January 5, 2006

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

Re: Comments on Werdegar Committee Report

Dear Mr. Alumno:

What follows are my comments on the Preliminary Report and Recommendations of the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee"). While the Committee has done some good work, I am unable to say whether I "agree or disagree" with the "proposed changes." This is because I disagree with the Committee's fundamental assumption that the unpublished opinions of the courts of appeal should remain, in overwhelming proportion, uncitable. I therefore cannot engage myself in fashioning standards for when such opinions should be citable. I think they always should be.

Nonetheless, I have a number of comments on the Committee's preliminary report, comments that I hope will persuade the Committee to alter its course and change its assumption.

1. Attached article. Attached to these comments is an op-ed "Forum" column of mine, titled (not by me) "Unpublished Opinions: Oh, the Shame of It!," which appeared in the San Francisco Daily Journal, Nov. 16, 2005, page 8. This article focuses on the Committee's work, and I hereby submit it as part of my present comments.

2. The role of the Committee's Members.

The Committee's 13 members included seven appellate justices (six from the court of appeal, one from the supreme court); three attorneys in private practice; and three functionaries. See pages 7-9. Even putting aside the three functionaries, the judge-attorney split of 7 to 3 skews the Committee's membership so as to discredit its recommendations.

The Committee's actions as well as its membership raise questions of imbalance. On a key point -- whether the presumption of Rule 976 against publication should be changed to one in favor of publication -- the Report states that "a majority of the committee decided not to recommend revising the presumption at this time" (p. 5). The reference to a Committee "majority" implies that there was one or more dissenting view(s). Readers of the Report are not told, however, either who the dissenter(s) may have been or what they may have said. This is a regrettable lack of transparency; the public and the profession deserve to know these things. I therefore suggest that now, in its final Report, the Committee should disclose by name how its individual members have voted and the content of any dissenting view or views they have expressed.

(3) The New York Comparison

Faced with the example of comparable numbers of opinions in New York, where they are all citable, the Committee seeks to distinguish New York, both factually and legally (pp. 14-15). The Committee claims that New York's practice and procedure "relies heavily upon the use of brief memorandum opinions, [which] would not likely be a satisfactory alternative for a California bench and bar long accustomed to receiving fully reasoned appellate dispositions of causes, regardless of publication status -- and may be inconsistent with our state's constitutional requirements."

Two problems beset this argument. First, the constitutional danger is a red herring. California's "constitutional requirements" almost certainly would be satisfied by "memorandum" opinions such as those used in New York. See Lewis v. Superior Court of San Bernardino County (1999) 19 Cal.4th 1232 (passim); People v. Garcia (2002) 97 Cal. App. 4th 847, 850 (confirming "propriety of memorandum opinions in unpublished cases") Second, the argument is in any event irrelevant, since there is no proposal for California to switch to New York-style opinions. California's

unpublished opinions could stay exactly as they are; they satisfy California's constitution now, and they would continue to do so.

(4) Tracking Unpublished Opinions

The Report discloses that the Supreme Court's criminal and civil staffs "internally track issues in cases seeking review, whether published or unpublished, in order to identify inconsistencies," and that this is done with "internal computer programs, along with a numerical system for identifying issues." In so far as it involves unpublished cases, this tracking system may violate Rule 977, which provides that unpublished opinions "shall not be cited or relied on by a court or a party in any other action . . . ." One can argue about the meaning of the words "cited" and "relied on" when it is an individual justice who takes the action for research purposes in his or her own chambers. In this case, however, the Supreme Court's tracking system plainly is run by the court; it is the court -- probably through its staff employees -- that does any of the "citing" or "relying" involved. When one of the court's staff members writes a "conference memorandum" that concludes with a recommendation to grant or not to grant review, it would seem hard to say that the court is not "citing" or "relying on" the unpublished cases in its tracking system data base -- and is not violating Rule 977. At the least, the Committee in its final Report is obliged, I respectfully suggest, to address this question of legal integrity -- of whether the state supreme court routinely violates state law -- that has been raised by the Committee's own Preliminary Report.

(5) Publication Requests After Online Availability

The Committee makes much of the fact that although unpublished opinions have been available on the Internet since October 2001, "no discernible increase" has occurred during that period in requests for publication of opinions originally filed unpublished (pp. 11-12). There is no mystery here. One reason for this conduct, unremarked by the Committee, readily suggests itself. If an unpublished opinion is significant enough to a party's case that the party would request publication, that opinion would have been known to the party (or the party's counsel), whether or not it was

on the Internet. Putting these opinions online thus does not tell the parties anything they do not already know.

(6) Continuing the Committee's Work

A final, cross-cutting comment arises from the Committee's discussion of "limited citation" -- and its revelation that 67 percent of attorneys questioned said they thought parties should be permitted to cite to the Supreme Court unpublished opinions from the same appellate district that arguably conflict with the decision before the court (p. 27) . Thus there appeared to be "some interest in such an innovation," the Committee mildly states. (p. 34) But because the Committee's charge purports to forbid consideration of citing unpublished opinions (p. 34), all that the Committee felt it could do -- and all it did do -- was ask the Supreme Court to consider convening yet another advisory committee. ("The Committee also recommends that the Supreme Court consider asking an advisory committee to evaluate the possibility of expanding the circumstances under which parties may draw the Supreme Court's attention to unpublished opinions." (p. 34).)

This would be extremely wasteful -- at a time when the judiciary is trying to impress the legislature with its fiscal prudence -- and it is not all that the Committee can do. Anything that a new advisory committee could do, the present Committee can do; it need only ask the Chief Justice to extend either the Committee's term of existence or its charge, or both. That way, the work done by the Committee and its members and staff would not be wasted; the "limited citation" proposal, for example,would not have to be stuffed back into the files for another five or ten years. Having claimed that it cannot do more because of limits on its charge (Summary of Report, p. 3; Report, p. 34), the Committee is obliged, I think, to explain in its final report why it should not simply ask to have those limits lifted.

Extension of the Committee's term would be as easy as extension of its charge. As the materials distributed by the Committee disclose, the Committee's predecessor, the Appellate Process Task Force ("Strankman Task Force"), was appointed in 1997 and was still going in 2001, ironically for the very purpose of keeping unpublished opinions uncitable. See "A White Paper on Unpublished Opinions of the Court of Appeal," Appellate Task Force, March 2001. It is time that the Committee and its handlers stopped avoiding, and faced directly, the question whether unpublished

opinions of the court of appeal must be opened to citation by courts and lawyers in other cases.

That concludes my comments. If I can be of assistance to the Committee, please feel free to call on me.

Respectfully submitted,

Stephen R. Barnett
Elizabeth J. Boalt Professor of Law Emeritus

Encl.