Response Form

Title: Preliminary Report and Recommendations on Rules for Publication of Court of Appeal Opinions

☐ **Agree** with proposed changes

☐ **Agree** with proposed changes **only if modified**

☐ **Do not agree** with proposed changes

Comments:_____

_____

_____

_____

_____

Your comments may be written on this form, written directly on the proposal, or submitted in a letter. If you are not commenting directly on this form, please remember to attach it to your comments for identification purposes.

Name:_____ *Title*:_____

Organization:_____

Address:_____

*City:*_____ *State*:_____ *Zip*:_____

Please mail or fax this form to:

Clifford Alumno
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, California 94102-3688
Fax: 415-865-7664

To submit your response online, visit www.courtinfo.ca.gov/invitationstocomment.

DEADLINE FOR COMMENT: Friday, January 6, 2006, at 5:00 p.m.

Title	**Preliminary Report and Recommendations on Rules for Publication of Court of Appeal Opinions**
Summary	This proposal seeks comments on a report that addresses the standards for publication of Court of Appeal opinions and recommends certain changes.
Source	Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions Justice Kathryn M. Werdegar, Chair
Staff	Lyn Hinegardner, Committee Counsel, 415-865-7698, lyn.hinegardner@jud.ca.gov
Discussion	The Supreme Court has asked its Advisory Committee on Rules for Publication of Court of Appeal Opinions to review the publication practices that exist within the Court of Appeal districts and their divisions. The court also asked the committee to consider whether the existing publication rules could be amended to better assist the courts in making their initial determination of whether to certify an opinion for publication. The committee has completed its initial draft report, including recommendations that California Rules of Court, rule 976, be amended to provide further clarification concerning the criteria that justices on the Court of Appeal should consider in deciding whether to certify an opinion for publication. Article VI, section 14 of the California Constitution gives the Supreme Court the authority and responsibility to decide which cases are published. The same constitutional provision provides that appellate decisions "shall be in writing with reasons stated." Pursuant to its constitutional authority, the court has established standards for publication of appellate opinions, set forth in rule 976 et seq. of the California Rules of Court. The current rules provide that all opinions of the Supreme Court are published. An opinion of the Court of Appeal or the appellate division of the superior court may not be published unless it meets one of four specified criteria: 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." (Rule 976(c).) A majority

of the panel must certify an opinion for publication. (Rule 976(b).)

The committee reviewed practices in other jurisdictions, relevant literature, and recent statistical information on the publication practices of the Courts of Appeal. It found, for example, that although other comparable states may publish all intermediate appellate opinions, typically a large number of those opinions are brief memorandum opinions that often might not satisfy the constitutional requirement in California that opinions contain the reasons for the decision in writing. In addition to reviewing available information, the committee conducted two surveys, one of the justices of the Courts of Appeal and another of attorneys, particularly those engaged in appellate practice. The results of these surveys informed the committee's recommendations.

The committee concluded that some differences in publication rates among districts of the courts of appeals may be explained by a variety of neutral factors. When factors such as case type and workload are considered, publication rates appear relatively consistent across districts and divisions.

Responses to the surveys, however, raised several areas that the committee concluded deserved careful consideration. Information concerning the use of criteria not cited in the rules by the courts of appeal, and the response by counsel revealing uncertainty about the consistent use of the criteria led the committee to recommend various improvements and clarifications to the publication rules and practices. The committee believes that doing so will decrease the number of decisions that are not published, but should be, while not overburdening litigants and lawyers with an overabundance of unhelpful material.

In its draft report, the committee suggests that the criteria in California Rules of Court, rule 976(c) be amended to make them more specific and to include reference to factors that should *not* play a role in the decision of whether to publish an opinion. Several other options were considered by the committee, such as changing the presumption of rule 976 to one in favor of publication, rather than against. Survey results indicated, however, that a majority of the legal community did not support such a change and a majority of the committee decided not to recommend revising the presumption at this time.

The committee also considered several other potential changes. It recommends that a future advisory committee consider whether 1) the

Supreme Court should exercise the option of ordering the partial publication or depublication of a Court of Appeal opinion, 2) the Supreme Court should evaluate whether parties may refer it to unpublished opinions, and 3) the rules relating to the publication of opinions by the appellate divisions of the superior court should be revised.

The committee would appreciate comments concerning the proposed amendments to rule 976, as well as the contents of its draft report. The committee's charge did *not* include discussing whether all opinions should be citable; it was asked by the Supreme Court to focus on the existing rules that guide the courts in determining whether or not to certify opinions for publication — and comments should be limited to the scope of the committee's inquiry.

Suggestions for other factors that courts might consider or other approaches for encouraging courts to publish all cases that will be of benefit to the bench and bar are welcome.

The committee will meet to review and consider all public comments. These comments will inform the committee's final report and recommendations. The final draft report and the proposed rule amendment will then be presented to the Supreme Court for consideration.

The committee's draft amendments to the rule are attached, but the entire report should be considered before commenting on the proposals.

Attachment

Rule 976 of the California Rules of Court would be amended, effective January 1, 2007, to read:

DRAFT
10/3/05

Rule 976. Publication of Appellate Opinions

(a) * * *

(b) * * *

(c) Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:

(1) establishes a new rule of law~~,~~;

(2) applies an existing rule of law to a set of facts significantly different from those stated in published opinions~~,~~;

(3) ~~or~~ modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(~~2~~5) resolves or creates an apparent conflict in the law;

(~~3~~6) involves a legal issue of continuing public interest; ~~or~~

(~~4~~7) 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~~.~~;

(8) invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

Factors such as the workload of the court, the presence of a concurring or dissenting opinion solely on the facts, or the potential embarrassment of litigants, lawyers, or trial judges should not affect the determination of whether to publish an opinion.

(d) *** * ***

(e) *** * ***

Report of the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Draft Preliminary Report and Recommendations
October 2005

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

CONTENTS

XI. Appendices

A. California Rules of Court, rules 976 through 979
B. 1971 Report of the Committee on Selective Publication of Appellate Court Opinions
C. 1979 Judicial Council Report on Proposed Rule Amendments for Publication of Appellate Opinions
D. 2001 White Paper on Unpublished Opinions of the Court of Appeal
E. Publication Rates for the Courts of Appeal
F. Survey of Justices of the Courts of Appeal
G. Report on Survey of Justices of the Courts of Appeal
H. List of Attorneys and Organizations Contacted for Survey
I. Survey of Appellate Attorneys
J. Report on Survey of Appellate Attorneys

I. Executive Summary

The Supreme Court of California Advisory Committee on Rules for Publication of Court of Appeal Opinions (the "committee") recommends that the Supreme Court take the following actions:

1. Adopt proposed amendments to California Rules of Court, rule 976, to clarify and expand the criteria that the Courts of Appeal should consider when deciding whether to publish an opinion.

2. Assuming the proposed amendments are adopted, periodically evaluate their impact on Court of Appeal publication rates.

3. Reevaluate at a future time whether the rule 976 presumption against publication should be changed to a presumption in favor of publication.

4. Encourage further judicial education regarding the publication rules and related practices.

5. Consider appointing a committee to:

   (a) Evaluate the feasibility of procedures whereby the Supreme Court could order the partial publication or partial depublication of a Court of Appeal opinion.

   (b) Evaluate the possibility of expanding the circumstances under which parties may draw the Supreme Court's attention to unpublished opinions.

   (c) Review and make recommendations concerning the publication of opinions of the appellate divisions of the superior court.

II. Introduction and Summary of the Report

The California Supreme Court appointed the Advisory Committee on Rules for Publication of Court of Appeal Opinions in November 2004. The court charged the committee with reviewing the standards for the publication of opinions of the Courts of Appeal and with recommending to the court whether the existing criteria or procedures set forth in the rules for publication of these opinions should be changed. The committee specifically focused on whether the existing rules were being applied uniformly across the six appellate districts.

The practice of selectively publishing intermediate appellate court opinions has served as an effective way to create and manage a body of precedential appellate opinions that provide accessible and useful guidance for litigants and the public. The goal is to allow appellate opinions to be assessed against specific criteria, so that those meeting the criteria are published and therefore citable; those not meeting the criteria are not published, but are available to the public from a variety of sources. Although by and large the approach in existence has been successful, the committee's review suggests that some important adjustments should be made to better ensure the publication of those opinions that may assist the reasoned and orderly development of the law.

Article VI, section 14 of the California Constitution gives the Supreme Court the authority and responsibility to decide which cases are published.[1] Pursuant to that authority, the court has established standards for publication of appellate opinions, set forth in the California Rules of Court, rule 976 et seq. The current rules provide that all opinions of the Supreme Court are published. An opinion of the Court of Appeal or the appellate division of the superior court may not be published unless it meets one of four specified criteria: 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." (Rule 976(c).) A majority of the panel certifies an opinion for publication. (Rule 976(b).)

Some members of the California legal community have long advocated that all opinions of the Court of Appeal should be published, or, in the alternative, that all opinions should be made citable. After various legislators expressed interest in ensuring that all appropriate opinions be readily available, Chief Justice Ronald M. George consulted with the court and appointed the committee to determine whether a disparity in publication practices exists among the appellate districts and within their divisions, and to consider whether the existing publication rules should be amended to better assist the courts in

[1] Article VI, section 14 of the California Constitution provides in part: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person."

making their initial determination of whether to certify an opinion for publication. Associate Justice Kathryn M. Werdegar was named as Committee Chair.

The debate about whether all opinions should be published is not unique to California. For example, the Judicial Conference of the United States has approved a proposed rule that would allow citation to all unpublished federal decisions. Proponents of unlimited publication argue that unpublished opinions may be used to suppress certain types of decisions or to prevent Supreme Court review. Opponents note the large number of opinions issued in California and the state constitutional requirement that all cases be decided in writing with reasons stated. The committee was not asked to consider the question of allowing citation or publication of all opinions; the committee's charge was to consider whether the existing standards for publication can be improved so that the cases that may provide useful guidance to litigants and the public are published.

To assist in fulfilling its charge, the committee reviewed practices in other jurisdictions, relevant literature, and recent statistical information on the publication practices of the Courts of Appeal. Additionally, two surveys were conducted, one of the justices of the Courts of Appeal and another of attorneys, particularly those engaged in appellate practice. The results of these surveys informed the committee's recommendations.

The statistical analysis and, to a lesser extent, the survey results suggested several neutral factors that explain why certain districts have higher publication rates than others. When analyzed over time and controlled for case type, it appears that publication rates are relatively consistent across districts and divisions. Several areas deserving consideration were raised by the responses to the survey, however, and the committee believes that publication rules and practices can and should be improved and clarified. We believe that doing so will decrease the number of decisions that are not published, but should be.

The committee recommends that the criteria in California Rules of Court, rule 976(c) be amended to make them more specific and to include reference to factors that should *not* play a role in the decision of whether to publish an opinion. Several other options were considered by the committee, such as changing the presumption of rule 976 to one in favor of publication, rather than against. Survey results indicated, however, that a majority of the legal community did not support such a change and a majority of the committee decided not to recommend revising the presumption at this time.

The committee also considered several other potential innovations. It recommends that a future advisory committee consider whether 1) the Supreme Court should exercise the option of ordering the partial publication or depublication of a Court of Appeal opinion, 2) the Supreme Court should evaluate whether parties may refer it to unpublished opinions, and 3) the rules relating to the publication of opinions by the appellate divisions of the superior court should be revised.

III. Form of This Report

The report describes the committee's process (Part IV) and the background and history of selective publication in California and in certain other jurisdictions (Part V). It details the process of developing the statistics and surveys upon which the committee relied, and analyzes the results (Parts VI and VII). The report's recommendations for amending California Rules of Court, rule 976, and for areas of inquiry that future committees might address are in Part VIII. The public commentary received in response to the proposed amendments will follow (Part IX). In its conclusion, the committee recommends areas of inquiry for future committees to address (Part X). All of the supporting documents regarding the statistics and surveys are included as appendices to this report (Part XI).

IV. Process for Developing the Report of the Task Force

A. The Committee Charge

The Supreme Court charged the committee with the task of reviewing the existing standards for the publication of opinions of the Courts of Appeal and with recommending to the Supreme Court whether the criteria or procedures set forth in the rules for publication of these opinions should be changed with regard to the practices of the Courts of Appeal and the Supreme Court. The committee was asked to consider several specific points, including consistency in practice among the appellate districts, relevant Supreme Court procedures and oversight, and the treatment of opinions published by the appellate divisions of the superior court.[2] The committee focused on rule 976 and on how the

[2] The full text of the committee's charge reads as follows:

The committee is charged with reviewing the existing standards for the publication of opinions of the Courts of Appeal and with recommending to the Supreme Court whether the criteria or procedures set forth in the rules for publication of these opinions should be changed with regard to the practices of the Courts of Appeal and the Supreme Court.

In fulfilling its charge, the committee should consider consistency in practice among the districts and divisions of the Courts of Appeal, whether express or implicit local standards guide the process in any individual district or division of the Courts of Appeal, and whether further standards should be developed to assist those courts in their initial determination whether to certify an opinion for publication.

The committee further should consider what weight the Supreme Court should accord to the preferences of the authoring court when acting upon a request for publication, whether the criteria applied by the Supreme Court for ordering publication should be the same as those applied by the Court or Appeal, whether the Supreme Court should take into account additional criteria in determining whether to order depublication, and the weight, if any, to be given to the issuance of a dissenting opinion by a justice on the Court of Appeal panel or to a request to publish by one justice on the Court of Appeal panel.

The committee also should 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.

In addition, the committee should consider whether the standards applied to determine whether to certify for publication an opinion of an appellate division of the superior court should remain the same as those governing the Courts of Appeal.

Finally, the committee should 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.

Courts of Appeal decide to certify opinions for publication. The committee concluded that changes to the other rules in this series are not warranted at the present time.

B. Composition of the Advisory Committee

The 13 members of the committee include one justice from each of the six appellate court districts, several attorneys with extensive appellate practice experience, the Reporter of Decisions, and the Principal Attorney to the Chief Justice. The committee is supported by staff from the Administrative Office of the Courts' Office of the General Counsel and Office of Court Research. The participants in the committee are:

Chair: Hon. Kathryn Mickle Werdegar, Associate Justice, California Supreme Court

Hon. Joanne Parrilli, Associate Justice of the California Court of Appeal, First Appellate District

Hon. Kathryn Doi Todd, Associate Justice of the California Court of Appeal, Second Appellate District

Hon. Fred K. Morrison, Associate Justice of the California Court of Appeal, Third Appellate District

Hon. Patricia D. Benke, Associate Justice of the California Court of Appeal, Fourth Appellate District

Hon. Gene M. Gomes, Associate Justice of the California Court of Appeal, Fifth Appellate District

Hon. Richard J. McAdams, Associate Justice of the California Court of Appeal, Sixth Appellate District

Mr. Dennis A. Fischer, Law Offices of Dennis A. Fischer

Mr. Ellis J. Horvitz, Horvitz & Levy

Ms. Victoria J. DeGoff, DeGoff & Sherman

Mr. Richard Frank, Chief Deputy Attorney General, California Department of Justice

Ms. Beth J. Jay, Principal Attorney to the Chief Justice, California Supreme Court

Mr. Edward Jessen, Reporter of Decisions, California Supreme Court

---

The committee shall report to the Supreme Court concerning its findings and conclusions and make recommendations, if appropriate, for improving the standards for publication of opinions to better ensure the publication of those opinions that may assist in the reasoned and orderly development of the law.

Staff: Ms. Lyn Hinegardner, Attorney, Office of the General Counsel, Administrative Office of the Courts

Staff: Mr. Clifford Alumno, Court Services Analyst, Office of the General Counsel, Administrative Office of the Courts

Staff: Mr. Chris Belloli, Senior Research Analyst, Office of Court Research, Administrative Office of the Courts

C. Meetings of the Advisory Committee

The committee met twice prior to development of its initial report, once in January 2005 and again in May 2005. In addition, the committee communicated via e-mail and telephone conferences.

The January meeting was primarily devoted to presentations on the background and status of the publication of Court of Appeal opinions. Additionally, the committee reviewed a draft of the survey that was later sent out to all Court of Appeal justices. This survey also served as the basis of a related survey that was targeted at attorneys having a substantial appellate practice. At its May meeting, the committee reviewed the results of the justices' survey and the preliminary results of the attorney survey. The committee formulated its tentative recommendations, which were finalized after reviewing the final report on the attorney survey results.

D. Public Commentary

The committee solicited information through two surveys. The committee circulated a comprehensive survey regarding publication rules and practices to all justices on the Court of Appeal and received 86 responses. A similar survey was made available to attorneys, particularly those having substantial appellate practices. Approximately 600 attorneys viewed or completed at least a portion of that survey. In addition, the committee intends to circulate this draft report for public comment.

V. Background and Current Rules of Court on Publication

Under the state Constitution, the Supreme Court has the authority to determine which opinions of the Supreme Court and Courts of Appeal are published and may therefore be cited as precedent in state courts. Pursuant to this authority, the Supreme Court adopted rules of court governing publication of opinions. Rule 976(a) provides that all Supreme Court opinions shall be published. Rule 976(b) through (e) addresses publication of Court of Appeal and superior court appellate divisions opinions, including criteria for publication. Additionally, rule 976.1 addresses the publication of selected portions of an opinion. Rule 977 addresses the limited circumstances under which parties may cite to unpublished opinions. Rule 978 provides the procedures whereby requests can be made

to publish an unpublished opinion, and rule 979 addresses requests made to depublish a published opinion.[3]

A. Brief Summary of the History of Publication in California

The history of the publication rules in California dates back to *Houston v. Williams* (1859) 13 Cal. 24, in which the Supreme Court held that the Legislature lacked the authority to compel the court to document its opinions in writing with reasons stated. The California Constitution of 1849 included a provision allowing the Legislature to provide for the publication of statutes and judicial decisions as it deemed appropriate. The court concluded, however, that the provision did not authorize the Legislature to require that all decisions be rendered by written opinion. At the Constitutional Convention of 1879, a clause was adopted requiring that the decisions of the Supreme Court be made in writing with grounds stated. In 1904, the clause was amended to include the publication of Court of Appeal opinions, and to give the Supreme Court the power to determine which appellate opinions would be published.

All opinions of the Supreme Court and the Courts of Appeal were published until the number of opinions began rapidly increasing during the middle of the last century. The concept of selective publication emerged in the early 1960's. During the middle years of the last century, the courts annually produced an average of about 10 volumes of Court of Appeal opinions, averaging about two-thirds of the number of pages of modern volumes. This increased to an average of about 13 volumes a year during the last few years preceding the start of selective publication. After rules for selective publication were adopted in 1964, the courts issued an average of nine volumes annually over the next several years. The current average is about a volume per month, depending on printing format.

California Rules of Court, rule 976, was first adopted in 1964 pursuant to the authority contained in article VI, section 14 of the California Constitution, which is echoed in sections of the Government Code.[4] The original rule contained a presumption that all Court of Appeal opinions were publishable, requiring panels to certify that opinions were not publishable based on failure to satisfy criteria similar to the criteria that are presently in the rule. California was the first jurisdiction to enact selective publication measures.

B. Work of Prior Committees on Publication

After their adoption, the rules regarding selective publication were first revisited in 1971. Chief Justice Donald R. Wright appointed a committee that surveyed all Court of Appeal justices and encouraged public comment on the impact of rule 976. After considering the input received, the committee recommended that the rule be retained, but that the

[3] The full text of these rules is attached as Appendix A.

[4] Government Code section 68902 (derived from earlier code sections) provides: "Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court."

publication criteria be expanded.[5] Next, the committee recommended that the rule's presumption in favor of publication be removed and replaced by the presumption that opinions are not publishable unless they fall within the stated criteria. The court accepted the committee's recommendations and adopted these changes.

In 1979, a committee appointed by Chief Justice Rose Bird reviewed rule 976 in an extensive study that included public hearings and circulation of draft proposals for public comment, leading to the submission of a report to the court and the Judicial Council. The same committee recommended the adoption of a rule allowing partial publication as a one-year experiment.[6] Several of the committee's recommendations for changes to rule 976 were not adopted. For example, one recommendation was to amend the publication criteria to provide for publication if there is a dissenting or concurring opinion in which the reasons are stated. The principal objection to this proposal was that, in most cases, whether a decision has precedential value is unrelated to whether it has a dissenting or concurring opinion, as these opinions are often devoted exclusively to factual disagreements.

