decision out and removing one more case from the docket. But as anyone who has drafted an argument knows, sometimes careful writing is essential to understanding. "If it won't write, it isn't right" is trite but true.

This creates an environment in which calendar management can overshadow deliberative decision making. Some courts have declined to honor extension stipulations that are expressly authorized by the California Rules of Court; others begin working up cases before the reply is filed.[15] And, perhaps most problematic, most cases are already at least tentatively decided, with a draft opinion already written, before oral argument. This last practice is mainly a response to California's 90-day rule, under which opinions must be decided within 90 days after submission.[16] But in combination with the mounting caseload, the 90-day rule creates an environment that is inimical to the careful deliberation that should characterize the appellate process.

Of course, justices don't work alone; they have research attorneys to help them. But over time, the attorney staff has become permanent and professionalized. The lawyers hold career positions; they are not the first-year-after-law-school clerkships of the past. Unavoidably, these career attorneys must shoulder more and more of the decision-making work. This results in a tradeoff. These attorneys are highly skilled and experienced, and they embody much of a court's institutional memory. But at the same time, as one appellate lawyer notes, "While many are very able lawyers, they lack the breadth of experience and community involvement the justices have, and the environment at the court shelters and insulates them from the lives and activities of the people and institutions whose cases they are deciding."[17]

To deal with these problems, courts of appeal have turned to technology. Although it confers many benefits in efficiency, technology has its dark side too. Computers make editing a simpler task than it used to be, but they also create a temptation to use prepackaged assemblies of text and citations to deal with issues that may not be as susceptible to standard solutions as they seem. Using one-size-fits-all text assemblies—for example, to describe the standard of review—results in longer opinions with less carefully tailored language. But time pressures may make the temptation irresistible.

Legal research may also suffer from shortcuts. A computer screen is too small a window for viewing the vast world of the law, but it is also the most readily available. With cases piling up at the door, where is the incentive and opportunity to search out and study the many texts that have not yet made it into Lexis or Westlaw, or to leaf through a general-law discussion in a treatise in order to gain general understanding and, perhaps, to find a connection that a words-and-phrases search will never reveal?

Time constraints have also affected the way appellate courts react to errors at the trial level. Sometimes a trial court's error is so palpable that no appellate court can ignore it, but a quick way to affirmance is to find that the error is harmless, since reversal requires not just error but prejudice.[18] This principle is nothing new, but the California Supreme Court has given broad license to apply it in cases like *Soule* v. *General Motors Corp.*,[19] in which it rejected the idea of per se reversible error and instead required an evaluation "in light of the entire record."[20] In the abstract this approach seems perfectly reasonable. But appellate lawyers know that in practice it can become an all-too-tempting refuge for an overworked and understaffed court that is unconstrained by the prospect of public or supreme court scrutiny.

These separate threads combine to create perhaps the most serious problem for lawyers and their clients: unpredictability. No court of appeal is bound to follow the decisions of any other, not even of another division within the same district.[21] The vast majority of court of appeal decisions are unpublished and so escape the notice of everyone but the parties, and the supreme court will rarely intervene. What, then, is left to channel decision making into predictable results?

Without predictability, the system fails—or becomes politicized.[22] Appellate lawyer Gideon Kanner has observed that "the confusion that flows from the lack of predictability impacts on more people who understandably take an increasingly political view of the selection of those who, in the name of resolving their disputes, actually govern them." Edward Horowitz likewise attributes "the decline in the significance of and respect for appellate decisions" to their "reduced predictability" and "the reduced ability of the appellate courts to provide orderly, thoughtful interpretation and development of the law."

This loss is significant and dangerous. While a legitimately contested appeal should not have an absolutely predictable outcome, the parties should expect much more than the unpredictability of trial. There should at least be what Karl Llewellyn called "a reckonability equivalent to that of a good business risk."[23]

Counter-Trends

Is all lost? Should we simply give up on the appellate courts? Hardly. For all their complaints, most lawyers will agree that despite these problems, there are many talented and conscientious justices who, against all odds, continue to generate thoughtful and important appellate decisions. And there are other trends that, to some extent, mitigate the caseload crush.

One notable development over the past 25 years has been the emergence of appellate practice as a recognized, distinct speciality. In the mid-1970s, most of the bench and bar would have scoffed at such an idea. But the quarter-century since then has witnessed an explosion in the area, marked by the rise of voluntary organizations like the California Academy of Appellate Lawyers and the American Academy of Appellate Lawyers, multiple appeal-focused entities within the American Bar Association, and the certification of appellate specialists by the California State Bar.