In 1989, the Supreme Court approved new rule 979, establishing procedures for making requests for depublication. In March 2001, the Appellate Process Task Force authored a White Paper on unpublished opinions of the Court of Appeal.[7] The report discussed the value of making all unpublished opinions available electronically. Opinions not certified for publication have always been available to the public at the clerks' offices for the Courts of Appeal. Today, unpublished opinions are accessible on the California Courts Internet site, as well as online legal research databases.

C. Current Status of Published/Unpublished Opinions

1. Volume of opinions

From 2002 to 2004, the annual total of Court of Appeal opinions averaged 12,040 (12,313 in 2002; 12,166 in 2003; and 11,642 in 2004). During these years, the Courts of Appeal annually filed an average of 11,027 unpublished opinions (11,294 in 2002; 11,183 in 2003; and 10,604 in 2004), and 1,013 published opinions (1,019 in 2002; 983 in 2003; and 1,038 in 2004). Of the total opinions, on average, 8.4 percent were published during this time (8.3 percent in 2002; 8.1 percent in 2003; and 8.9 percent in 2004).

2. Online availability of unpublished opinions

Starting October 1, 2001, all Court of Appeal opinions filed without publication certification have been made available on the California Courts Web site at <http://www.courtinfo.ca.gov/opinions/nonpub.htm>. With few exceptions, opinions are received and posted to the site the day of filing. Opinions remain available there for 60 days, except that opinions in which the Supreme Court grants review remain on the site

[5] A copy of the 1971 report is attached as Appendix B.
[6] A copy of the 1979 report from the Judicial Council is attached as Appendix C.
[7] A copy of the 2001 White Paper is attached as Appendix D.

until the Supreme Court's disposition is final. All unpublished opinions posted to the site include a conspicuous notice and explanation that unpublished opinions are not precedential and generally are uncitable.

LexisNexis and Westlaw, the two major providers of online legal research materials for the California bench and bar, both integrate every unpublished Court of Appeal opinion into their respective services, and each has done so since October 1, 2001. Both services allow users to limit research only to California published opinions. For LexisNexis users, the "CA Published Cases" database excludes unpublished Court of Appeal opinions from search results, and for Westlaw users, "West's California Reported Cases" database excludes unpublished opinions from search results.

Other LexisNexis and Westlaw databases include both published and unpublished California opinions, but the search results listings in both services differentiate between published and unpublished opinions. For example the "CA State Cases" and "CA Federal & State Cases" databases in LexisNexis include published and unpublished opinions, and Westlaw's "West's California State Cases" and "California State & Federal Cases" databases include both; both databases retain the conspicuous notice and explanation that unpublished opinions are not precedential and generally uncitable.

3. Tracking of unpublished opinions

The committee learned that the Supreme Court's criminal and civil central staffs internally track issues in cases seeking review, whether published or unpublished, in order to identify inconsistencies among districts and between published and unpublished opinions. Internal computer programs, along with a numerical system for identifying issues, assist the court in tracking issues presented in cases in which a petition for review is filed in order to determine if conflicts are developing or if particular questions or claims warrant the court's full-scale review.

4. No increase in publication requests since online availability

Notwithstanding the availability of unpublished opinions on the Internet since October 2001, no discernible increase has occurred in requests to Courts of Appeal and the Supreme Court to publish opinions originally filed without certification for publication. In fact, in 2003 and 2004 the number of publication requests filed in the Supreme Court declined from the historical average. The chart on the following page shows the combined totals of publication requests that the Supreme Court's criminal and civil central staffs evaluated each year.[8]

[8] The numbers include both requests that the Court of Appeal thought were without merit, and those that the Court of Appeal agreed with only after losing jurisdiction to order publication. Both civil and criminal central staffs at the Supreme Court track stand-alone requests for publication (i.e., requests not part of petitions for review), but publication requests intertwined with petitions for review are not reflected in these numbers and there is no practical way to determine how many there have been.

Year	Number of postfiling publication requests
1998	217
1999	224
2000	217
2001	184
2002	201
2003	168
2004	185

The following chart shows by calendar year the number of opinions ordered published by both the Courts of Appeal and the Supreme Court after an initial decision not to certify for publication.[9]

Year	Number of postfiling publication orders
1998	116
1999	120
2000	109
2001	92
2002	126
2003	119
2004	126

5. Granting review of published/unpublished opinions

Between January 1, 2001, and August 31, 2005, the Supreme Court granted review in 578 cases in which there had been a published opinion and 284 cases in which the opinion was not certified for publication. Only about 8 percent of opinions overall are published (see ante), but 68 percent of total grants were from published opinions.

The Supreme Court's grant of a petition for review may be an outright grant, usually followed by briefing, argument, and an opinion, or it may be a "grant and hold," which occurs when the Supreme Court already has granted review in a case concerning the same issue and anticipates deciding the controlling issues in the lead case. Briefing is deferred

[9] The column labeled "Number of postfiling publication orders" is an estimate of the number of opinions that were initially filed by Courts of Appeal as nonpublished, but were later ordered published by either the Court of Appeal or the Supreme Court. Within the time frame for this report, there was no discernible way to extract accurate data from the docket databases for the Courts of Appeal or Supreme Court. Instead, the estimate relies upon a daily log for published opinions that has been maintained in the Reporter's office for Web posting. For each day, the opinions received and posted are listed with name, docket number, filing date, and district/division. If there is any significant gap between the date of the entry and the filing date for the opinion, that factor (with statistically insignificant exceptions) reliably indicates an opinion that was filed as nonpublished and then certified after the court reconsidered. These numbers also include postfiling certifications by the Supreme Court where the Court of Appeal had lost jurisdiction but nonetheless recommended, upon reconsideration, that the Supreme Court grant the request to publish.

in the latter matters, and "grant and hold" cases typically are disposed of by order and not by an opinion of the Supreme Court.

Briefing was deferred in 152 of the 578 grants of review from published opinions described above and in 200 of the 284 grants of review from unpublished opinions. Between 2001 and 2005, the Supreme Court issued a total of 441 opinions,[10] 360 of these arose out of cases in which the Court of Appeal decision was certified for publication and 81 out of cases in which it was not certified. Cases in which the Court of Appeal opinion was certified for publication thus accounted for about 82 percent of the matters in which the Supreme Court issued an opinion. Of the approximately 92 percent of cases overall that were not certified for publication, only one-tenth of one percent of these cases resulted in opinions issued by the Supreme Court. Of the approximately 8 percent of cases in which the opinion had been certified for publication, about 7 percent resulted in a Supreme Court opinion.

6. Depublication

California Rules of Court, rule 976(d)(2) provides: "The Supreme Court may order that an opinion certified for publication [by a Court of Appeal] is not to be published or that an opinion not certified is to be published." Rule 977(a) provides that opinions "not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."[11]

Depublication orders may be filed after opinions appear in the Official Reports advance pamphlets but prior to final editing work for the bound volume. (See Cal. Rules of Court, rule 976(e).) Depublished opinions are not included in the bound volumes of the Official Reports. Between 1985 and 2000, the Supreme Court averaged about 90 depublication orders per calendar year; in recent years (2001 to 2004) the average has been about 22 depublication orders per calendar year.

D. Practices of Other Jurisdictions

1. Summary of rules and practices

Jurisdictions that differentiate between opinions that have precedential value and those that do not use similar criteria.[12] In jurisdictions other than California, depublication and partial publication are rare, especially depublication by the state's highest court. Research

[10] This total number of opinions excludes death penalty opinions, original proceedings, and certified questions from the 9th Circuit.

[11] The Supreme Court exercises this authority in the form of orders typically reading: "The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed _____, ___, which appears at ___ Cal.App.4th ___. (Cal. Const., art. VI, section 14; rule 976, Cal. Rules of Court.)"

[12] For a comprehensive summary of publication rules from other jurisdictions see Serfass, *Federal and State Court Rules Governing Publication and Citation of Opinions* (2001) 3 Journal of Appellate Practice and Process 251.

found only one other jurisdiction (Arizona), whose rules provide that the Supreme Court has the authority to order depublication of an opinion.

Some courts phrase the presumption in favor of publication rather than against. Some courts allow publication upon the request of a single judge of the panel, as opposed to California's requirement of a majority request. As of 2003, only nine states either published all of their appellate opinions, had no rules against citation to unpublished opinions, or allowed citation of unpublished opinions as precedent.[13] Twelve other states allowed citation to unpublished opinions for persuasive value only.[14]

2. Practical distinctions between California and other jurisdictions

California is virtually unique in its constitutional requirement that decisions by Courts of Appeal that determine causes "shall be in writing with reasons stated." (Cal. Const., art. VI, § 14.) By contrast, all other jurisdictions surveyed except the State of Washington provide intermediate appellate courts with some discretion to decide causes on appeal summarily, without issuing opinions in writing stating the reasons. Intermediate appellate courts in some states (e.g., Georgia, Alabama, Florida, Kansas, Massachusetts, and Pennsylvania) have discretion to make summary dispositions of causes on appeal, particularly where appellate judgments merely affirm the rulings of trial courts and the reasons for those trial court rulings are found to be without error.

The Federal Rules of Appellate Procedure, rule 36, and related local rules for the various circuits give the United States Courts of Appeals discretion to decide cases on appeal without written opinions. The First Circuit's Local Rule 36 states: "The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion."

Recently, the Judicial Conference of the United States voted to send a rule proposal (Proposed Federal Rules of Appellate Procedure, rule 32.1) to the United States Supreme Court for consideration. This rule would allow citation to all unpublished federal decisions. If the court approves the rule change, the proposal will be transmitted to Congress for final endorsement. Even if the Courts of Appeals cease differentiating between citable published opinions and uncitable unpublished opinions, those courts would apparently retain discretion to summarily dispose of causes on appeal by orders not stating reasons.

3. Comparison to New York state

The committee was particularly interested in publication practices in New York because that state is roughly comparable to California in terms of its volume of cases. New York ostensibly publishes all its Court of Appeal and Appellate Division opinions (its high

[13] Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis* (2003) 5 Journal of Appellate Practice and Process 473, 481–482.
[14] *See* Barnett, *supra,* n. 11.

court and intermediate appellate court, respectively). In 2002, 10,674 appeals filed in the Appellate Division in New York were disposed of after submission by either a full opinion or a memorandum opinion. The option of a memorandum opinion in New York creates a significant distinction between New York and California practices.

Most full opinions generated by the New York appellate courts are roughly comparable in length to California appellate opinions, but the memorandum opinions are very short. In 2003, New York published 301 full opinions in 1,988 printed book pages and 10,085 memorandum opinions in 10,132 printed book pages. These numbers do not vary greatly from year to year. In one volume of opinions examined by the committee (Vol. 290), 39 cases in which full opinions were written produced 200 pages of material. Six hundred sixty-nine cases resolved in memorandum opinions resulted in 732 pages of text. New York's Appellate Division courts also have discretion to dispose of cases through affirmances without any opinion, but the practice is seldom used.
New York's practice and procedure, which relies heavily upon the use of brief memorandum opinions, 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.

VI. Statistics, Surveys, and Analysis

A. Publication Statistics in California

The committee studied the statistics collected by the Judicial Council on publication rates for fiscal years 1999–2000 through 2003–2004.[15] The data was broken out by district. For the three districts that have separate appellate divisions, the statistics for each division also were broken out separately.[16]

[15] For purposes of these statistics, partial publications are treated as published opinions.
[16] See Appendix E for complete set of publication statistics.

The committee examined the five-year average publication rates for the six districts. Statistically, because the numbers are limited, it is difficult to establish what constitutes a significant variation. Overall, however, if case type, variations in workloads and other factors discussed below are taken into account, the range of publication rates is quite consistent across the districts and the range of fluctuation within each district is similar.

Publication Rate by Appellate District – 5-year average (FY 1999-2000 through 2003-2004)

Appellate District	Publication Rate	Low	High
District 1	9.2%	8.3%	10.4%
District 2	7.9%	6.9%	9.3%
District 3	7.7%	6.5%	8.7%
District 4	7.2%	5.9%	8.4%
District 5	3.7%	3.2%	4.0%
District 6	4.8%	4.0%	6.0%

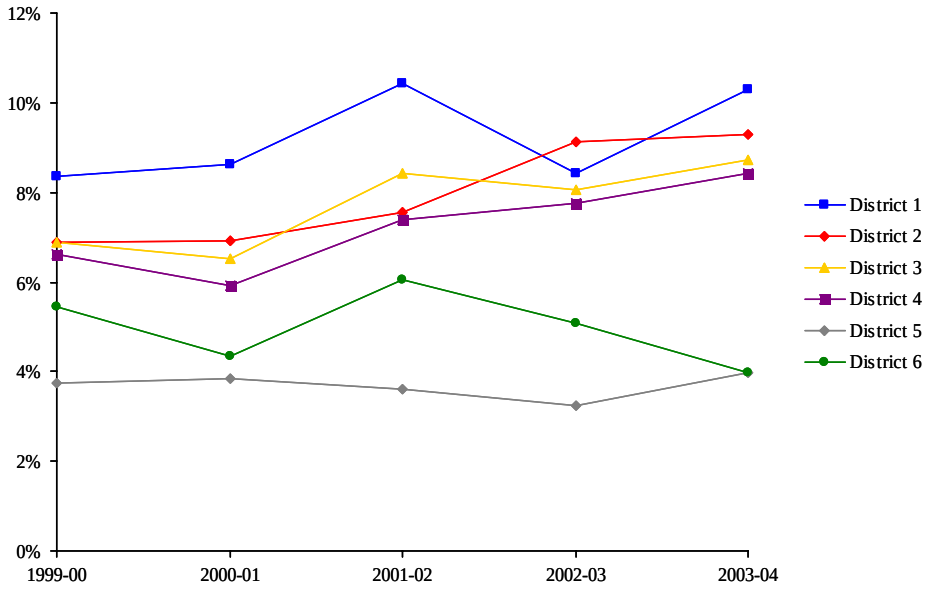
Statewide Publication Rate by Year

Fiscal Year	Publication Rate
1999-00	6.6%
2000-01	6.4%
2001-02	7.4%
2002-03	7.6%
2003-04	8.0%

The graphs below show publication rates across the districts from year to year, as well as across the three case types over time.

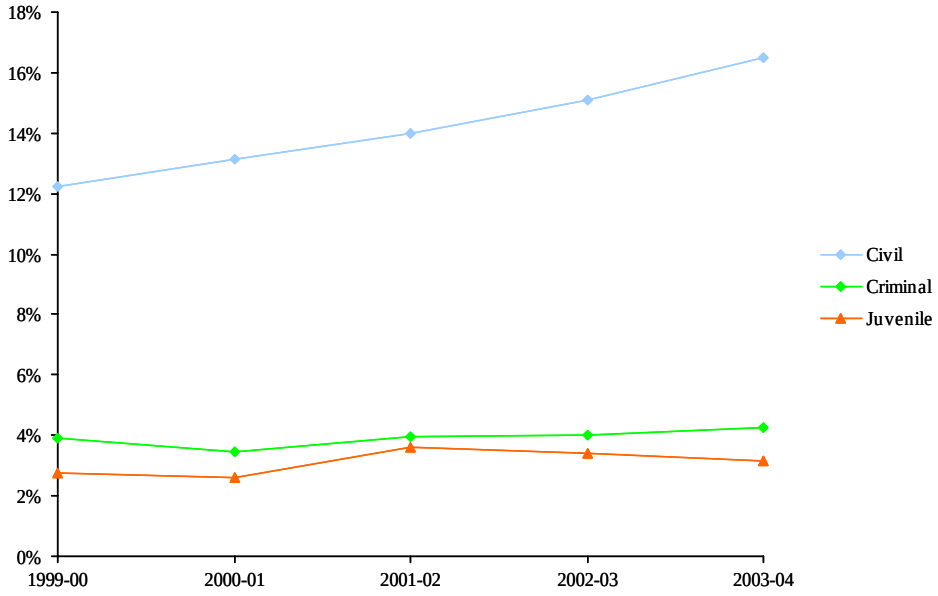
Graph 1, **Publication Rate by Appellate District,** shows that the publication rate for District 5 is consistently below the other districts across time. However, once case type is accounted for, District 5's publication percentages, although tending to be toward the bottom, are not as consistently below those of the other districts. The committee's analysis of these statistics is discussed in the next section.

Graph 1: Publication Rate by Appellate District – FY 1999-00 through 2003-04



Graph 2, **Publication Rate by Case Type** shows that the percentages of criminal cases and juvenile cases published are fairly consistent over the five-year span, while the percentage of civil cases published has increased. Further analysis was done to control for annual fluctuations in case type in order to make a statistical conclusion across the districts.[17]

Graph 2: Publication Rate by Case Type – FY 1999-00 through 2003-04

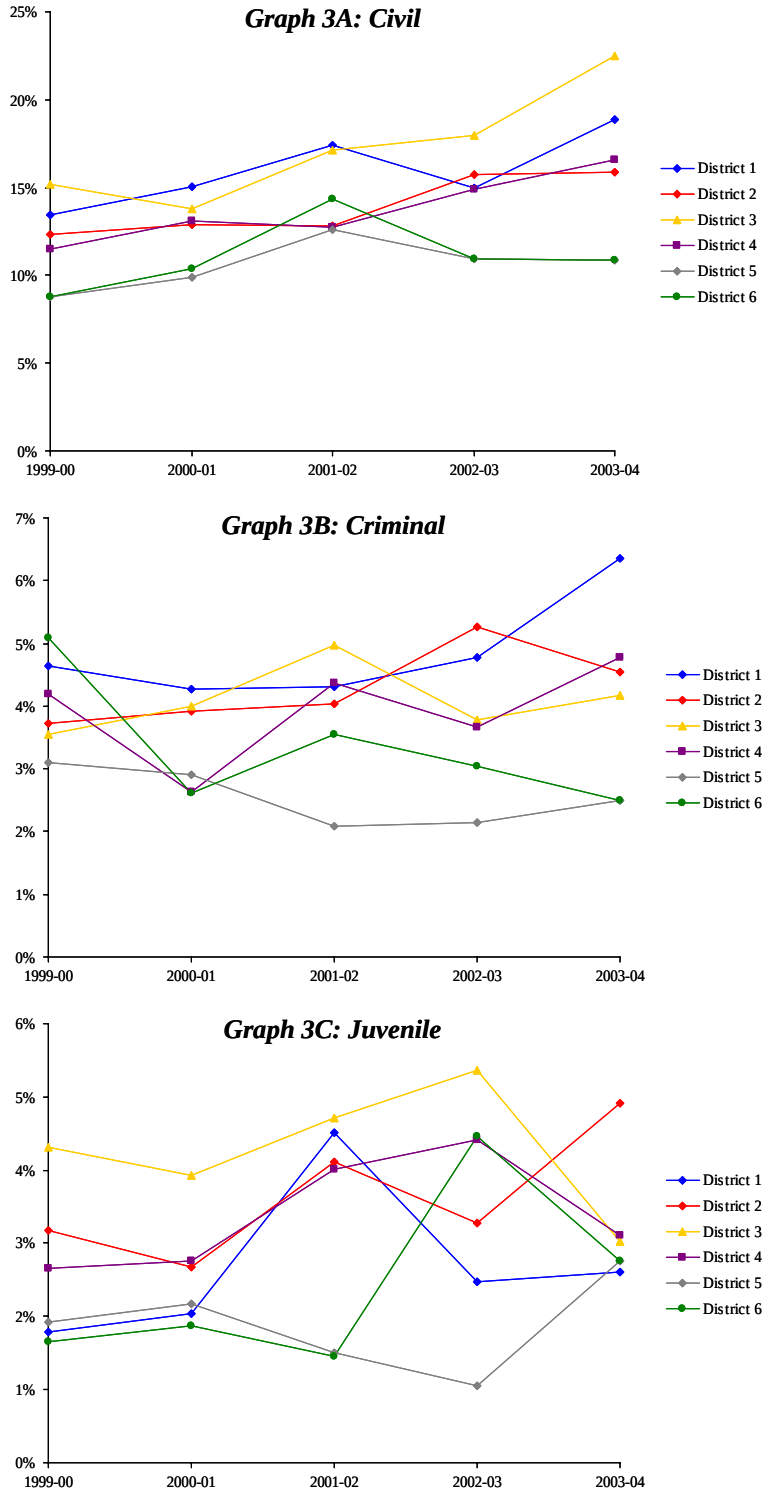


[17] Statistical control is achieved by including in a multiple regression model the variables that capture the variation on factors related to the dependent variable. For example, by including case mix in the equation, it becomes apparent that the different publication rates across districts are driven in part by the fact that civil

B. Analysis of Publication Statistics

The objective of the committee's analysis was to compare appellate district publication rates and to evaluate the impact, if any, of differences in case mix, workload, or other factors that might affect the publication rate. The charts to the right (Graphs 3A–3C) track some of the factors that may explain differences in publication rates among the Courts of Appeal.

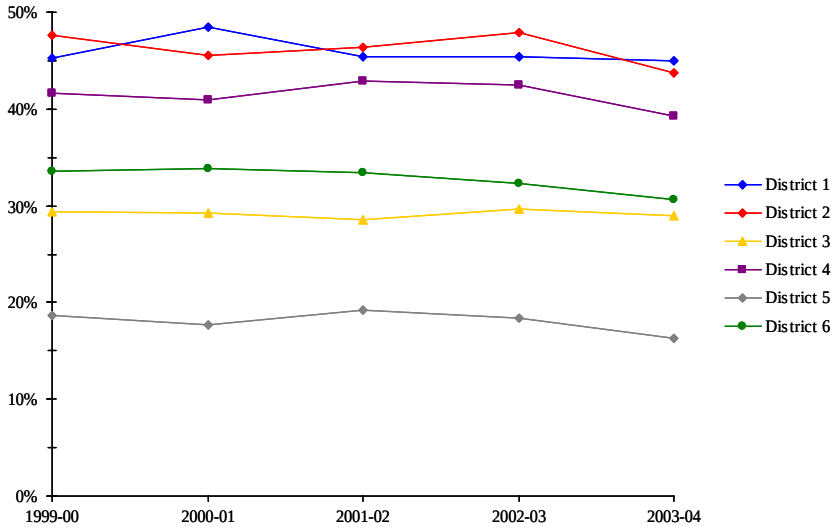
Graphs 3A–3C: Publication Rate by Appellate District by Case Type



filings are published at a much higher rate than other case types and that certain districts have much higher levels of civil filings.

1. Case mix

Graph 4: Civil filings as a proportion of total filings

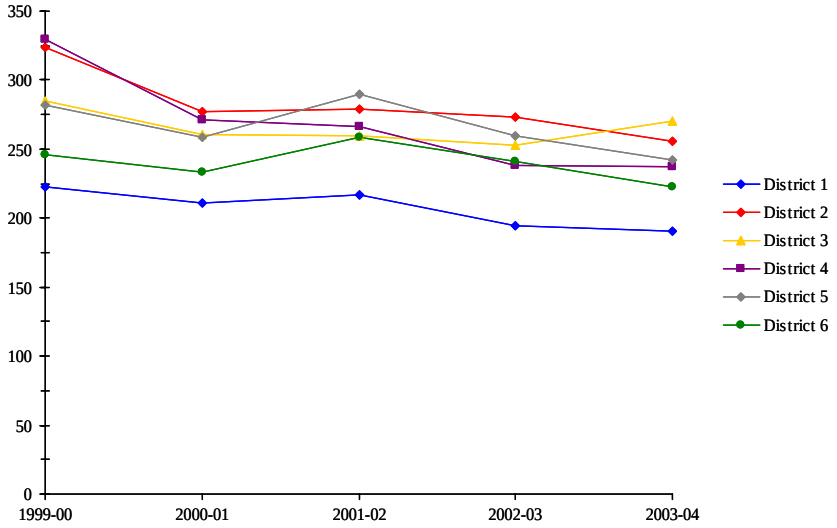


Case mix appears to be influential. Civil cases are four times more likely to be published than criminal or juvenile cases. Because civil cases have a much higher publication rate than other case types, districts where their civil filings make up a high proportion of their total filings will generally have higher overall publication rates. Graph 4 shows that for Districts 1 and 2, their higher overall publication rate appears to correlate, at least in part, with their high proportion of civil filings. Overall, Districts 5 and 6 have lower publication rates and a lower proportion of civil filings.

2. Workload

There also appears to be a statistically significant relationship between a court's workload and its publication rate, even using different methods of measuring workload. The decision whether to certify an opinion for publication thus may be affected by workload in the district. The committee hypothesized that because more work typically is devoted to preparing opinions for publication, courts with a high workload will likely publish fewer opinions due to perceived time constraints.

Graph 5: Total filings per appellate justice (FTE)

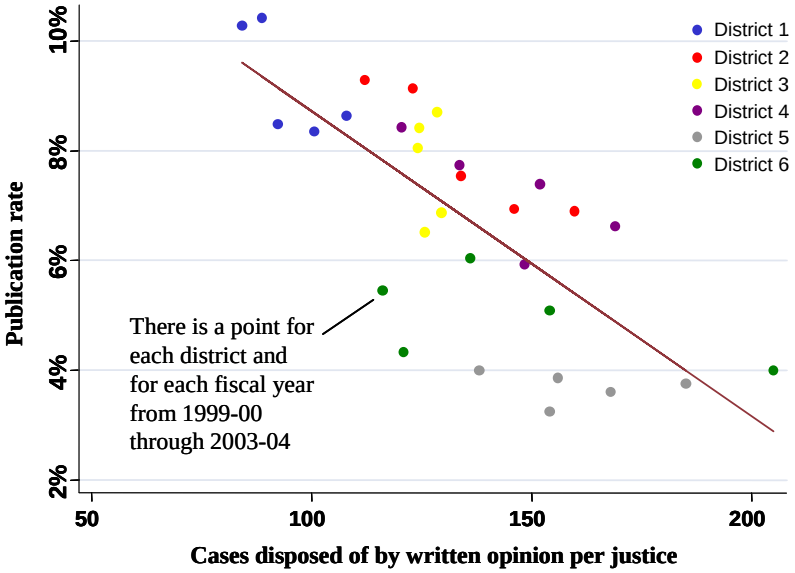


The statistics show that districts with a lower number of total filings per justice tend to have a higher publication rate, while districts with a higher number of total filings per justice tend to have lower publication rates. For example, District 1 has the highest publication rate overall (see Graph 1) and although, as noted above, this is probably related to its high proportion of civil filings per justice, the rate also may be affected by a lower workload as measured

by their total filings per justice (see Graph 5). District 1 consistently has had the lowest number of total filings per justice over the past five fiscal years.

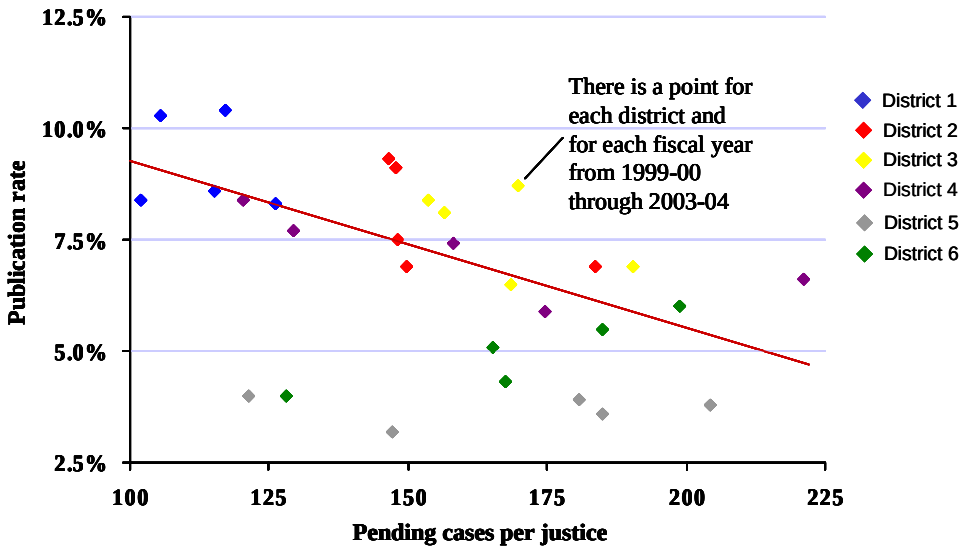
The statistics also strongly suggest a relationship between the publication rate and the number of cases disposed of by written opinion per justice. This workload measure shows that districts that dispose of a lower number of cases by written opinion per justice tend to have a higher publication rate while districts that dispose of a higher number of cases by written opinion per justice tend to have lower publication rates (see Graph 6). For example, District 5, which has had the lowest average publication rate over the past five years, has generally disposed of a higher number of cases by written opinions per justice.

Graph 6: Relationship between publication rate and the number of cases disposed of by written opinion



Finally, a third measure of workload—the number of cases pending at the end of the fiscal year per justice—shows the same relationship to the publication rate (see Graph 7). Districts with a lower number of pending cases per justice tend to have a higher publication rate while districts with a higher number of pending cases tend to have lower publication rates.

Graph 7: Relationship between publication rate and pending caseload



The preceding graphics indicate that there is a statistically significant relationship between a court's publication rate and its workload, using several different methods of measuring workload. Districts with a higher workload (i.e., higher number of cases disposed of by written opinion, higher number of pending cases) tend to have a lower publication rate while districts with a lower workload tend to have a higher publication rate. This suggests that workload is an important factor to be taken into account when analyzing differences in publication rates among districts. For example, District 1 has the highest average publication rate over the five fiscal years studied by the committee (see table on page 16). However when workload is included in a statistical analysis of publication rates, the publication rate for District 1 is not significantly higher than for the other districts.

3. Other factors

Other factors may account for some of the variation in publication rates across districts. For example, the publication rates in District 3, which are similar to Districts 1 and 2, cannot be attributed to a similarly higher proportion of civil cases. However, a disproportionate number of cases involving state government, such as election cases, are litigated in District 3. The committee surmised that factor may account for District 3's higher publication rate despite the fact the district's overall number of civil cases is not atypical. The higher publication rates in Districts 1 and 2 may be explained, in part, by the higher volume of business litigation generated in the San Francisco and Los Angles areas. Larger districts also will tend to decide cutting-edge issues before smaller districts do, simply by virtue of a larger pool of cases. Smaller districts that get the same issues later may be less inclined to publish because another court has already spoken. Because data on these factors is not available, the committee could not statistically confirm these hypotheses, but considered them logical bases for the differences found.

VII. Surveys

A. Justices of the Court of Appeal

1. Drafting and distribution

As noted above, in 1971 a survey was conducted of all appellate court justices regarding the publication rules. The committee concluded that a current survey could provide valuable information toward completing its charge. The survey explored whether disparity exists among districts and their divisions in the application of the publication rules, and whether implied or unspoken addenda to the publication rules exist. The committee also sought feedback on various potential reforms.[18] The survey included questions regarding the importance of the publication criteria found in rule 976, the frequency with which the justices had applied each criterion to justify publication, and other factors that may influence decisions on whether to publish an opinion.

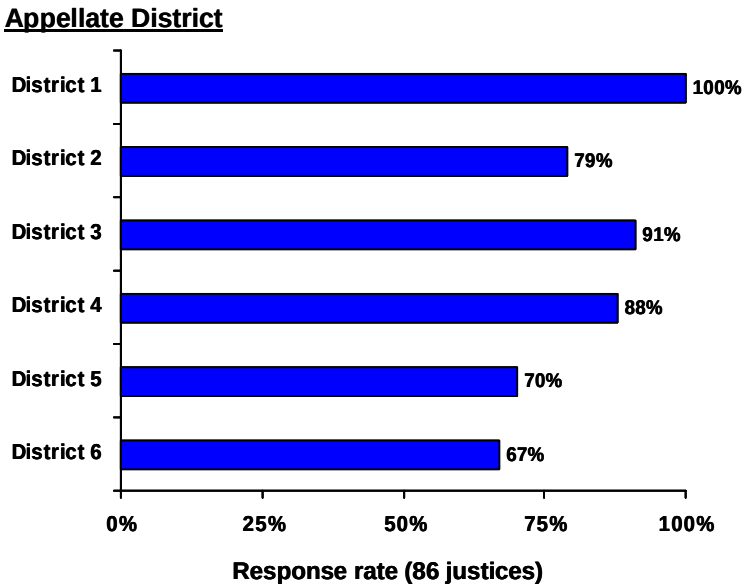
The survey was distributed to all justices both electronically and in hard copy. Each justice also received a list of his or her 10 most recently published opinions.[19]

The survey was administered using a double-blind process, which allowed the committee to track which justices submitted their survey responses, while allowing the justices to maintain anonymity. The committee concluded that such an approach would elicit the most candid responses, but the justices were given the option to identify themselves at the end of the survey.

[18] A hard copy version of the survey is included as Appendix F.
[19] A report showing the results with an accompanying analysis is included as Appendix G.

2. Response rate

The survey had an excellent 86 percent response rate overall. The response rate was fairly consistent across the six appellate districts, although District 1 had the highest response rate, with all 20 justices responding to the survey. Because Districts 5 and 6 have fewer justices than the other districts, the lower response percentages in these districts can be attributed to a relatively small number of nonrespondents.



B. Appellate Attorneys

The committee conducted a similar survey of practitioners, focusing especially on those with a significant appellate practice. In order to achieve substantial participation, the leaders of several appellate attorney organizations were informed about the survey by letter, and the survey was posted on the home page of the California Courts Web site, allowing all attorneys who were interested to respond.[20] The survey was available in hard copy and online. The survey elicited responses concerning publication from an attorney's perspective and differed in some respects from the justices' survey.[21] More than 600 persons viewed the online survey and almost 300 completed the entire survey.[22] The attorney survey was not conducted as a random sampling and thus the pool of survey respondents was self-selected, unlike the appellate justice survey, which was submitted to all justices.

C. Survey Results

1. Importance of the rule 976(c) criteria

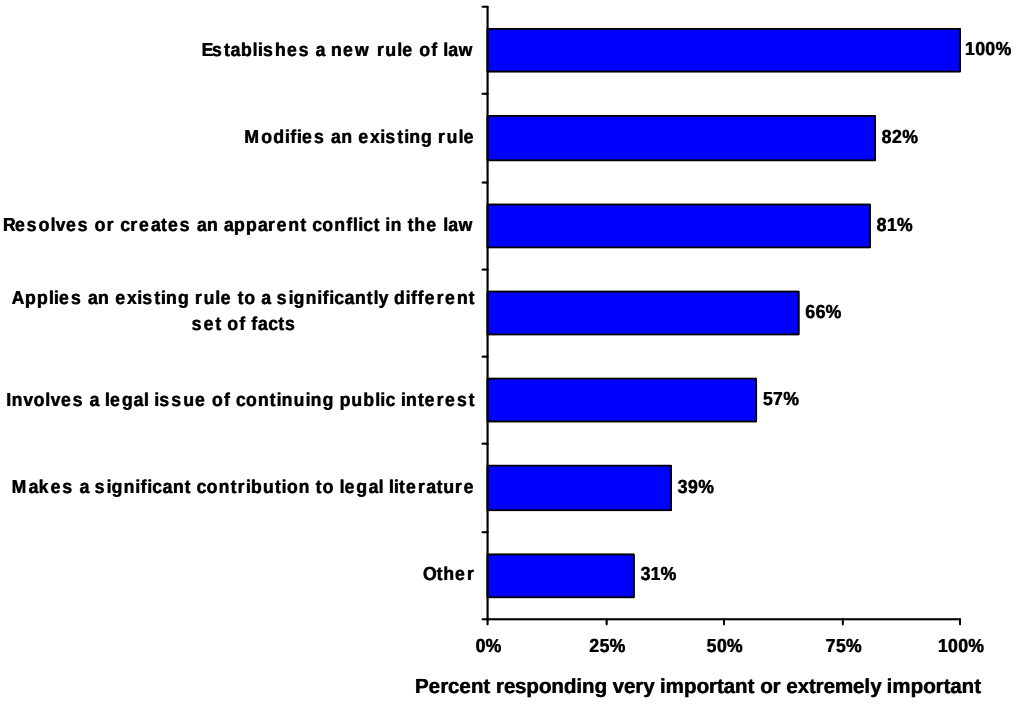
The justices were asked how important they felt each criterion in rule 976(c) is in persuading them that an opinion should be published. The most important criterion to the justices is "establishes a new rule of law," followed by "resolves or creates an apparent conflict in the law."

[20] A list of the organizations and individuals that the committee contacted directly is attached as Appendix H.
[21] A hard copy version of the survey is attached as Appendix I.
[22] A complete report of the responses received is attached as Appendix J.

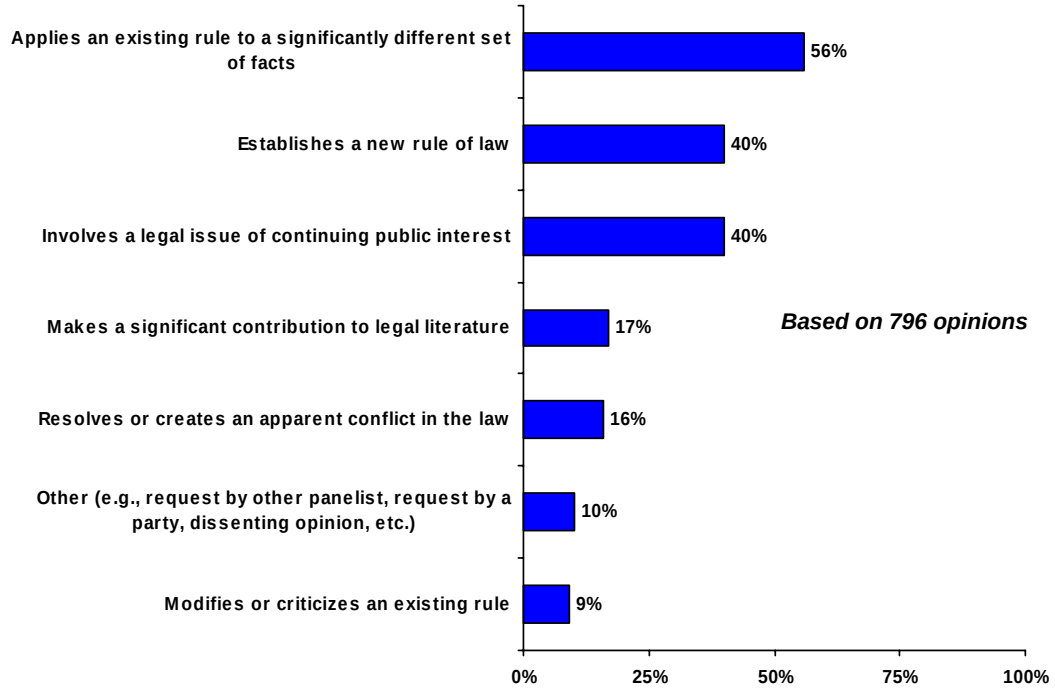
The justices also were asked which criteria formed the basis for their decision to certify for publication each of their most recent 10 opinions. The most frequently cited criterion is "applies an existing rule to a significantly different set of facts."

The differences between the two results can be explained by contrasting the subjective importance of the criteria with their practical application. For example, many justices feel that it is important to publish opinions that state a new rule of law; nonetheless, they may not often be given the opportunity to do so. The criterion "makes a significant contribution to legal literature" was cited infrequently by justices in regard to both importance and how often it formed the basis of a decision to certify a decision for publication.

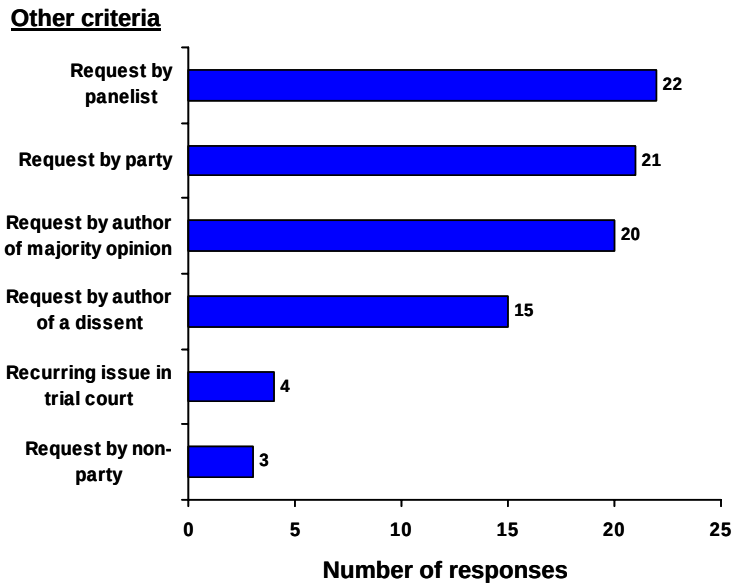
How important are the rule 976 criterion in persuading justices that an opinion should be published?



Proportion of all opinions from survey where the following criteria formed the basis to certify for publication



The justices cited several other criteria as at least somewhat important in persuading them that an opinion should be published. The other criterion cited most often is a request by a panelist, closely followed by a request by a party, a request by the author of the majority opinion, and a request by an author of a dissent. Other criteria that actually played a part in the justices' recent publication determinations include opinions that interpreted a statute and opinions for which publication was requested by a non-party.