There is now at least one law journal devoted entirely to appellate practice, *The Journal of Appellate Practice and Procedure*. Many regional bar associations have appellate practice sections or committees, including the Association's highly active Appellate Courts Committee. And the courts have explicitly recognized that "appellate practice entails rigorous original work in its own right."[24]

A recurring complaint of appellate justices is that far too few lawyers understand the appellate process and that the courts sometimes have to work much harder on cases that do not have the benefit of appellate expertise. As more lawyers learn how the appellate courts work and how to speak to them effectively, the courts will inevitably become more efficient.

Appellate mediation is another welcome development that is improving the quality of appellate justice. The First District recently released a highly favorable report on its pilot program for mandatory mediation.[25] The encouraging results are mirrored in various other programs around the state, including the District-Wide Settlement Conference Program in the Second District. This voluntary program yielded settlements in 27 percent of the conferences held during 2000-01.[26] Appellate cases do settle, and at surprisingly high rates.

Technology, too, has had a positive impact on appellate law. Without a doubt, it has fundamentally changed the way both lawyers and courts do their research and writing. Properly used and with an understanding of its risks, technology can yield better research, better writing, and better analytical tools. Tools like electronic records and briefs allow instant access to the most remote part of huge records, even on a laptop computer at a mountain hideaway. Online dockets and e-mail notification streamline the procedural aspects of an appeal. Word processing programs eliminate the need to hesitate about whether to make a needed change in a brief or an opinion.

And now the Internet has made possible the "publication" of nonpublished opinions—and so we come full circle. Although not everyone is enthralled by the idea of a 17-fold expansion of the California research database, the availability of nonpublished opinions cannot help but have a far-reaching, and hopefully salutary, effect on appellate practice. The fact that they cannot be cited will not lessen their utility as a tool for both the bench and bar to analyze and anticipate judicial trends. The fact that every opinion can receive public scrutiny will diminish the temptation to use nonpublication as a substitute for careful analysis. And the fact that everyone will have access to them will promote a better understanding of the court and its processes in all quarters. ■

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[1] The opinions are posted for 60 days at http://www.courtinfo.ca.gov/opinions/nonpub.htm, with the following disclaimer:

> Rule 977 (a), California Rules of Court, prohibits courts and parties from citing or relying on any unpublished opinion in any action or proceeding, except in limited circumstances specified by rule 977 (b). Availability of unpublished opinions on this Web site does not constitute publication under California Rules of Court, rules 976, 976.1, 977, or 978.

Westlaw and Lexis maintain the opinions in their databases.

[2] Statewide, 6% of opinions were published. JUDICIAL COUNCIL OF CALIFORNIA, 2001 COURT STATISTICS REPORT 29 (Table 9) (reporting on fiscal year 1999-2000) [hereinafter 2000 STATISTICS].

[3] Data supplied by Joseph Lane, Clerk, Court of Appeal, Second District.

[4] JUDICIAL COUNCIL OF CALIFORNIA, COURT OF APPEAL STATISTICS (reporting for fiscal year 2000-01) (forthcoming 2002) [hereinafter 2001 STATISTICS].

[5] There were 14,238 written opinions but only 43 more justices. 2000 STATISTICS, *supra* note 2, at 23 (Table 3) and 25 (Table 5). The year 2000-01 offered only a slight improvement: 13,001 opinions authored by 93 justices (with 7 more authorized as of Jan. 1., 2001), yielding 140 opinions per justice per year. 2001 STATISTICS, *supra note* 4.

[6] JUDICIAL COUNCIL OF CALIFORNIA, 1999 COURT STATISTICS REPORT 110-11 (Tables 3-4) (covering 1997-98). The Ninth Circuit's caseload during the last quarter century has increased even more dramatically: A Westlaw search comparing the years 1976 and 2000 shows that the opinions almost tripled in number, from 1,455 opinions in 1976 to 4,073 in 2000.

[7] Unless otherwise noted, this and all other quotations from appellate lawyers are from e-mail exchanges with the author. The lawyers are all former presidents of the California Academy of Appellate Lawyers.