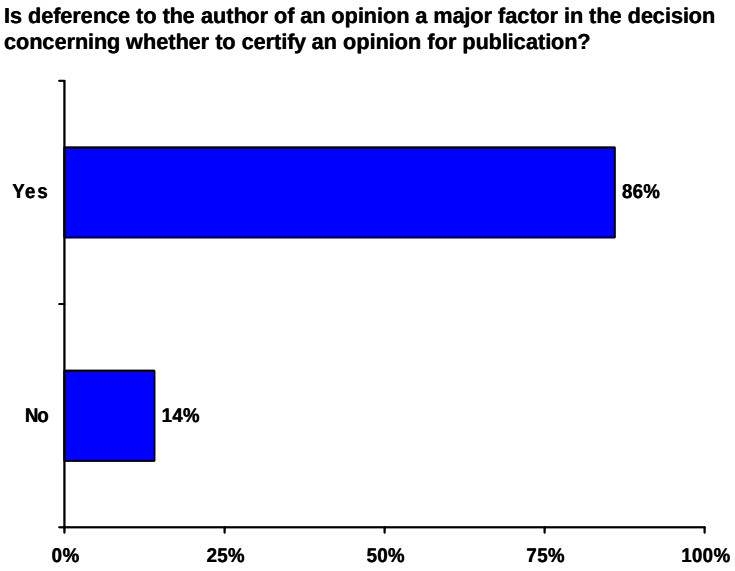
The results of the attorneys' survey roughly mirror the results of the justices' survey with respect to the relative importance of the rule 976(c) criteria.[23]

2. Publication process

The survey results indicate that the decision to certify an opinion for publication is typically made in one of three somewhat interrelated manners: (1) A collective decision is made by the entire panel; (2) the author makes a recommendation regarding publication to the panel, but the panel votes whether to publish; or (3) the author primarily determines whether or not to publish.

Districts differ regarding the timing of their decision on certification. In most cases, a tentative decision is made before oral argument. Some justices, however, prefer to decide after oral argument, and other justices are flexible as to when they make this determination.

Deference to the author and, to a lesser degree, deference to other panel members are cited by justices as major factors in the decision to certify an opinion for publication.[24]

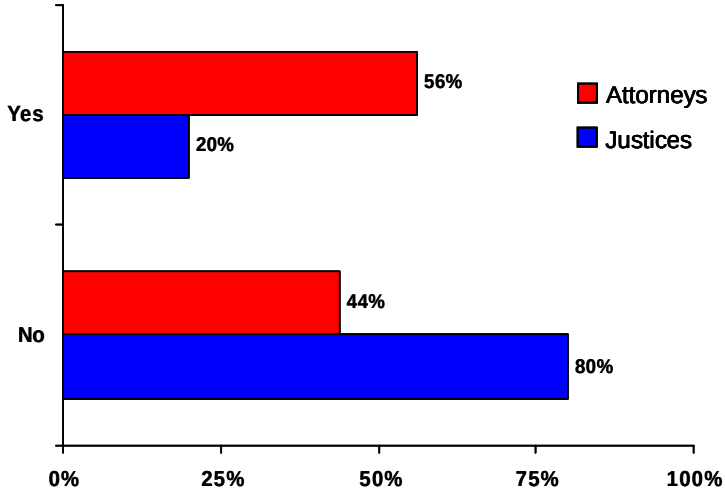


[23] See pages 5 and 6 of Appendix G for a graphic display of this data.
[24] Sixty-five percent of the justices said that deference to other panel members also is a major factor.

3. The influence of other factors on publication

An overwhelming majority of justices (95%) believe that civil and criminal cases are treated no differently with respect to certification for publication. Additionally, the great majority of justices stated that nothing other than the publication rules influences their determination whether or not to certify an opinion for publication. Nevertheless, 20 percent indicated that other factors, such as local traditions, standards, or practices, also may influence their decision. This finding is consistent statewide; no statistically significant differences appear in the responses received from each district. In contrast, a majority of attorneys believe that factors other than the publication rules have an influence on the justices' publication decisions, and 67 percent believe that the publication rules are not uniformly followed overall.

Does anything other than the rules, such as local traditions, standards, or practices, also influence the determination whether or not to certify an opinion for publication?

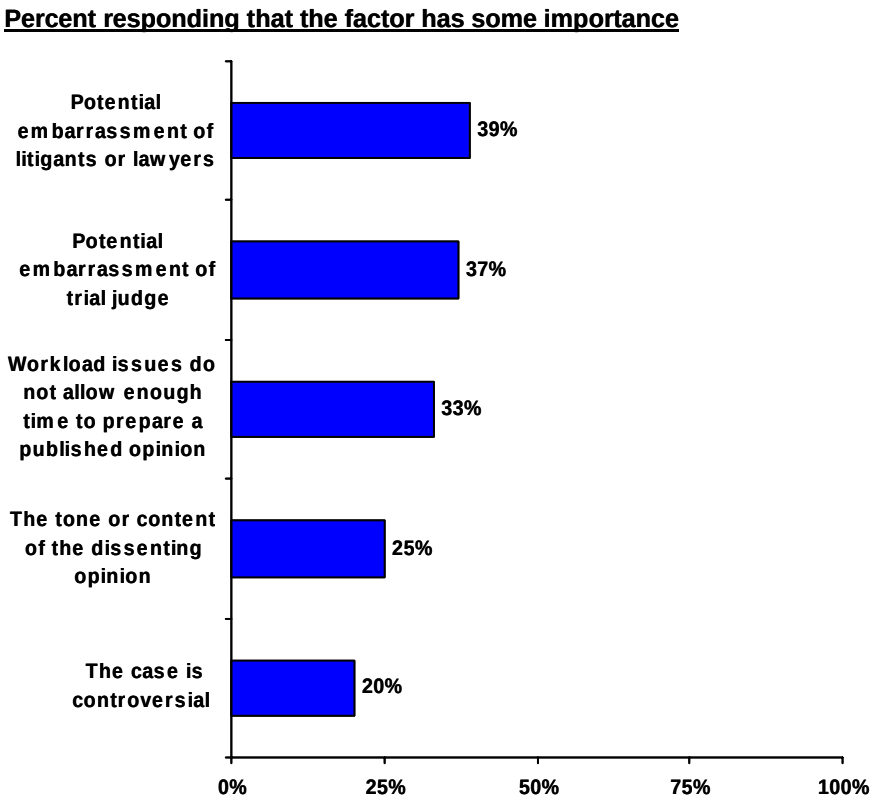


4. Unpublished opinions

Rule 976 does not mandate that an opinion be published if it meets the stated criteria. In order to explore this aspect of the rule, the justices were surveyed as to how frequently they have been involved in a case that resulted in an unpublished opinion that they thought should have, or could have, been published because it satisfied the publication criteria. About one-quarter of the justices either occasionally or frequently have been involved in a case that resulted in such an unpublished opinion. In contrast, 73 percent of attorneys indicated that they have been involved in such a case either occasionally or frequently.

The justices also were asked about the relative importance of certain factors in deciding *not* to publish a case that appears to meet the rule 976(c) criteria.

The justices listed among the factors having some importance: potential embarrassment of litigants, lawyers, or trial judges; workload not allowing enough time to prepare a published opinion; the existence or content of the dissenting opinion, and the controversial nature of the case.



With online availability of unpublished opinions, the committee was interested in the extent to which justices and attorneys incorporate these opinions into their work. Fifty-eight percent of the justices stated that they have relied on unpublished opinions in their work. Most of these justices indicated that they do so in order to consider the rationale or analysis used in a similar decision, or to ensure consistency with their own prior rulings as well as those within their district or division. Some justices also use unpublished opinions as a source of boilerplate language. In contrast, over 90 percent of the attorneys indicated that they have used unpublished opinions in the course of their practice. Attorneys were asked how often they find useful material in unpublished opinions that is not otherwise available from a citable source. Forty-eight percent stated that they occasionally do so; 26 percent said they frequently do so.

5. Limited citation to unpublished opinions

Both justices and attorneys were asked their opinions on allowing limited citation to unpublished opinions in cases before the Supreme Court. Twenty-eight percent of the justices and 67 percent of the attorneys stated that they thought parties should be permitted to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in the case before the Supreme Court. Those who answered this question in the negative generally did so because they believed that allowing such limited citation would remove any distinction between published and unpublished opinions and that the practice could be abused.

6. Partial publication

Ninety-six percent of the justices stated that they had certified only part of an opinion to be published pursuant to rule 976.1. The vast majority of justices (94%) and attorneys (83%) answered in the negative when asked if rule 976.1 (partial publication) should be revised or repealed. The justices and attorneys strongly agree (82% and 91%, respectively) that the Supreme Court should be able to order a partial publication of a Court of Appeal opinion. A solid majority of justices and attorneys (78% and 81%, respectively) also agree that the Supreme Court should be able to order a partial depublication. Many of the respondents indicated that they see no distinction in the authority of the Supreme Court to order either a full or partial publication or depublication. But others noted that partial publication or depublication by Supreme Court order could cause the context of the opinion to be lost, creating a potential for inconsistent application in the lower courts.

Several justices, regardless of their responses, indicated in their comments that they would like this decision to be a collaborative one involving input from the author. The following comment sums up these concerns: "Partial publication [or depublication] would present serious problems, unless the opinion was sent back to the Court of Appeal first for editing in light of the Supreme Court's order to [publish or] depublish part. If any part is deleted that was significant to the Court of Appeal's reasoning, it might alter the meaning or intention of the original authors."

7. Potential changes to rule 976

Justices and attorneys by a large majority (83% and 70%, respectively) believe that no changes to the existing criteria in rule 976 are needed. In their comments, most of the justices indicated that they believe the current rule is clear and works well. Of the justices who believe changes should be considered, several indicated that the criteria could be clarified or expanded upon in some manner.

When asked if additional criteria should be added, about 75 percent of the justices and 68 percent of the attorneys answered in the negative. All respondents were provided with a list containing a summary of over 20 criteria that are used in other jurisdictions. The justices who indicated that new criteria should be added cited the following most frequently, in order of the number of responses received:

- The disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published;

- The opinion directs attention to the shortcomings of existing common law or inadequacies in statutes;

- The opinion treats a previously overlooked rule of law; and

- The opinion reaffirms a principle of law not applied in a recently reported decision.

The attorney respondents who stated that additional criteria should be added also endorsed the above criteria, albeit in a slightly different order.[25]

Justices overwhelmingly (90%) believe that the presumption set forth in rule 976 against publication should not be changed to an affirmative presumption in favor of publication. Several justices feared that such a change would greatly increase the number of published cases by compelling publication of marginally helpful cases. Others noted that panels would be forced to justify their decisions not to publish a case, which would be unduly time-consuming. Justices were almost evenly split on whether the presumption affects their decision on whether to publish an opinion. While a majority of attorneys indicated that the presumption should not be reversed, the percentages were much closer, with only 58 percent opposed to such a change.

D. Summary

The statistics led the committee to reach several conclusions. First, there appears to be a relationship between workload and publication rates: the greater the workload, the lower the publication rate. The statistics also reveal that as overall filings per justice have gone down, publication rates have increased. This trend further supports the inference that workload and publication rates are related. The committee members agreed that generally it appears that justices spend more time on opinions that are slated for publication. While the workload factor was not cited directly by many of the justices in their responses to the survey, its impact may be underreported.

Second, there may be a relationship between publication rates and deference to the author. Justices from District 3 were less likely than justices from other districts to respond that deference to the author of an opinion is a major factor in publication. In contrast, Districts 5 and 6, which have the lowest publication rates in fiscal year 2003–2004, were the only two districts in which all of the justices indicated that deference to the author is a major factor in the publication decision. The impact of deference is impossible to quantify. Several justices observed that deference to the author is a logical approach to making a publication determination because the author has the most familiarity with the circumstances of the case as well as with the state of the law on the relevant issues.

The committee reviewed and considered all of the survey results in arriving at its recommendations. In general, it appears that the justices are fairly satisfied with the

[25] The top criteria cited by the attorneys were (in order of responses received): The opinion reaffirms a principle of law not applied in a recently reported decision; the disposition of a matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published; the opinion treats an issue of first impression; the opinion directs attention to the shortcomings of existing common law or inadequacies in statutes; the opinion treats a new constitutional or statutory issue; the opinion construes a provision of a constitution, statute, ordinance, or court rule; and the opinion constitutes a significant and non-duplicative contribution to legal literature.

current publication rules and procedures, while the attorney respondents are somewhat less satisfied. A majority of attorneys believe that the publication rules are not uniformly followed, while only 20 percent of the justices indicated that factors other than the rules may affect their publication decisions. In spite of these differences, a large majority of both judges and attorneys believe that no changes to the existing criteria in rule 976 are needed.

VIII. Committee Discussion and Recommendations

A. Proposed Rule Revisions

The committee discussed several options for revising the publication criteria in rule 976(c), concluding that amendments to clarify and expand the criteria would be beneficial, particularly in light of the perception that the rules are not uniformly followed. Although a majority of justices and attorneys surveyed did not indicate a strong need to modify the criteria in rule 976, the comments received demonstrated that a sizeable proportion of the bench and bar believed that improvements could be made. Based upon that, as well as upon the collective experience of its members, the committee concluded that various changes would assist the courts in consistently applying the criteria. As noted above, the relevant statistical analyses suggest that many neutral factors account for the differences in the publication rates across the districts, including case mix and, possibly, workload. Nevertheless, the committee believes the existing rules and procedures can be improved and the publication standards should be clarified for the benefit of appellate justices as well as practitioners. The proposed amended rule is designed to encourage the publication of all cases that can provide helpful guidance to the lower courts and practitioners and to increase public confidence in the process, while avoiding overwhelming the legal community with thousands of cases that are of limited value as precedent.

The committee focused on refining the rule's existing criteria and the possibility of adding criteria, with specific reference to the criteria used in other jurisdictions. The committee concluded that it also could be beneficial to emphasize that publication decisions should be based solely on the publication criteria. The justices' survey results indicate that a large majority of justices already take this approach, but many justices also cited additional factors that may influence publication determinations by some. A majority of attorneys surveyed stated that the stated criteria are not uniformly followed, further suggesting that fine-tuning is warranted and would be welcome.

While the influence of other factors is impossible to quantify, the committee believes that this subject should be addressed. Accordingly, the committee recommends that rule 976(c) be amended to clarify the existing criteria, to add several new criteria, and to set forth factors that should not play a role in a justice's decision to certify, or not to certify, an opinion for publication.

1. Amendments to existing criteria

The committee recommends separating the compound criteria stated in rule 976(c)(1) into three separate subdivisions to emphasize the independent nature of each criterion. In addition, the committee would add the words "of law" after the references to "rule" in new (c)(2) and (c)(3). The committee also would add the word "explains" after the word "modifies" in new (c)(3). Opinions that explain an existing rule of law may provide valuable guidance to the trial courts and to practitioners. For example, several commentators noted that it is particularly helpful when the Courts of Appeal expand upon the application of a recent ruling of the California Supreme Court.

2. Addition of new criteria

The committee recommends adding four new criteria to rule 976(c). These four factors were cited most frequently as potential additions by both judicial and attorney survey respondents.

Issues involving a constitution, statute, ordinance, or court rule

The committee recommends adding a new criterion authorizing publication if the opinion newly interprets, clarifies, criticizes or construes a provision of a constitution, statute, ordinance, or court rule. Explanations and critiques of statutes and other provisions provide valuable information for lower courts and practitioners, and also provide valuable feedback to the Legislature. While this new criterion arguably is encompassed by the current criteria regarding the treatment of "an existing rule of law," the committee believes explicit reference to statutory law is helpful.

The first case that interprets a statute would almost always be published under the existing criteria. The committee noted, however, that subsequent opinions can be valuable to clarify the "wrinkles" of a statute. Although this criterion may appear broadly applicable, the committee did not believe it would lead to publication of an undue number of cases beyond those useful to the legal community.

Overlooked rules of law and law not recently addressed

The committee recommends adding a new criterion authorizing publication if the opinion involves overlooked rules of law or law not recently addressed in a reported opinion. This criterion may be particularly important in criminal cases. Several jurisdictions have a similar criterion in their publication rules, including Arizona and the Ninth Circuit. A current discussion of an older standard or rule of law may be beneficial in terms of reinforcing its continued vitality and placing it in the context of other, subsequent developments in the law.

Separate concurring or dissenting opinion on a legal issue

The committee recommends adding a new criterion authorizing publication if the opinion is accompanied by a separate opinion that concurs or dissents on a legal issue. This criterion is not intended to supersede the majority vote requirement stated in rule 976(b). It simply is a criterion that the majority should consider in deciding whether an opinion has value as precedent.

3. Factors not to consider

The committee recommends adding a paragraph to the rule setting forth various factors that justices should *not* consider when deciding whether to certify an opinion for publication. These factors include: workload; the presence of a concurring or dissenting opinion based solely on a different interpretation of the facts; and potential embarrassment for a litigant, lawyer, or trial judge. Several justices indicated in their responses that these factors sometimes affect decisions not to publish an opinion that otherwise appears to be worthy of publication under the criteria stated in rule 976(c). Attorneys similarly noted that they viewed these factors as affecting decisions whether or not to publish. The committee believes that the publication decision should be based solely on the value of an opinion as legal precedent. While justices should retain discretion regarding when to publish an opinion, the committee does not believe that the factors stated above provide an appropriate foundation upon which to base a decision to certify for publication.

Conclusion

The committee concludes that if properly applied these factors, both positive and negative, should increase public confidence that the decision whether to publish is properly motivated by and based upon the panel members' determination that the opinion will provide useful legal guidance to lawyers and litigants.

The amendments to the rule proposed by the committee read as follows:

> No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:
>
> (1) establishes a new rule of law~~,~~;
>
> (2) applies an existing rule of law to a set of facts significantly different from those stated in published opinions~~,~~;
>
> (3) ~~or~~ modifies, explains, or criticizes with reasons given, an existing rule of law;
>
> (4) advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(~~2~~5) resolves or creates an apparent conflict in the law;

(~~3~~6) involves a legal issue of continuing public interest; ~~or~~

(~~4~~7) 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~~.~~;

(8) invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

Factors such as the workload of the court, the presence of a concurring or dissenting opinion solely on the facts, or the potential embarrassment of litigants, lawyers, or trial judges should not affect the determination of whether to publish an opinion.

B. Future Monitoring

If the proposed amendments are adopted, the committee recommends that the Supreme Court periodically evaluate their impact on Court of Appeal publication rates, and that the publication statistics collected and published by the Judicial Council be regularly reevaluated to assess the impact of the rule changes. Such studies will set the stage for further reforms, if necessary.

C. Presumption Against Publication

Although rule 976 originally contained a presumption in favor of publication, this presumption was reversed in the 1970's, apparently to encourage the publication of only those opinions that met the criteria. The majority of committee members concluded that the current presumption should be preserved at this time. The statistics show that requests for publication have not increased since unpublished opinions have been made more easily accessible, suggesting that the present presumption, and the system in general, do not require radical change to ensure that appropriate opinions in a manageable number are published for the benefit of the bench, the bar, and the public. The committee recommends, however, that the court, as part of its overall evaluation of the publication process, regularly review whether there is any indication that this presumption should be changed in order to achieve the overall goal of publication of useful Court of Appeal decisions.

D. Judicial Education

The committee also recommends that the Supreme Court request that the Education Division of the Administrative Office of the Courts incorporate in its educational

curriculum for appellate justices information concerning the publication rules and related practices, to assist new justices and to remind all justices of the relevant considerations. If the proposed amendments to the criteria are adopted, judicial education can assist in making all justices aware of the changes. Such education could cover the processes used in the various Courts of Appeal, emphasizing collaborative decisionmaking.

E. Partial Publication or Depublication

A majority of respondents to both surveys indicated that they believed the Supreme Court should have the option of ordering a partial publication or a partial depublication of a Court of Appeal opinion. Such an innovation could serve to preserve valuable precedent while retaining the goal of limiting the volume of material that lower courts and practitioners would need to sift through in researching their cases. Adoption of such a procedure raises implementation issues that the committee did not fully assess. The committee recommends that the court consider appointing a committee to evaluate whether and how this change should be pursued.

F. Unpublished Opinions

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. While the issue of citation to unpublished opinions was not contained in the committee's charge, the committee did ask justices and attorneys about their views on limited citation to unpublished opinions in petitions and answers filed with the Supreme Court. There appears to be some interest in such an innovation.

G. Appellate Divisions of the Superior Court

The standards for publication of Court of Appeal opinions apply to opinions of the appellate divisions of the superior courts. (See rule 976 (b) and (c).) The committee did not have sufficient time to consider specifically whether there is a need to change these standards. Such opinions are very limited in number; currently about five opinions are published every year. The committee recommends that the Supreme Court consider requesting that an advisory committee consider whether further modification of the rule for these opinions is necessary.

IX. Public Comment

[To be added.]

X. Conclusion and Recommendations

The Supreme Court of California Advisory Committee on Rules for Publication of Court of Appeal Opinions recommends that the Supreme Court take the following actions:

1. Adopt proposed amendments to California Rules of Court, rule 976 to clarify and expand the criteria that the Courts of Appeal and the appellate divisions of the superior courts should consider when deciding whether to publish an opinion.

2. Assuming the proposed amendments are adopted, periodically evaluate their impact on Court of Appeal publication rates.

3. Reevaluate at a future time whether the rule 976 presumption against publication should be changed to a presumption in favor of publication.

4. Encourage further judicial education regarding the publication rules and related practices.

5. Consider appointing a committee to:

   (a) Evaluate the feasibility of procedures whereby the Supreme Court could order the partial publication or partial depublication of a Court of Appeal opinion.

   (b) Evaluate the possibility of expanding the circumstances under which parties may draw the Supreme Court's attention to unpublished opinions.

   (c) Review and make recommendations concerning the publication of opinions of the appellate divisions of the superior court.

XI. Appendices

Appendix A:
California Rules of Court, rules 976 through 979

Rule 976. Publication of appellate opinions

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (d), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c) Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication 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.

(d) Changes in publication status

(1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(e) Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 106.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Rule 976.1. Partial publication

(a) Order for partial publication

A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under rule 976.

(b) Opinion contents

The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published.

(c) Construction

For purposes of rules 976, 977, and 978, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion.

Rule 977. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or

(2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Advisory Committee Comment

A footnote to the published version of former rule 977(d) stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. Revised rule 977 deletes this footnote because it is not part of the rule itself and the event it describes rarely occurs in practice.

Rule 978. Requesting publication of unpublished opinions

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within 20 days after the opinion is filed.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Advisory Committee Comment

Subdivision (a). Former rule 978(a) required generally that a publication request be made "promptly," but in practice the term proved so vague that requests were often made after the Court of Appeal had lost jurisdiction. To assist persons intending to request publication and to give the Court of Appeal adequate time to act, revised rule 978(a)(3) specifies that the request must be made within 20 days after the opinion is filed. The change is substantive.

Subdivision (b). Former rule 978(a) did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or

could not have granted. In practice, however, it was not uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case or, if there was no such petition, had lost jurisdiction to grant review on its own motion. To assist the Supreme Court in timely processing publication requests, therefore, revised rule 978(b)(1) requires the Court of Appeal to forward the request within 15 days after the decision is final in that court. The change is substantive.

Rule 979. Requesting depublication of published opinions

(a) Request

(1) Any person may request the Supreme Court to order that an opinion certified for publication not be published.

(2) The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages.

(3) The request must concisely state the person's interest and the reason why the opinion should not be published.

(4) The request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal.

(5) The request must be served on the rendering court and all parties.

(b) Response

(1) Within 10 days after the Supreme Court receives a request under (a), the rendering court or any person may submit a response supporting or opposing the request. A response submitted by anyone other than the rendering court must state the person's interest.

(2) A response must not exceed 10 pages and must be served on the rendering court, all parties, and any person who requested depublication.

(c) Action by Supreme Court

(1) The Supreme Court may order the opinion depublished or deny the request. It must send notice of its action to the rendering court, all parties, and any person who requested depublication.

(2) The Supreme Court may order an opinion depublished on its own motion, notifying the rendering court of its action.

(d) Effect of Supreme Court order to depublish

A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Advisory Committee Comment

Subdivision (b). Former rule 979(a) required depublication requests to be made "by letter to the Supreme Court," but in practice many were incorporated in petitions for review. To clarify and emphasize the requirement, revised rule 979(a)(2) specifically states that the request

"must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages." The change is not substantive.

Appendix B:
1971 Report of the Committee on Selective Publication of Appellate Court Opinions

CONFERENCE: Wednesday, June 9, 1971

SUBJECT: Publication of Appellate Opinions

MEMO BY: Sullivan, J.

RECOMMEND: Tentative Approval of Proposed Revision of Supreme Court Rule 976[1]

Submitted herewith are:

(1) Report of Committee on Selective Publication of Appellate Court Opinions.

(2) Proposed revision of Rule 976.

---

1. See California Constitution, article VI, section 14; Government Code section 68902.

Report of Committee on Selective Publication of Appellate Court Opinions

The Committee on Selective Publication of Appellate Court Opinions was appointed by Chief Justice Donald R. Wright in October 1970 and charged with the responsibility of making a thorough study of the relationship between the present standards for publication of opinions (Cal. Rules of Court, Rule 976) and the manifest proliferation of published opinions and of reporting its findings and recommendations to the Supreme Court.

Background

Rule 976 governing the publication of appellate opinions was adopted by the Supreme Court effective January 1, 1964. Prior to its adoption all opinions of the Courts of Appeal were published, and with the rapid growth in the number of appellate judges after 1961 the bench and bar were being inundated by the tremendous volume of Court of Appeal opinions. The rule was intended to stem this tide, but it was recognized that the standard for publication specified in the rule would need reexamination later in the light of actual experience in its operation.

The impact of Rule 976 in reducing the publication of Court of Appeal opinions has been greater than its proponents would have dared to predict. Nevertheless, the volume of published opinions is still substantial, and there is a general feeling in the legal profession that many of the published opinions contribute nothing to the body of the law and do not justify

the cost of publication. It was against this background that the present committee was appointed.

In order to obtain a broad expression of views, the naming of the committee was widely publicized with an invitation for all interested persons to submit suggestions for committee consideration., A number of judges and lawyers submitted various suggestions which have been reviewed by the committee. In addition, the committee sought the views of all Court of Appeal judges regarding their reasons for publishing opinions. Most of the appellate judges cooperated with the committee by stating their reasons for publishing opinions filed for publication during September-December 1970. These statements were enlightening and helpful to the committee.

Findings and Recommendations

1. The voluntary system of limiting publication has been effective and there is no present need for a separate review body.

Some judges and lawyers expressed the view that effective control of the publication of opinions can be achieved only by creating a separate body with responsibility for reviewing Court of Appeal opinions and determining which opinions merit publication. Several appellate judges stated that it is not realistic to expect a judge who has invested substantial time and effort in preparing an opinion to conclude that it does not warrant publication. The committee does not agree with this view.

The experience under Rule 976 shows that a system in which the author of an opinion and his associates determine whether it should be published can be effective in limiting the number of published opinions. The proportion of opinions certified for nonpublication has been steadily increasing from year to year, and for the first 10 months of 1970-71 rose to 71.9 percent (81.7 percent for criminal appeals and 60.5 percent for civil appeals). While there are significant differences in the percentage of unpublished opinions among the various appellate districts and divisions and among individual judges, the committee has found that the variance resulted largely from imprecision in the standard for publication specified in Rule 976. The committee has found nothing in the present situation that would require or justify a radical change in procedure such as would be involved in the creation of a review body with authority to determine which opinions should be published.

2. The standard for publication in Rule 976 should be revised.

There is no evidence that opinions are being published in deliberate noncompliance with the standard for publication in Rule 976; rather the variation in application of the standard appears to result from the subjective nature of the criteria in the standard. The committee has concluded that the criteria for publication should be restated in order to provide more precise guidelines for the courts.

The committee therefore proposes that the criteria for publication specified in Rule 976(b) should be amended as indicated in the appended draft of a revised Rule 976. The principal changes in the criteria for publication are:

(a) The present criterion that the opinion should be published "if it involves a new and important issue of law [or] a change in an established principle of law" would be restated to provide for publication if the opinion "establishes a new and important rule of law or alters or modifies an important existing rule." In addition, a footnote commentary would emphasize that the criterion is applicable only when important new rules are established or important existing rules are changed, and that it does not justify publication because a case involves a novel factual situation.

The statements of reasons for publication furnished to the committee by the appellate judges reveal that this criterion is being misapplied. Sixty percent of the opinions were reported as being published under this criterion. The committee believes that this figure far exceeds the number of Court of Appeal opinions that establish new and important rules of law or change important existing rules. It is believed that the revised criterion with the accompanying commentary will provide better guidance to the courts.

It should be noted that Mr. Witkin differs from the other members of the committee regarding the requirement that the new rule be important or that the change relate to an

important rule of law. He believes that any new rule or any change in an existing rule should be a reason for publication.

(b) The present requirement for publication of opinions that involve "a matter of general public interest" would be restated to require that the opinions involve "a legal issue of continuing public interest." The footnote commentary points out that it is the legal issue, rather than the case or controversy, that must be of a continuing public interest. The commentary also defines public interest and gives examples of kinds of opinions that would meet the public interest test.

The committee has found evidence that the existing public interest criterion is being used to justify the publication of opinions where the facts of the case rather than the legal issues involved are of public interest, often of a transient nature. The committee believes that the rule should make it clear that public curiosity does not satisfy the requirement of public interest.

(c) A new criterion would be added, calling for the publication of opinions that criticize existing law. The commentary points out that this criterion would justify publication of the rare Court of Appeal opinion which calls attention to defects in existing rules and recommends changes by a higher court or by the Legislature.

The committee anticipates that very few opinions will be published under this test but it believes that the criterion may be useful in preserving such opinions for attention by a higher court or by legislative officials.

3. Court of Appeal opinions should be published only when the court certifies them for publication.

Rule 976 provides that every Court of Appeal opinion is deemed to meet the standard for publication and shall be published unless a majority of the court rendering the opinion certifies that it does not meet the standard and specifies it for nonpublication. In contrast, for appellate department opinions Rule 976 provides for publication only if two of the judges joining in the opinion certify that it meets the standard for publication.

The committee believes that there should be no presumption that a Court of Appeal opinion requires publication. The fact that nearly three out of every four Court of Appeal opinions are now unpublished, even though the present rule requires affirmative court action to prevent publication, would indicate that the presumption should be that an opinion does not require publication.

The committee recommends that the appellate department opinion rule should be made applicable also to Court of Appeal opinions and that no opinion should be published unless a majority of the court rendering the opinion certifies it for publication (see appended draft of Rule 976(c)). This change will eliminate the publication of some opinions now being published merely because the court takes no steps to prevent publication.

4. The power of the Supreme Court to order either publication or nonpublication of Court of Appeal opinions

should be expressly stated in the rule.

Under the California Constitution the Supreme Court has authority to determine what appellate opinions shall be published. The Supreme Court adopted Rule 976 pursuant to its constitutional authority, but the rule does not expressly reserve to the Court the power to order publication, except in a limited situation, of an opinion that a Court of Appeal has certified for nonpublication, nor to order nonpublication of an opinion that a Court of Appeal has not certified for nonpublication. Because the rule does not expressly reserve such authority the Supreme Court has on occasion granted petitions for hearing in order to prevent the publication of Court of Appeal opinions that it did not approve. Rule 976(c) as revised by the committee would expressly reserve to the Supreme Court the power to order publication or nonpublication of any Court of Appeal opinion.

5. The proposed changes in Rule 976 should reduce the number of published opinions, but the voluntary cooperation of Court of Appeal judges will also be necessary.

The committee, while recommending changes in Rule 976, recognizes that the rule is merely a guide and that the desired result can be attained only if every Court of Appeal judge will cooperate and comply with the intent and spirit of the rule. In this regard, the committee believes that the workshops for Court of Appeal judges sponsored by the Judicial Council can be effective instruments for achieving the cooperation of the judges and for promoting a common understanding

of the rule and its application.

Because the understanding and cooperation of the appellate judges is so important the committee believes that they should have an opportunity to discuss the revised rule before its adoption. The committee therefore recommends that the Supreme Court tentatively approve the appended revision of Rule 976 and authorize it to be distributed with copies of this report to the Court of Appeal judges and to be considered at the Judicial Council's forthcoming workshop for Court of Appeal judges. The committee further recommends that it be authorized to review any comments and suggestions made by the judges and then submit its final recommendation to the Court for action.

Respectfully submitted,

Raymond L. Sullivan, Chairman
Thomas W. Caldecott
Leonard M. Friedman
Robert S. Thompson
B. E. Witkin

Rule 976 would be amended as follows:

Rule 976. Publication of appellate opinions

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standard for opinions of other courts] ~~An~~ No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports ~~if~~ ~~it~~ unless such opinion (1) ~~involves~~ establishes a new and important ~~issue~~ rule of law~~, a change in an established principle of law~~ or alters or modifies an important existing rule,[1] ~~or a matter~~ (2) involves a legal issue of ~~general~~ continuing public interest,[2] or (3) criticizes existing law.[3]

1/ This criterion calls for publication of the relatively few opinions that establish important new rules of law or that change important existing rules. The requirement is that the rule be both new and important; an unimportant new rule or a change in an unimportant existing rule will not suffice. Nor does this criterion 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.

(c) [Courts of Appeal and appellate departments] Unless otherwise directed by the Supreme Court, every an opinion of a Court of Appeal or of an appellate department of the superior court ~~shall be deemed to meet the standard for publication specified in subdivision (b) and~~ shall be published in the Official Reports ~~unless (1)~~ if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it ~~does not~~ meets the standard for publication specified in subdivision (b) ~~and specifies it for nonpublication and (2) either no petition for hearing in the Supreme Court is filed in the cause or the petition is denied by the Supreme Court without ordering publication of the Court of Appeal opinion~~. An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.

~~(d) [Appellate departments] Unless otherwise directed by the Supreme Court, an opinion of an appellate department shall be published in the Official Reports if two of the judges joining in the opinion certify that it meets the standard for publication specified in subdivision (b).~~

~~(e)~~ (d) [Superseded opinions] 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.

~~(f)~~ (e) [Editing] Written opinions of the Supreme Court, Courts of Appeal and appellate departments of the superior courts

shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court, and two copies of each opinion of a Court of Appeal ~~required to be published pursuant to this rule, and two copies of each opinion~~ or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval.

Appendix C:
1979 Judicial Council Report on Proposed Rule Amendments for Publication of Appellate Opinions

THE JUDICIAL COUNCIL OF CALIFORNIA
STATE BUILDING, 350 McALLISTER STREET, SAN FRANCISCO 94102

ADMINISTRATIVE OFFICE OF THE COURTS

PROPOSED RULE AMENDMENTS FOR PUBLICATION OF APPELLATE OPINIONS

Chief Justice Rose Elizabeth Bird has announced that the California Supreme Court will hold a public hearing regarding proposals to amend the rules on publication of appellate opinions.

Written comments and requests to present testimony may be sent to Mr. Laurence P. Gill, Clerk of the Court, at 455 Golden Gate Avenue, Room 4250, San Francisco 94102. Individuals who wish to testify should include a brief summary of their testimony with their request.

Following is the text of the proposals, which were recommended by the Judicial Council of California to improve the system for selective publication of appellate court opinions (rules 976-978 of the California Rules of Court). The proposals were developed by the Chief Justice's Advisory Committee for an Effective Publication Rule.

Prior to their consideration by the Council, the advisory committee's recommendations were published and widely circulated for comment. Comments and suggestions were received from appellate and trial judges, attorneys, the State Bar, the California Judges Association, and other interested persons and organizations.

In addition to proposed rule changes, the Council approved an advisory committee recommendation for a one-year experiment permitting "partial publication" of an appellate opinion where only a portion of the opinion meets the standards for publication.

These proposals, as approved by the Council, are summarized below and their full text is attached.

Noncitation (rule 977)

Rule 977, which generally prohibits citation of unpublished opinions, would be amended to permit citation of unpublished Court of Appeal opinions in connection with petitions for hearing in the Supreme Court when it appears that an unpublished opinion is inconsistent 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.

Publication standards

The publication standards in rule 976(b) would 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, unless all three judges agree that the opinion should not be published; 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 would be removed from the rule.

Supreme Court procedures

Rule 976(c) would be amended to provide that in exercising its power to order opinions published or not published, the Supreme Court would observe the specified standards for publication. Rule 976(d) would be modified to delete language that prohibits publication of Court of Appeal opinions superseded by a Supreme Court grant of hearing. A superseded opinion in the Official Reports would be accompanied by an appropriate notation of the Supreme Court's action in the case.

An amendment to rule 29 would expressly authorize the Supreme Court to comment on a Court of Appeal opinion when denying a petition for hearing. The comments would be published with the Court of Appeal opinion in the Official Reports.

Requests for publication

Rule 978(a) would be amended to require the Court of Appeal to send its recommendation and statement of reasons regarding a request for publication to all parties and to any person who has requested publication. Rule 978(b) would be amended to provide that each party and any other person who has requested publication shall be notified of the action taken by the Supreme Court.

PROPOSED PARTIAL PUBLICATION EXPERIMENT

The Judicial Council has also recommended a one-year experiment with "partial" publication of Court of Appeal opinions. To authorize and provide guidelines for the experiment, the Council proposes a new rule 976.1, which would permit the Court of Appeal to certify for publication a part of an opinion, leaving unpublished any part that did not meet the standards for publication.

Rules 976, 977 and 978 of the California Rules of Court would be amended, and rule 29(c) would be added, to read:

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 *only 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,[1] (2) involves a legal issue of continuing public interest[2] *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 ,[3] *(4) resolves or creates an apparent conflict in the law, (5) constitutes a significant and nonduplicative contribution to legal literature*

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.

either by an historical review of the law or by describing the legislative history of a statute or ordinance, (6) otherwise aids the administration of justice, or (7) is one of the opinions in a case in which there is a dissenting opinion or a concurring opinion in which reasons are stated.

(c) [*Publication procedure*]

(1) [Courts of Appeal and appellate departments] ~~Unless otherwise directed by the Supreme Court, a~~ 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 *for publication* specified in *paragraphs (1) through (6) of* subdivision (b). *If the opinion is one of the opinions in a case in which there is a dissenting or concurring opinion, as specified in paragraph (7) of subdivision (b), it shall be published unless all members of the panel agree that it shall not be published.* ~~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* *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 or proceeding 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 is inconsistent with the decision or order in the case 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 proceeding 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.*

---

* 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. *The transmitting court, 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 the Court of Appeal opinion, but 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.

PARTIAL PUBLICATION EXPERIMENT

The Judicial Council has forwarded to the Supreme Court, with its favorable recommendation, a proposal for a one-year experiment with partial publication of Court of Appeal opinions.

The proposal was developed and presented to the Council by the Committee on Partial Publication of Appellate Opinions. It includes the text of a proposed rule (rule 976.1) authorizing partial publication for the term of the experiment, along with a set of proposed guidelines.

The Committee's Recommendations

The Committee on Partial Publication recommended that the Judicial Council conduct a one-year experiment with partial publication throughout the state, if the Supreme Court approves of the proposal and agrees to the joint adoption of a temporary rule expressly authorizing partial publication for the experimental period.

If the experiment and temporary rule are approved the committee proposes to disseminate general guidelines to all Court of Appeal and appellate department judges. These would emphasize the following points:

a. Nothing that will aid in the application or interpretation of the published part of an opinion should be left unpublished.

b. The published part should mention the existence of the unpublished part.

c. No issue should be discussed in both the published

and the unpublished parts of a partially published opinion.

d. Partial publication will probably be found most useful in cases involving numerous issues, only a few of which meet the criteria for publication.

Copies of existing partially published opinions and opinions thought appropriate for such treatment would be disseminated along with the guidelines.

The committee would develop a plan for evaluation of the experiment. One copy of each partially published opinion would be sent to the Administrative Office of the Courts for analysis and preparation of staff reports to the committee.

The committee drafted a proposed rule 976.1 and a guidelines statement for consideration by the Judicial Council. These documents are attached at pages 10-11.

D R A F T

Rule 976.1 is added to the California Rules of Court, effective _____, to read:

Rule 976.1 Partial publication experiment

(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

(b) [Other rules applicable] For purposes of rules 976, 977 and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

(d) [Rule repealed at end of one year] This rule is repealed effective _____.

D R A F T

GUIDELINES FOR THE PARTIAL PUBLICATION EXPERIMENT

The Judicial Council Committee on Partial Publication of Appellate Opinions has developed the following guidelines and materials to assist judges who wish to participate in the one-year partial publication experiment authorized by rule 976.1.

It is the intent of the rule that the court rendering an opinion have maximum discretion as to when to issue and how to prepare a partially published opinion. Therefore, only the most general guidelines are given.