[8] In the last 10 years, the number of opinions ranged from a low of 82 in 1996-97 to a high of 127 in 1990-91. 2000 STATISTICS, *supra* note 2, at 9 (Table 6). During that period, dispositions in the court of appeal climbed from 10,716 in 1990-91 to 13,890 in 1999-00. *Id.* at 25 (Table 5).

[9] This 30-year-old practice, the subject of substantial criticism (*see, e.g.*, Steven R. Barnett, *Depublishing Law Clerks*, CALIFORNIA LAWYER, June 1, 1999), seems to have subsided somewhat in recent years. *See also*, Steven B. Katz, *Without Precedent*, LOS ANGELES LAWYER, Mar. 2001, at 43.

[10] California Rule of Court 976(b) provides:

> No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
>
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> (2) resolves or creates an apparent conflict in the law;
>
> (3) involves a legal issue of continuing public interest; or
>
> (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

Under Rule 977(a), with very narrow exceptions, "An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding...." The Ninth Circuit has a similar rule, Ninth Circuit Rule 36-3, under which "[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit" except in very limited circumstances.

[11] *See, e.g.*, the collection of articles in 3 J. OF APPELLATE PRACTICE AND PROCESS 175-451 (2001); John P. Borger & Chad M. Oldfather, *Anastasoff* v. *United States and the Debate over Unpublished Opinions*, 36 TORT & INSUR. L. J. 899 (2001); Richard L. Neumeier, *Why No-Citation Rules Are Unworkable, Unwise, and Unconstitutional and How They Should Be Changed*, 19 THE APPELLATE PRACTICE J. 6 (2001). In *Anastasoff* v. *United States*, 223 F. 3d 898, *vacated as moot*, 235 F. 3d 1054 (8th Cir. 2000), the Eighth Circuit Court of Appeals threw down the gauntlet on this subject by declaring unconstitutional a circuit rule against citing nonpublished opinions. Although the court later vacated the opinion as moot, it continues to be the source of much commentary, as the cited articles show. The Ninth Circuit explicitly rejected *Anastasoff*'s reasoning in *Hart* v. *Massanari*, 266 F. 3d 1155, 2001 WL 1111647 (9th Cir. 2001), in a decision that threatens sanctions for the citation of a nonpublished decision.

[12] A review of the court's minutes for the 2000-2001 year reveals that of the 83 civil cases in which the court granted some form of relief on a petition for review (including transfers and grant-and-holds), 36 involved unpublished opinions. The court granted unqualified review in 40 cases, of which 7 had unpublished opinions.

[13] CAL. R. OF COURT 29(a)(1).

[14] The Ninth Circuit's use of nonpublished opinions has increased substantially since 1976, according to the author's research using Westlaw. In 1976, 56% of the court's 1,455 opinions were nonpublished, but by 2000 the percentage had increased to 79% of 4,073 opinions.

[15] The refusal to honor rule-authorized extension stipulations prompted a revision in the newly effective amended rules, which state, "The reviewing court may not shorten a stipulated extension." CAL. R. OF COURT 15(b)(1) (effective Jan. 1. 2002).

[16] The source of the rule is not a requirement that decisions be made but rather a 1966 constitutional provision that prohibits judges from being paid if they hold cases longer than 90 days. *See* CAL. CONST. art. VI, §19.

[17] *See supra* note 7; *see also* Barnett, *supra* note 9.

[18] Pool v. City of Oakland, 42 Cal. 3d 1051, 1069 (1986).

[19] Soule v. General Motors Corp., 8 Cal. 4th 548 (1994).

[20] *Id.* at 580.

[21] *E.g.*, In re Marriage of Shaban, 88 Cal. App. 4th 398, 409 (2001).

[22] This is another topic beyond the scope of this article. But no one who lived through the tumult of the Bird Court retention elections or the federal confirmation hearings from Bork through Thomas to Morrow can doubt the ever-increasing role of politics in judicial nominations over the past 25 years.

[23] Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS 17-18 (Part I: The Problem and the Worry) (1960).

[24] In re Shaban, 88 Cal. App. 4th at 410; *see also* Estate of Gilkison, 65 Cal. App. 4th 1443, 1449-50 (1998) ("[T]rial attorneys who prosecute their own appeals...would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice.").

[25] Task Force on Appellate Mediation, Mandatory Mediation in the First Appellate District of the Court of Appeal—Report and Recommendations (Sept. 2001).

[26] Data supplied by Joseph Lane, Clerk, Court of Appeal, Second District.