Guidelines

1. Partial publication will probably be found most useful in cases involving numerous issues, only a few of which meet the criteria for publication.

2. Format is not prescribed by the rule except that the unpublished part of each partially published opinion must indicate that part is unpublished.

3. Since the unpublished part is not citable (rule 977), rule 976.1(a) requires that all material, factual or legal, that aids in the application or interpretation of the published part must be in the published part. Issues discussed in one part should not be discussed in the other part.

Samples of Partially Published and Excerpted Opinions

[The committee collected several examples of partially published Court of Appeal opinions. The cases are People v. Moore (1971) 15 Cal.App.3d 851; People v. Peterson (1978) 85 Cal.App.3d 163; and People v. Gartner, 2 Crim. 35858 (filed in bifurcated form August 4, 1980 and later consolidated and issued as an unpublished opinion). The texts of these opinions would be distributed as part of the guidelines, along with copies of published cases containing parts not considered appropriate for publication, and of unpublished cases thought to have publishable parts. The following cases would be included: Meyser v. American Building Maintenance, Inc. (1978) 85 Cal.App. 3d 933; Golden Gate Bridge Dist. v. Muzzi (1978) 83 Cal.App.3d 707; People v. Johnson (1978) 82 Cal.App.3d 183; People v. Superior Court (Hulbert) (1977) 74 Cal.App.3d 497; People v. Collins (1975) 44 Cal.App.3d 617.]

Appendix D:
2001 White Paper on Unpublished Opinions of the Court of Appeal

A White Paper on Unpublished Opinions of the Court of Appeal

Authored by Professor J. Clark Kelso and Joshua Weinstein

Appellate Process Task Force

March, 2001

Task Force Membership

Hon. Gary E. Strankman (Chair)
Ms. Mary Carlos
Mr. Peter Davis
Mr. Donald Davio
Mr. Jon Eisenberg
Mr. Dennis Fischer
Ms. Laura Geffen
Hon. Margaret M. Grignon
Hon. Judith L. Haller
Mr. Edward Horowitz
Hon. Arthur W. McKinster
Hon. Nathan D. Mihara
Professor John Oakley
Mr. Arnold O. Overoye
Mr. Daniel Potter
Hon. Robert K. Puglia (Ret.)
Hon. William F. Rylaarsdam
Hon. Ronald Sabraw
Mr. Jonathan Steiner
Hon. Steven J. Stone (Ret.)
Hon. James Thaxter

Judicial Council Liaison

Hon. Marvin R. Baxter

Committee Staff

Ms. Marcia Taylor
Mr. Joshua Weinstein

Reporter

Professor J. Clark Kelso
University of the Pacific
McGeorge School of Law

A White Paper on Unpublished Opinions of the Court of Appeal

Background

At its inception the Appellate Process Task Force – created in 1997 by the Judicial Council of California – identified issues affecting California's intermediate appellate courts that should be studied. One issue was public access to unpublished appellate court opinions. In the task force's Interim Report (released in March 1999) and in its Report of August 2000, the issue was listed as one that was still being contemplated. (See *Report of the Appellate Process Task Force* (August 2000) page 4.)

When the task force took up the study last year, it observed that unpublished court of appeal opinions are available to any member of the public from the court clerk's office. (See *McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685 [court records generally available to public] and *People v. Ford* (1981) 30 Cal.3d 209, 216 [unpublished opinions are "available in the public records of … the Court of Appeal"].) However, in practice, unpublished opinions have limited exposure; they are often only read by litigants and institutional practitioners. The task force focused on whether and how to improve public access to unpublished opinions of the courts of appeal.

During the time the task force took up the topic, the issue was provoking interest in other circles as well. Several commentators and scholars weighed in,[1] an appellate court published an opinion on the issue (see *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4th 703), and legislation was proposed that would have required all appellate opinions to be published and citable as precedent.[2] (Assem. Bill 2404 (Papan) 1999-2000 Reg. Sess., § 1.)

---

[1] A. Kozinski and S. Reinhardt, "Please Don't Cite This!" (June 2000) *California Lawyer*, 43; R. Arnold, *Unpublished Opinions: A Comment* (1999) 1 J. App. Prac. & Process 219 (1999); B. Martin, Jr., *In Defense of Unpublished Opinions* (1999) 60 Ohio St. L.J. 177; C. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?* (1998) 50 S.C. L. Rev. 235; K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeal* (1997) 85 Calif. L. Rev. 541; and D. Merritt and J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals* (2001) 54 Vand. L. Rev. 71.

[2] Additionally, for a few brief months last year, there was a federal appellate decision from the Eighth Circuit declaring as a matter of federal constitutional law that unpublished opinions were required to be treated as binding precedents (the decision was

The issue is not new. In fact, several years earlier in a report commissioner by the Appellate Courts Committee of the 2020 Vision Project, Professor J. Clark Kelso made the following recommendation:

> Make all unpublished opinions available electronically (which would give the public, scholars and the court of appeal easy access) but retain the no-citation rule (which would address the practical concerns expressed by appellate lawyers and judges). As appellate courts become paperless, provision should be made for giving the public access to unpublished as well as published opinions.[3]

That recommendation was a compromise position. In widely circulated drafts of his report, Professor Kelso argued that all appellate opinions should be published and citable as precedent and that the increasing use of unpublished opinions was contrary to fundamental principles of good appellate practice. This tentative suggestion triggered a chorus of protests from around the state, from both judges and practitioners, who asserted that "the nonpublication and noncitation rules are critically important to the court of appeal in preparing and processing its cases and to the practicing bar in litigating appeals."[4] Critics argued that publication of all opinions would overburden the appellate courts and practitioners, that publication and citability of all appellate opinions would substantially increase the workload of an already overburdened appellate court system and that practitioners would have to wade through an "overwhelming" amount of unpublished opinions that are "useless for future litigation because they involve no new law and no new, applicable factual situations."[5]

---

subsequently vacated as moot by an en banc panel of the circuit after the United States agreed to pay the disputed $6,000 tax claim made by the taxpayer). (*Anastasoff v. United States* (8th Cir. 2000) 223 F.3d 898, vacated on reh'g en banc, (8th Cir. 2000) 235 F.3d 1054.) For a critique of the constitutional analysis in *Anastasoff*, see Case Note, *Constitutional Law C Article III Judicial Power C Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect* (2001) 114 Harv.L.Rev. 940.

[3] C. Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L.J. 433, 492.

[4] *Ibid.*

[5] *Ibid.*

Although Professor Kelso's compromise position was not formally adopted by the full Commission on the Future of the California Courts, the Commission's final report endorsed the general proposition that "[s]implified, electronic access to the appellate courts, their records, and their proceedings will have a salutary effect on the public's comprehension of and trust in justice."[6] Moreover, the Commission formally recommended that "[a]ppellate justice should accelerate its adoption of and adaptation to new technology."[7]

Everything old is new again

The arguments for and against publication and citability of appellate court opinions have not changed much over the years. The dispute remains largely, but not entirely, between those who believe that all appellate court opinions should be published and citable and others who argue that the publication and citability of all unpublished opinions would overburden the courts and counsel, increasing the costs to clients and causing delays. For the reasons given below, the Appellate Process Task Force has decided after thorough consideration of the issue to make the following recommendation:

> Unpublished opinions should be posted on the Judicial Council's Web site for a reasonable period of time (e.g., 60 days), but the general proscription against citation of unpublished opinions (i.e., rule 977) should remain in place without change.

A. Electronic access

The Web site for California's appellate courts already makes published opinions available on the Web with commendable speed. Access to court opinions on the Web is often the preferred method of access for reviewing recently issued decisions. With the development of these widely available electronic portals to government information, there is no longer any convincing justification for not facilitating greater public access to the written work product of the appellate courts by taking advantage of existing information technologies. We live in an open, democratic society where the accountability of public servants is secured in large part by public access to government activity and output. Of course, openness and public access have their limits. Other important interests such as privacy, the attorney-client privilege, national security, and

---

[6] Commission on the Future of the California Courts, *Justice in the Balance B 2020* (1993) 166.

[7] *Id*., at p. 167 (Recommendation 10.1).

the deliberative process privilege, may dictate limited or no access to some types of information in certain circumstances. But no one claims that unpublished opinions fall into any of these categories. Indeed, as noted above unpublished opinions are already publicly available.

Those who argue that unpublished appellate opinions in California are some form of "secret" law have seriously overstated their case.[8] Nevertheless, it is true that unpublished opinions are not as widely and easily available as published opinions. Further, if the difference in availability can be eliminated at reasonable expense, the courts, no less than any other branch of government, should make unpublished opinions more accessible. The task force recognized that many institutional litigants – the insurance industry, the Attorney General, and the appellate projects, for example – to varying degrees review a large percentage of court of appeal opinions in their area of interest, whether published or not. Given the changes in technology and the apparent wide-spread interest in unpublished opinions, the task force recommends that the public have the same ease of access that is already afforded institutional practitioners.

In California, all published appellate opinions are now made available for a period of time on the judicial branch's Web site. Cost permitting, there is no compelling reason for not expanding the existing system so that *all* California appellate opinions, whether published or unpublished, are made available on the Web site for a reasonable period of time.

B. Citability

The remaining question is whether unpublished opinions should, once made available electronically, be citable as precedent. 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.

Under rule 977 of the California Rules of Court, unpublished opinions may not be "cited or relied on by a court or a party" except (1) "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel," or (2) "when the

[8] See, e.g., Carpenter, p. 236, fn. 7 ("What else, but a secret, is an unpublished opinion wrapped in a no-citation rule?").

opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." (Calif. Rules of Court, rule 977(a) & (b).)

It has been argued that a non-citation rule allows the courts to "hide" precedent setting decisions. Proponents suggest that an appellate court simply issues an unpublished opinion that is not citable, and the law that court "created" is not subject to public scrutiny and thus "hidden" from view. That argument fails on its face because, as noted above, all appellate court opinions are public records available from the clerk's office. Moreover, the California Supreme Court may review any court of appeal opinion – whether published or unpublished – to "secure uniformity of decision or the settlement of important questions of law." (Rule 29(a).)

One would have to assume that three justices of the court of appeal decided to violate rule 976 in a particular case in order to accept the notion that uncitable opinions are used to "hide" new law. Indeed, rule 976 provides that publication is appropriate for court of appeal opinions that establish new law, apply existing law to new facts, or modify or criticize existing law. (See rule 976(b)(1); see also rule 976(b)(2) & (3) for other criteria for publication.) The task force declined to accept that premise. Rather, the task force's combined experience is that unpublished opinions, considered as a whole, generally recite well-established law and do not apply it to new fact scenarios. As such, there is no justification to impose upon the public, the bar and the bench more than a ten-fold annual increase in the number of citable opinions by the Court of Appeal. [9]

The task force also considered suggesting that the California Supreme Court amend rule 977 to permit citation of unpublished opinions in cases where there is no other precedent or in cases where no other precedent would serve as well. This approach is taken in some other jurisdictions. But the task force declined to endorse this recommendation because of the likelihood that the exceptions would swallow the general rule and would engage the court and counsel in costly, tangential disputes over collateral issues regarding the weight or value of an unpublished opinion. Every citation of an unpublished opinion would trigger from opposing counsel an argument that the cited opinion actually does not satisfy the criteria for citation, and the court would be forced to do precisely what the proscription is designed to guard against: determine the weight as precedent of an unpublished opinion. The efficiencies that lie at the heart of the proscription against citation of unpublished opinions would be

[9] In fiscal year 1997-1998, 7% of court of appeal opinions were published. (Judicial Council of Cal., Ann. Court Statistics Rep. (1999) p. 31.)

largely lost if counsel were required to search all unpublished opinions to determine whether an unpublished opinion was more closely on point than a published opinion and the court was required to resolve a dispute involving that question. Moreover, the constitutional provisions on which the whole scheme is based would be undermined.

For the reasons given above, the task force recommends that rule 977 be retained without change.

Appendix E:
Publication Rates for the Courts of Appeal

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Publication Rates by Appellate District

Analysis

9/14/2005

Publication Rate by Appellate District – 5-year average (FY1999-2000 through 2003-04)

Appellate District	Publication Rate	Low	High
District 1	9.2%	8.3%	10.4%
District 2	7.9%	6.9%	9.3%
District 3	7.7%	6.5%	8.7%
District 4	7.2%	5.9%	8.4%
District 5	3.7%	3.2%	4.0%
District 6	4.8%	4.0%	6.0%

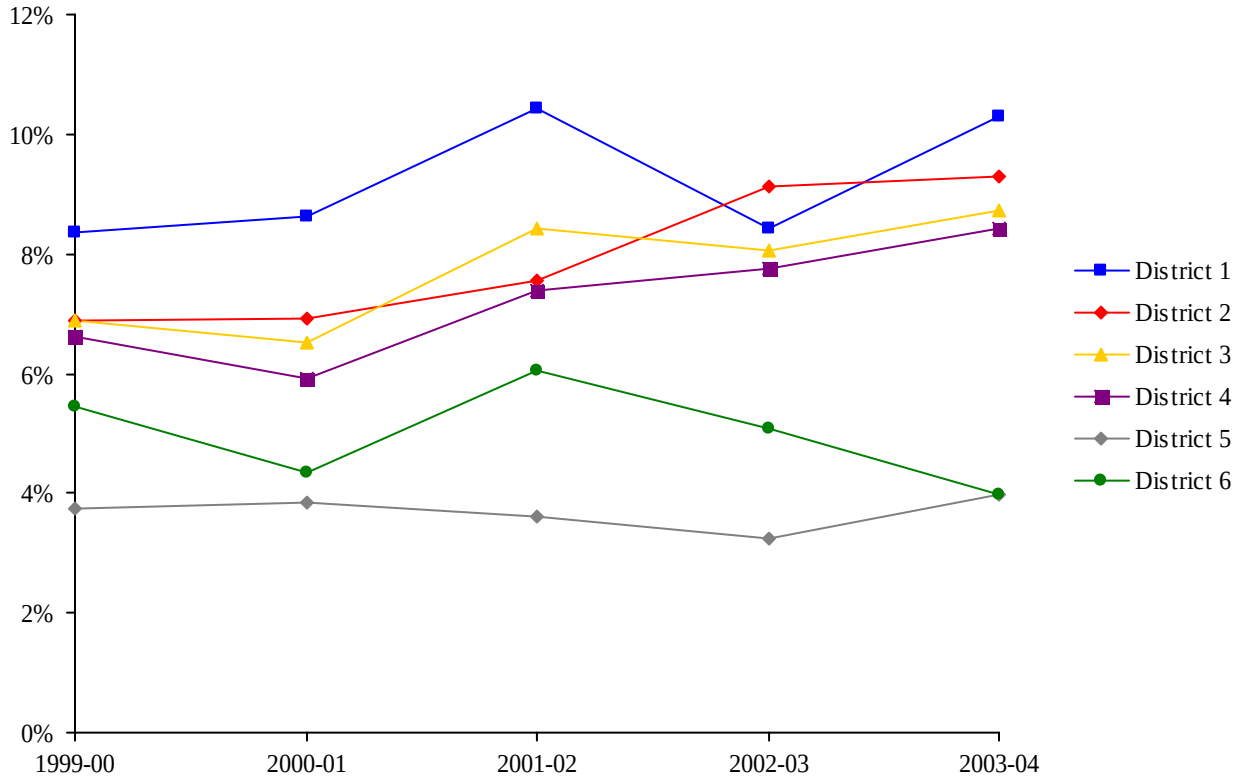
Publication Rate by Case type – 5-year average (FY1999-2000 through 2003-04)

Case Type	Publication Rate
Civil	14.2%
Criminal	3.9%
Juvenile	3.1%

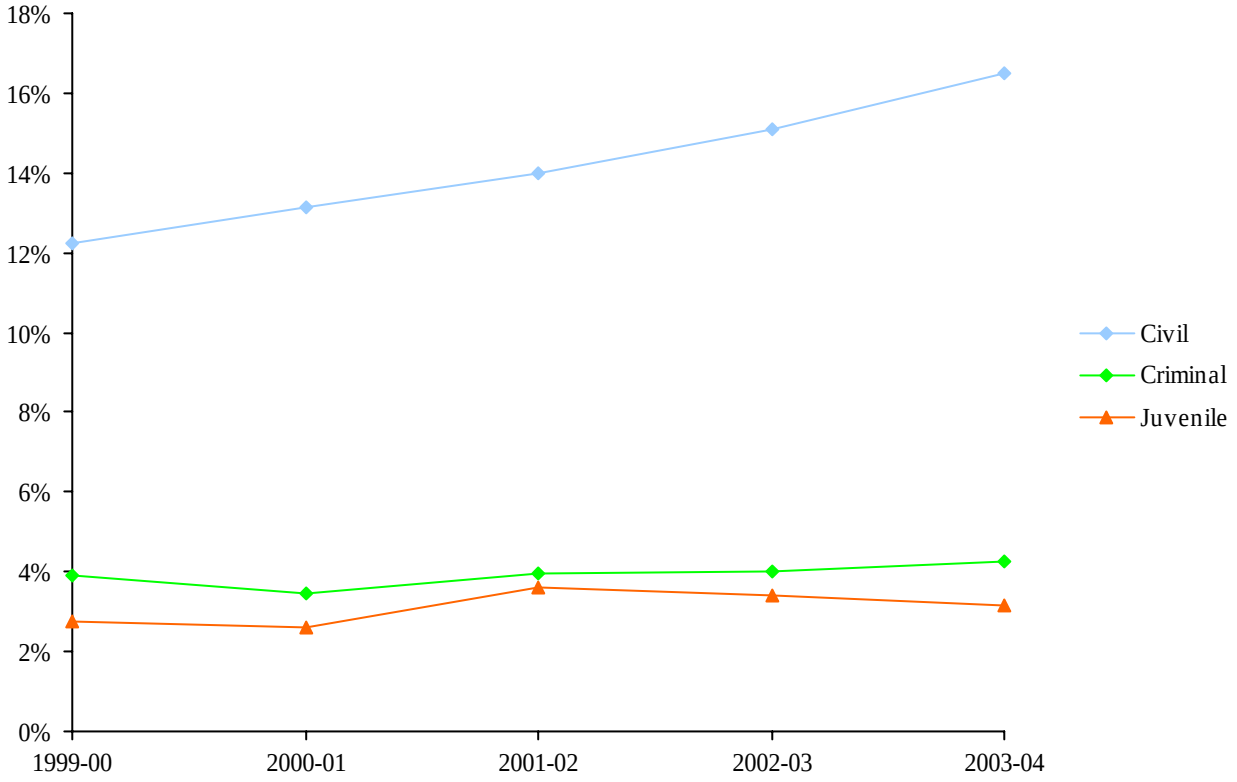
Publication Rate by Year

Fiscal Year	Publication Rate
1999-00	6.6%
2000-01	6.4%
2001-02	7.4%
2002-03	7.6%
2003-04	8.0%

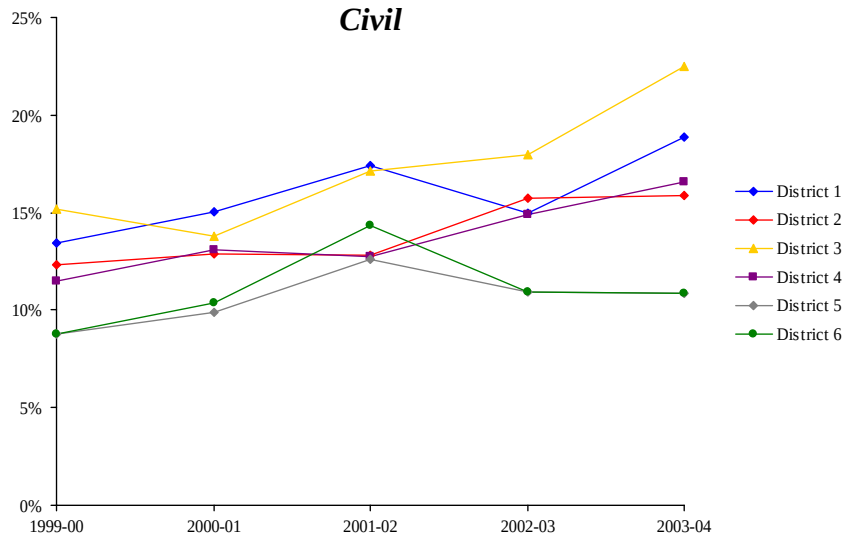
Publication Rate by Appellate District – FY 1999-00 through 2003-04

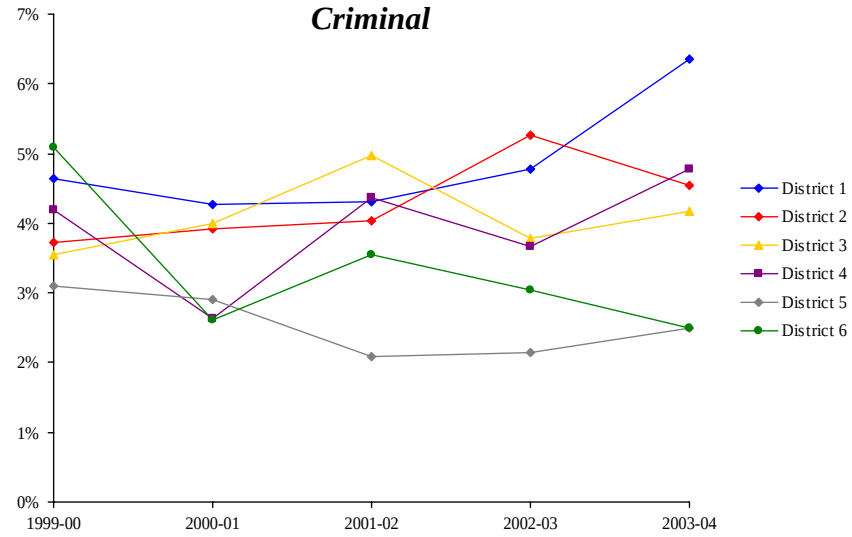


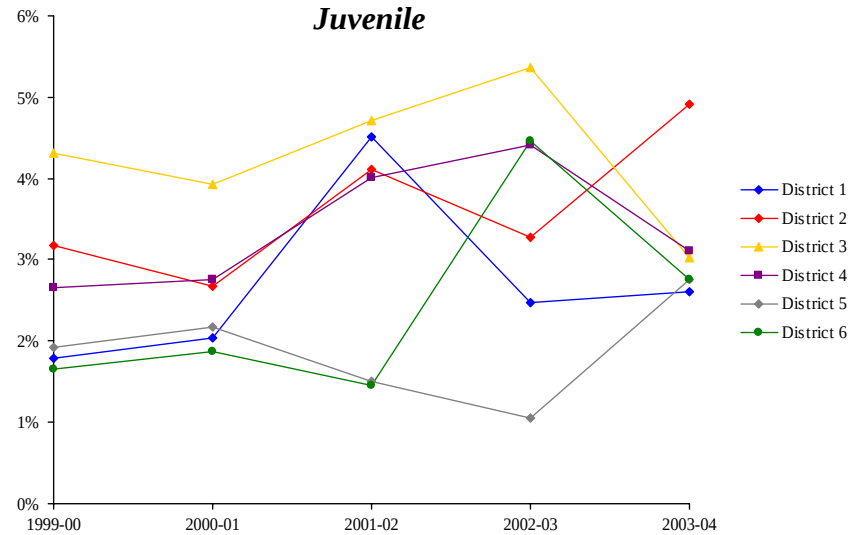
Publication Rate by Case Type – FY 1999-00 through 2003-04



Publication Rate by Appellate District by Case Type

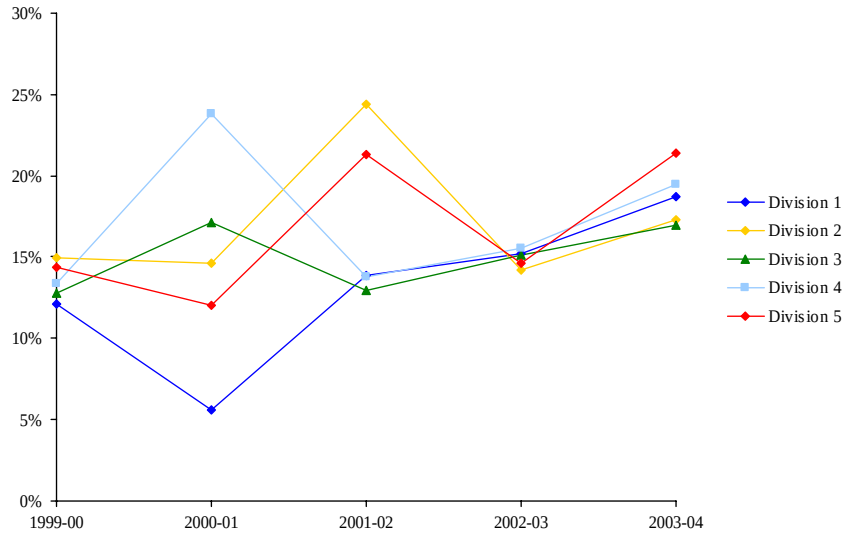




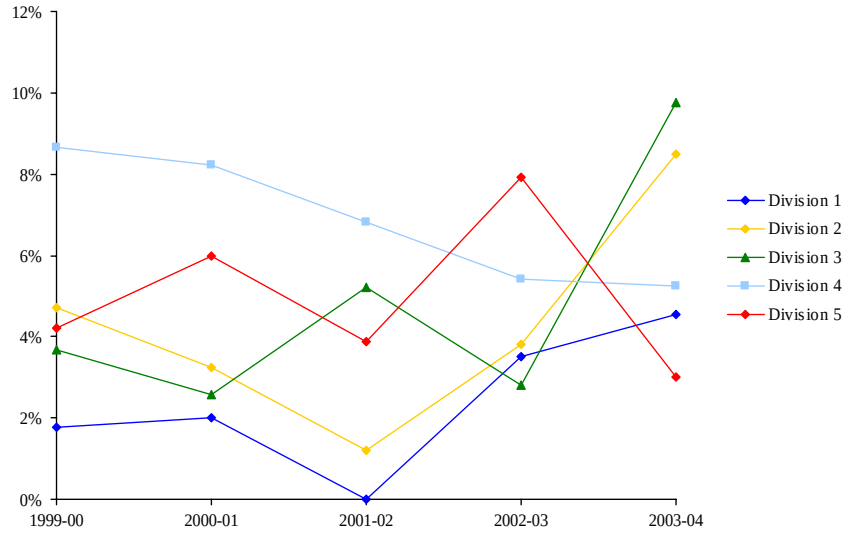


Publication Rate for 1st Appellate District by Division – FY 1999-00 through 2003-04

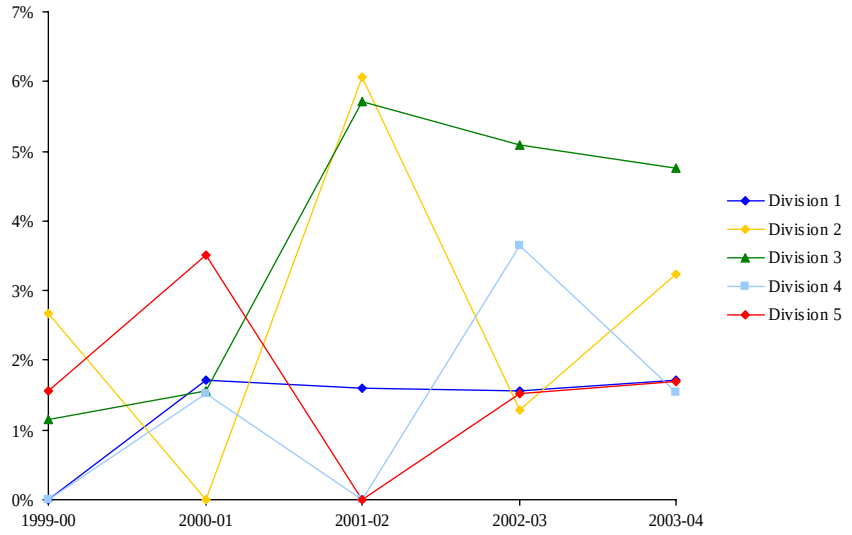
Civil



Criminal

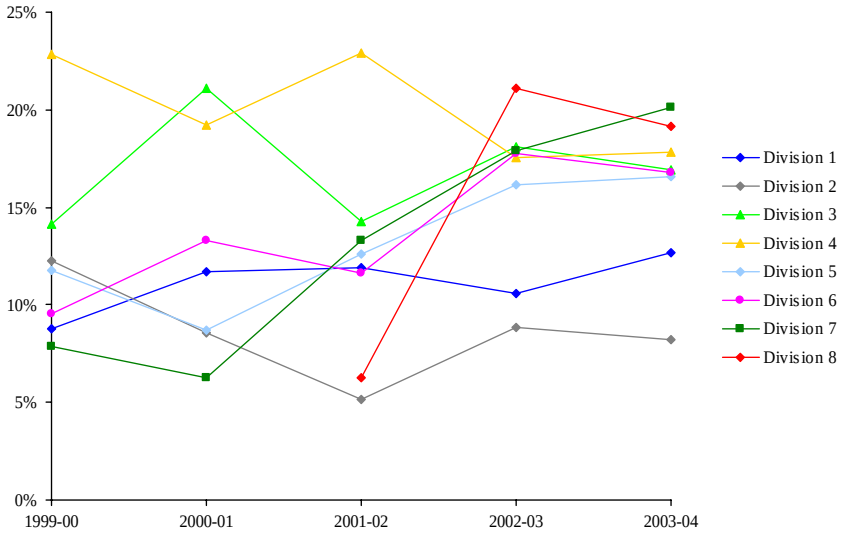


Juvenile

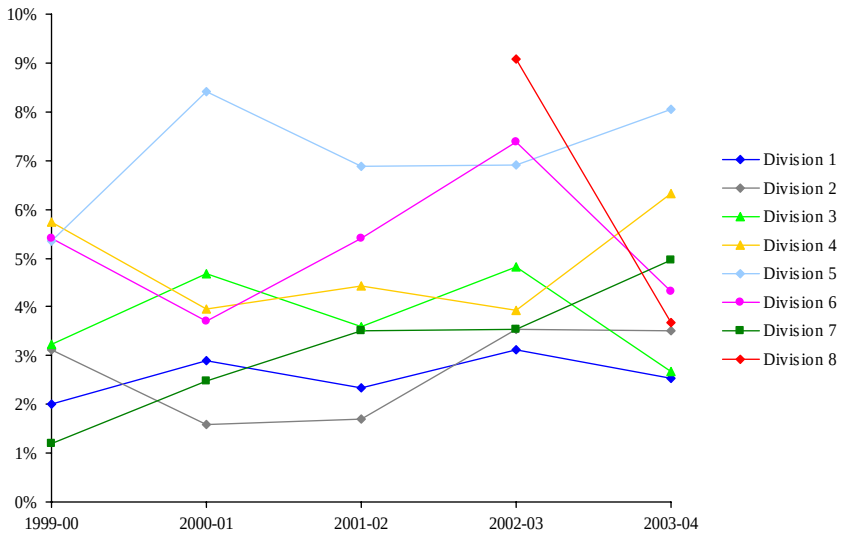


Publication Rate for 2nd Appellate District by Division – FY 1999-00 through 2003-04

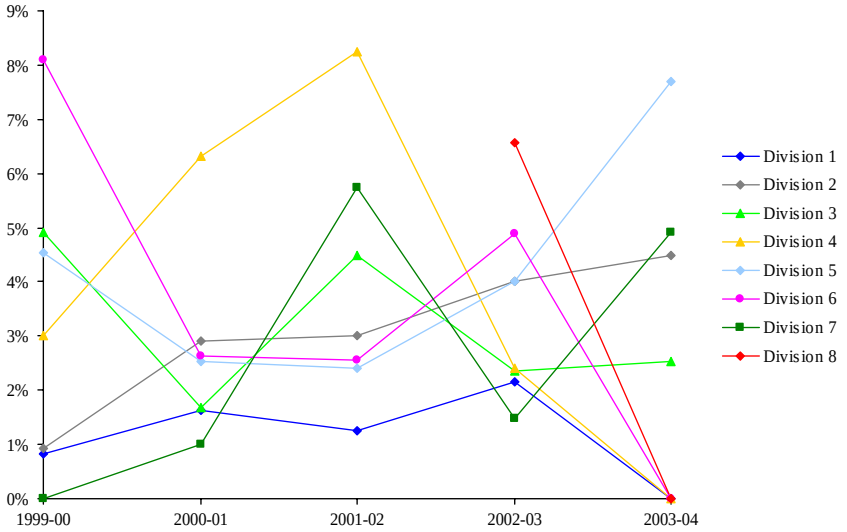
Civil



Criminal

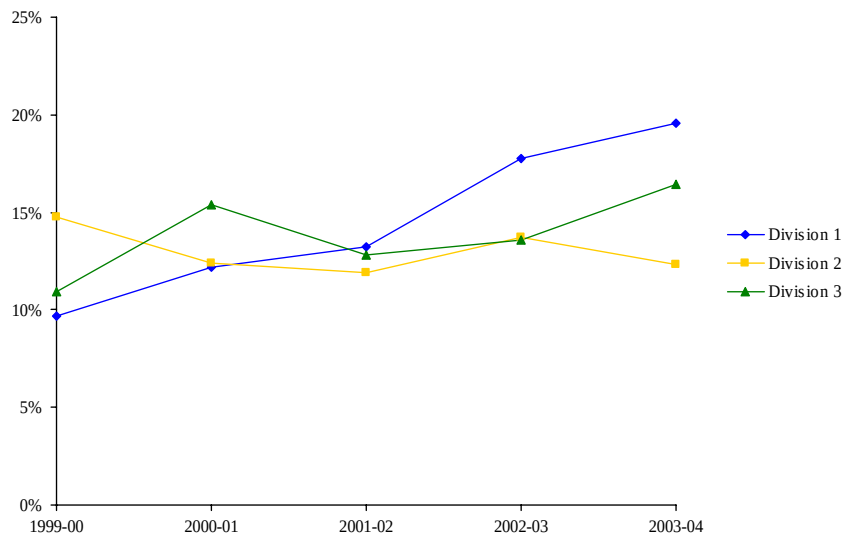


Juvenile

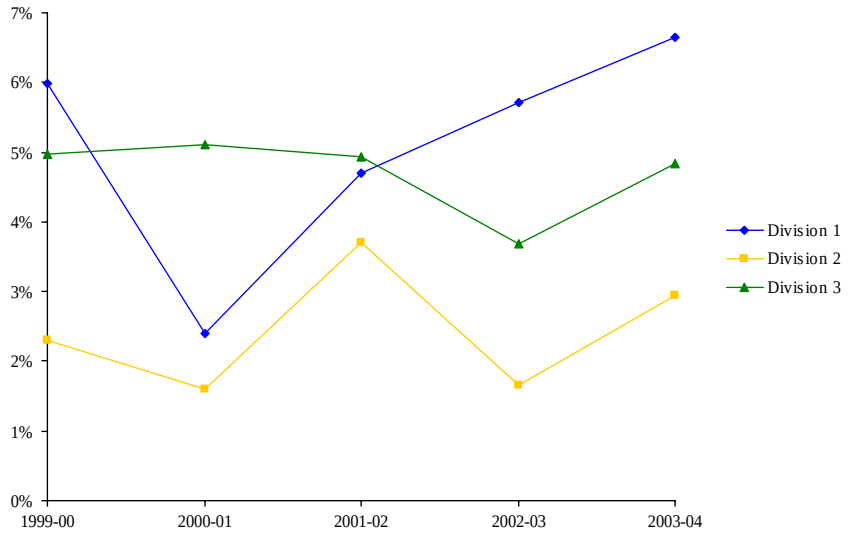


Publication Rate for 4th Appellate District by Division – FY 1999-00 through 2003-04

Civil



Criminal



Juvenile

Results of Analysis

Objective: Compare publication rates by appellate district, controlling for differences in the rate across case types and over time.

District

- After controlling for case type and time, District 1 and District 3 have a higher publication rate than the other appellate districts.
- The publication rates in Districts 5 and 6 are lower than in the other appellate districts.
- After controlling for one measure of workload—the number of cases disposed of by written opinion per justice—the publication rate in District 1 is no longer significantly higher than in other districts. In other words, the seemingly higher publication rate in District 1 can be attributed to the lower workload in this district as measured by the number of cases disposed of by written opinion per justice.

Year

- The publication rate in fiscal years 1999-00 is lower than in other years, while the publication rate in FY 2002-03 and FY 2003-04 are statistically higher.
- After controlling for the number of cases disposed of by written opinion per justice, the publication rate in FY 2002-03 is no longer significantly higher than in other fiscal years. In other words, the seemingly higher publication rate in FY 2002-03 can be attributed to the lower workload in this year as measured by the number of cases disposed of by written opinion per justice.

Division

District 1 – There are some statistically significant differences in the publication rate across the 5 divisions in District 1

- The publication rate in Division 1 is lower than the other divisions of the First Appellate District, while the publication rate in Division 4 is higher.

District 2 – There are some statistically significant differences in the publication rate across the 8 divisions in District 2

- The publication rate in Division 1 and Division 2 is lower than the other divisions of the Second Appellate District, while the publication rate in Division 4 and Division 5 is higher.

District 4 – There are some statistically significant differences in the publication rate across the 3 divisions in District 4

- The publication rate in Division 2 is lower than the rate in either Division 1 or Division 3 of the Fourth Appellate District.

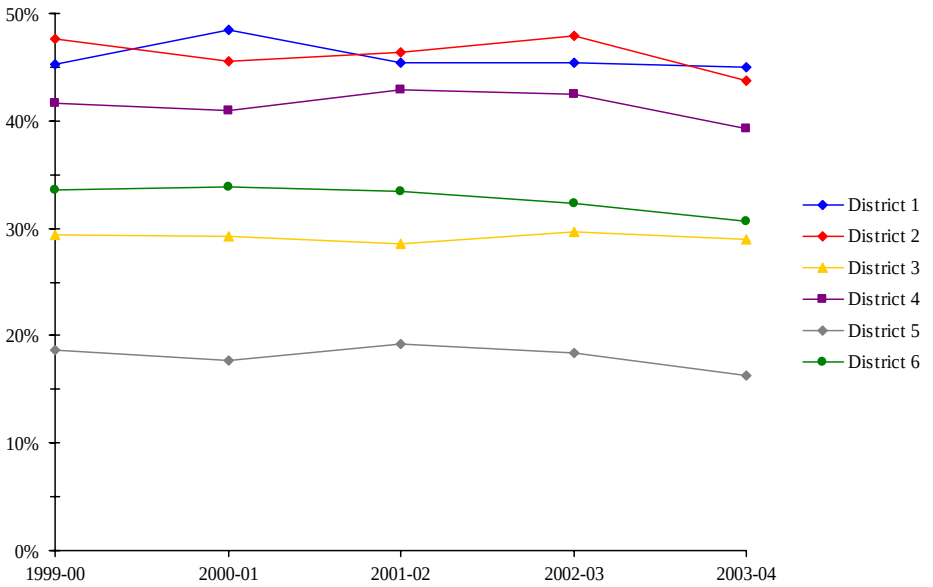
Factors that could explain differences in the publication rate

Case Mix

Because civil cases are much more likely to be published than either criminal or juvenile cases for every district, those districts with a high proportion of civil cases will generally have a higher overall publication rate.

The higher-than-average publication rate in Districts 1 and 2 appears to be driven in part by the high proportion of civil cases in these districts, while the low rate in District 5 is driven in part by their low proportion of civil cases.

Civil filings as a proportion of total filings

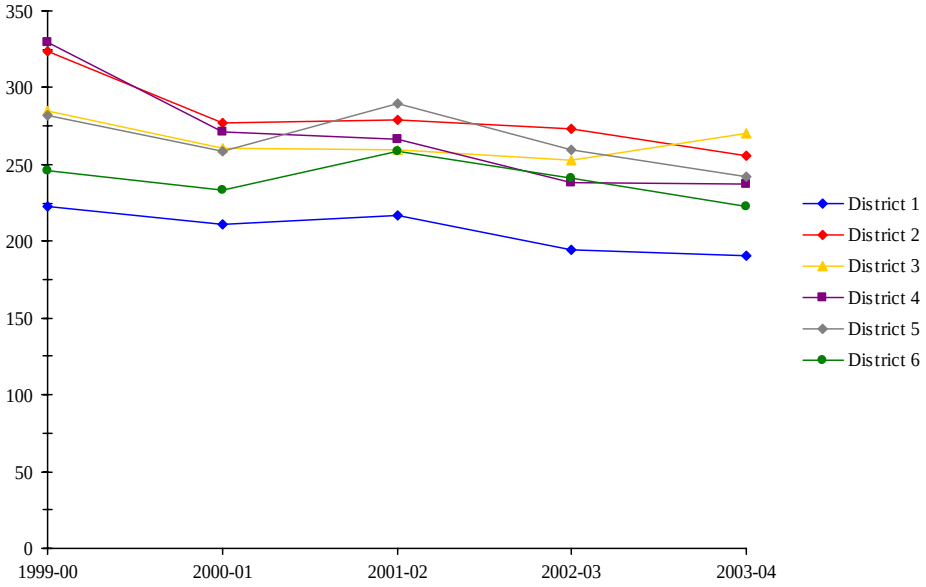


Workload

The decision whether to certify an opinion for publication could be impacted by workload issues in a given district.

The district with generally the highest overall publication rate–District 1–has consistently had the lowest number of filings per justice over the past five fiscal years.

Total filings per appellate justice (FTE)

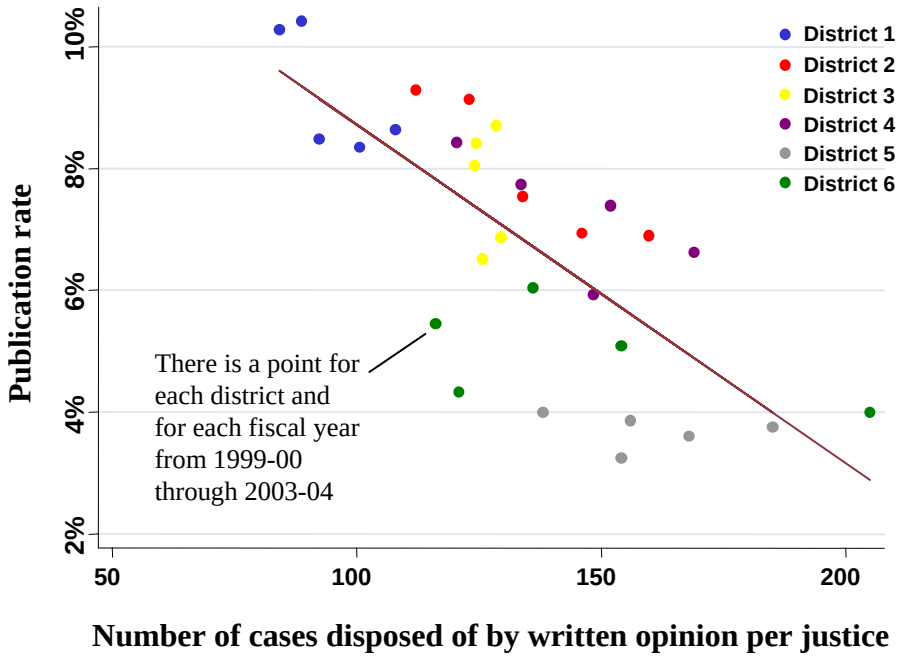


Relationship between publication rate and other measures of workload

There is a statistically significant relationship between the publication rate and the number of cases disposed of by written opinion per justice. Districts with a lower number of cases disposed of by written opinion per justice tend to have a higher publication rate while districts with a higher number of cases disposed of by written opinion tend to have lower publication rates.

For example District 5, which has had the lowest average publication rate over the past five years, has also disposed of a high number of cases by written opinion per justice in each fiscal year.

Relationship between publication rate and the number of cases disposed of by written opinion

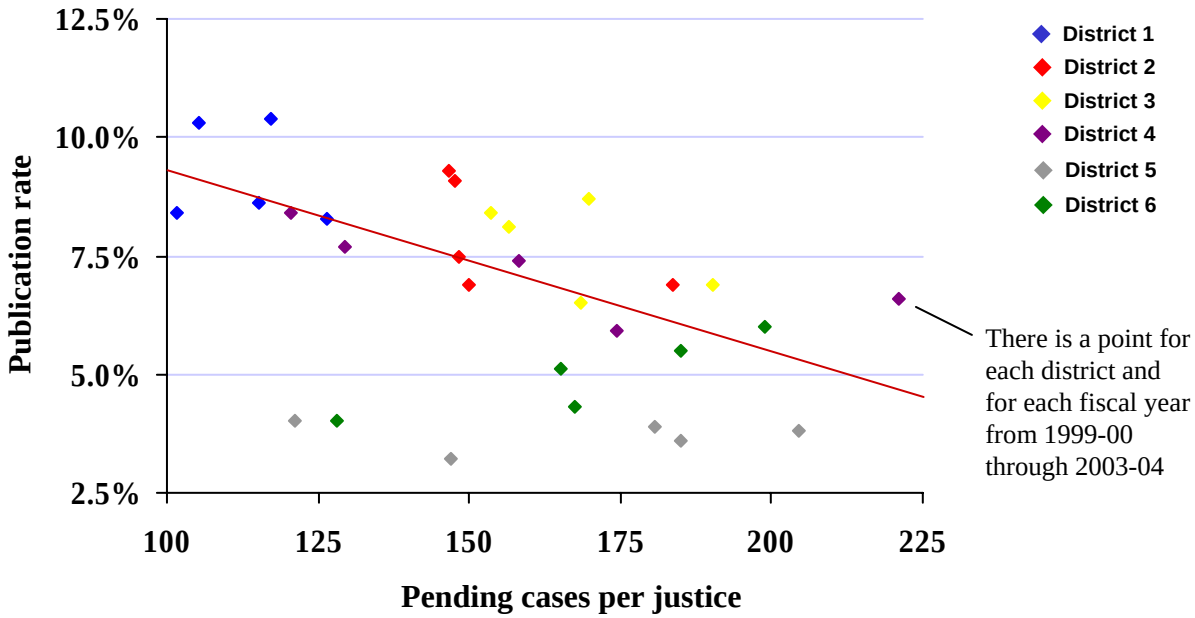


Number of cases disposed of by written opinion per justice

There is also a statistically significant relationship between the publication rate and the number of cases pending at the end of the fiscal year per justice, as shown in the graphic below. Districts with a lower number of pending cases per justice tend to have a higher publication rate while districts with high pending caseloads per justice tend to have lower publication rates.

For example District 1, which has had the highest average publication rate over the past five years, has also generally had the lowest number of pending cases per justice.

Relationship between publication rate and pending caseload



Pending cases per justice

Appendix F:
Survey of Justices of the Courts of Appeal

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions
Survey for Appellate Court Justices

Purpose of this survey:
The survey that follows is intended to inform the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions. Chaired by Supreme Court Justice Kathryn Werdegar, the 13-member committee is charged with reviewing the current standards used by the Courts of Appeal and the Supreme Court in determining which Court of Appeal opinions should be certified for publication and with making recommendations to the Supreme Court on what changes, if any, should be instituted to ensure that all appropriate cases are published.

Under the state Constitution, the Supreme Court has the authority to determine which opinions of the Supreme Court and Courts of Appeal are published and may therefore be cited as precedent in state courts. Under this authority, the court has established standards for publication of appellate opinions in rules 976 and 977 of the California Rules of Court.

The committee will report to the Supreme Court concerning its findings and conclusions and make recommendations, if appropriate, for improving the standards for publication of opinions to ensure the publication of those opinions that may assist in the reasoned and orderly development of the law.

You may respond by completing the hard copy of the survey, or by accessing the survey electronically via an Internet link that will be emailed to you. Your responses to this survey will be kept anonymous and confidential, and will be used only in aggregate form. The tracking number on the survey will be used for tracking purposes only and will be stripped from the data file to ensure anonymity. Thank you in advance for your participation.

Deadline:
Please return the completed survey no later than **April 1, 2005**. If you fill out the hard copy of this survey, please return it by mail or fax to:

Clifford Alumno
Office of General Counsel
Administrative Office of the Courts
455 Golden Gate Ave.
San Francisco CA 94102-3688
voice: 415-865-7683 fax: 415-865-7664
clifford.alumno@jud.ca.gov

Questions, comments:
Please address all questions and comments to:

Lyn Hinegardner
Attorney, Office of General Counsel
415-865-7698
lyn.hinegardner@jud.ca.gov

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Survey for Appellate Court Justices

BACKGROUND

1. Court (district and division): _____

2. How many years have you served on the appellate bench?

_____ year(s)

please round to the nearest year

PUBLICATION FREQUENCY AND CRITERIA

Rule 976

The Supreme Court has established standards for publication of appellate opinions, set forth in the California Rules of Court, rule 976 et seq. The current rules provide that all opinions of the Supreme Court are published. An opinion of the Court of Appeal or the appellate division of the Superior Court may not be published unless it meets one of four specified criteria: 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." (Rule 976(c).)

The following question refers to the body of published opinions that ***you have participated in as a panelist, whether or not you authored the opinions.***

3. During the course of your career, how important has each of the following criteria been in persuading you that an opinion should be published?

   For example, if an extremely important circumstance in your decision to support certification has been that the opinion established a new rule of law, you would mark "5" for the first criterion listed below.

Criteria	**Please circle your response for each criteria** ***Not important at all*** ▼	▼	▼	▼	***Extremely important*** ▼
establishes a new rule of law	1	2	3	4	5
applies an existing rule to a set of facts significantly different from those stated in published opinions	1	2	3	4	5
modifies, or criticizes with reasons given, an existing rule	1	2	3	4	5
resolves or creates an apparent conflict in the law	1	2	3	4	5
involves a legal issue of continuing public interest	1	2	3	4	5
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	1	2	3	4	5
other (e.g., request by other panelist, request by a party, dissenting opinion, etc.) ***please specify***: _____ _____ _____ _____	1	2	3	4	5

The following question refers to the 10 most recent opinions that ***you authored*** that have been certified for publication, a list of which is included with this survey as an attachment.

4. Please indicate with an "X" all of the criteria that formed the basis for the decision to certify for publication the 10 opinions that are included with this survey.

Criteria	***Please select the criteria that applied to each of the 10 attached recent opinions that were certified for publication***									
	Recent 10 opinions									
	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10
establishes a new rule of law ……	___	___	___	___	___	___	___	___	___	___
applies an existing rule to a set of facts significantly different from those stated in published opinions ……	___	___	___	___	___	___	___	___	___	___
modifies, or criticizes with reasons given, an existing rule ……...	___	___	___	___	___	___	___	___	___	___
resolves or creates an apparent conflict in the law ……...	___	___	___	___	___	___	___	___	___	___
involves a legal issue of continuing public interest ……	___	___	___	___	___	___	___	___	___	___
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 ……...	___	___	___	___	___	___	___	___	___	___
other (e.g., request by other panelist, request by a party, dissenting opinion, etc.) …….....	___	___	___	___	___	___	___	___	___	___
please specify: _____ _____ _____ _____ _____ _____										

5. How is the decision to certify an opinion for publication typically made?

please explain: _____

_____

_____

_____

_____

6. When is the decision regarding whether to certify an opinion for publication typically made?

Before oral argument ……..…….……. _____

After oral argument ……..……. _____

After a party requests publication ……..……... _____

Other ……. _____

(***please specify***) _____

_____

_____

7. Is deference to the author of an opinion a major factor in the decision concerning whether to certify an opinion for publication?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

_____

8. Is deference to other panel members a major factor in the decision concerning whether to certify an opinion for publication?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

_____

9. Does anything other than the rules, such as local traditions, standards, or practices, also influence the determination whether or not to certify an opinion for publication?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

10. Are there differences in the way civil and criminal opinions are treated with respect to certification for publication?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

_____

11. How often have you been involved in a case that resulted in an unpublished opinion that you thought should have, or could have, been published because it met the rule 976(c) criteria?

Never _____

Rarely _____

Occasionally _____

Frequently _____

if this has occurred, please describe the circumstances: _____

_____

_____

_____

_____

12. How important are each of the following factors in deciding not to publish a case that appears to meet the rule 976(c) criteria? (***please rate the following)***

Factors	**Please circle your response for each factor**				
	Not important at all ▼	▼	▼	▼	***Extremely important*** ▼
The case is controversial	1	2	3	4	5
Workload issues do not allow enough time to prepare a published opinion	1	2	3	4	5
The tone or content of the dissenting opinion	1	2	3	4	5
Potential embarrassment of trial judge	1	2	3	4	5
Potential embarrassment of litigants or lawyers	1	2	3	4	5
other (e.g., request by other panelist, request by a party, dissenting opinion, etc.) ***please specify***: _____ _____ _____	1	2	3	4	5

13. In your experience, what is the most common reason after filing for reconsidering a decision not to publish a case? (***please select one of the following)***

Most Common Reason

Further analysis demonstrates that the opinion does meet the rule 976(c) criteria …….. _____

Further analysis demonstrates that the opinion merits publication even though it does not strictly meet the rule 976(c) criteria ……. _____

Request by author or other panelist ……... _____

Request by a party …… _____

Request by interested person, not a party to the case ……... _____

Other ……. _____

(***please specify***) _____

_____

_____

14. Do you ever rely on unpublished opinions when drafting your opinions?

Yes _____

No _____

if yes, please explain: _____

_____

_____

15. In a petition for review, should parties be permitted to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?

Yes _____

No _____

please explain: _____

_____

_____

16. Have you ever certified only part of an opinion to be published (i.e., partial publication) pursuant to rule 976.1?

Yes _____

No _____

please explain under what circumstances you decided to partially publish, or why you have never done so:

_____

_____

_____

_____

17. Should the Supreme Court be able to order a partial publication of an opinion of a Court of Appeal?

Yes _____

No _____

please explain: _____

_____

_____

_____

18. Should the Supreme Court be able to order a partial depublication of an opinion of a Court of Appeal?

Yes _____

No _____

please explain: _____

_____

_____

_____

POTENTIAL CHANGES TO RULE 976 AND RULE 976.1

19. Should changes to any of the existing criteria in rule 976 be considered?

Yes _____

No _____

please explain: _____

_____

_____

_____

20. Should additional criteria be added? (*Please see attached sheet for samples of criteria used in other jurisdictions*)

Yes _____

No _____

please explain: _____

_____

_____

_____

_____

21. Does the presumption set forth in rule 976 (against publication) affect your decision on whether to publish an opinion?

Yes _____

No _____

please explain: _____

_____

_____

_____

22. Should the presumption against publishing set forth in rule 976 be changed to an affirmative presumption that requires publication unless the opinion does not meet any of the criteria?

Yes _____

No _____

please explain: _____

_____

_____

_____

23. Do you think rule 976.1, setting forth the basis for partial publication, should be revised or repealed?

Yes _____

No _____

please explain: _____

_____

_____

_____

Please provide additional comments or suggestions to the Advisory Committee regarding any of the rules relating to publication (Rules 976 to 979).

_____

_____

_____

_____

_____

_____

_____

_____

Your name (*optional*) _____

Please feel free to attach additional sheets as necessary. Thank you for your participation.

Nationwide criteria for publishing cases

1. The opinion establishes a new rule of law.

2. The opinion criticizes, clarifies, explains, alters, or modifies an existing rule of law.

3. The opinion applies an existing rule of law to facts significantly different from those to which that rule has previously been applied.

4. An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued by the opinion.

5. The opinion resolves a legal issue of substantial public interest, which the court has not sufficiently treated recently.

6. The case involves a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case.

7. The case is a test case.

8. The opinion treats an issue of first impression.

9. The opinion treats a new constitutional or statutory issue.

10. The opinion treats a previously overlooked rule of law.

11. The opinion corrects procedural errors, or errors in the conduct of the judicial process, whether by remand with instructions or otherwise.

12. A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

13. The disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published.

14. The opinion directs attention to the shortcomings of existing common law or inadequacies in statutes.

15. The opinion construes a provision of a constitution, statute, ordinance, or court rule.

16. The opinion reaffirms a principle of law not applied in a recently reported decision.

17. The opinion decides an appeal from a lower court order ruling that a provision of the state constitution, a statute, an administrative rule or regulation, or any other action of the legislative or executive branch of state government is invalid.

18. The opinion involves a substantial question under the federal or state constitutions.

19. Although not otherwise meriting publication, the opinion constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar.

20. The opinion affirms or reverses a lower court decision on different grounds.

21. The opinion reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order.

22. The opinion is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

Appendix G:
Report on Survey of Justices of the Courts of Appeal

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Survey for Appellate Court Justices

Survey Results

9/14/2005

Contents

I. Survey Administration and Response Rates

Results

Survey sent to 101 justices

86 completed responses as of 5/1/05

- 48 completed online survey
- 38 completed hard copy version of survey

86% response rate for justice survey

Responses for attorneys as of 7/13/05 are based on 288 completed surveys and 132 partially completed surveys

Administration

Initial e-mail from Associate Justice Kathryn M. Werdeger

Link to online survey sent to justices by e-mail

List of published opinions and criteria from other states sent by e-mail

Hard copy of survey and other materials mailed

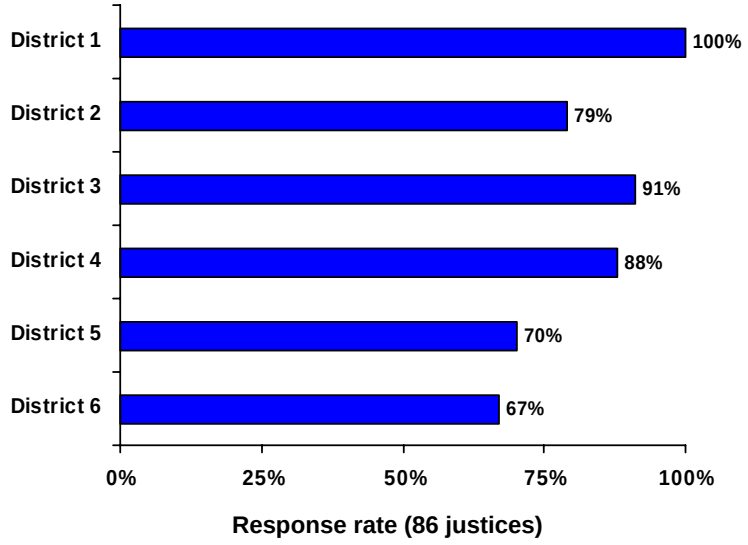
Committee members follow up individually with nonrespondents

The response rate was fairly consistent across the six appellate districts.

District 1 had the highest response rate, with all 20 justices responding to the survey.

The lower response rates in District 5 and District 6 can be attributed to their relatively small numbers of justices.

Appellate District



Justices were asked to indicate how many years they have served on the appellate bench, and their responses were recoded into groups of 5 years.

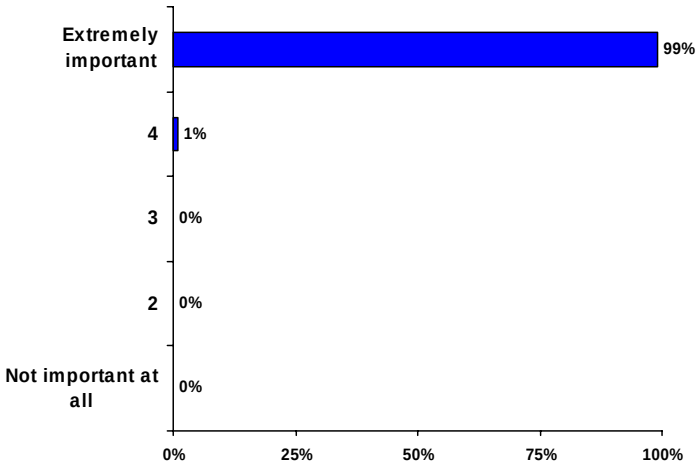
Over one-half of the justices who responded to the survey have been on the appellate bench for less than 10 years, while less than one in five justices have served for 16 years or more on the appellate bench.

Years on Appellate Bench

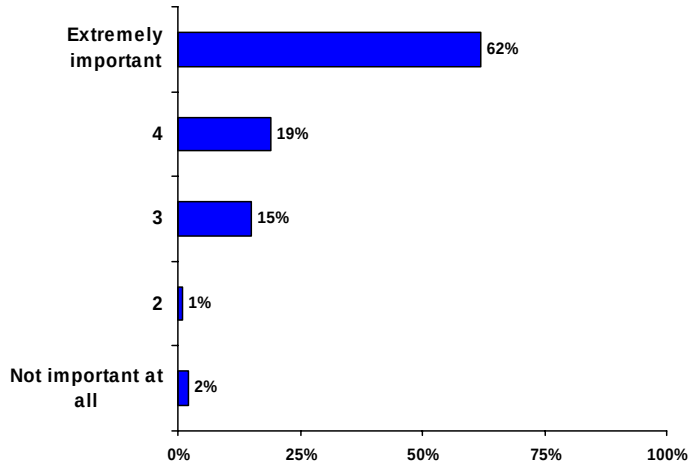
II. Publication Criteria

Q3: During the course of your career, how important has each of the following criteria been in persuading you that an opinion should be published?

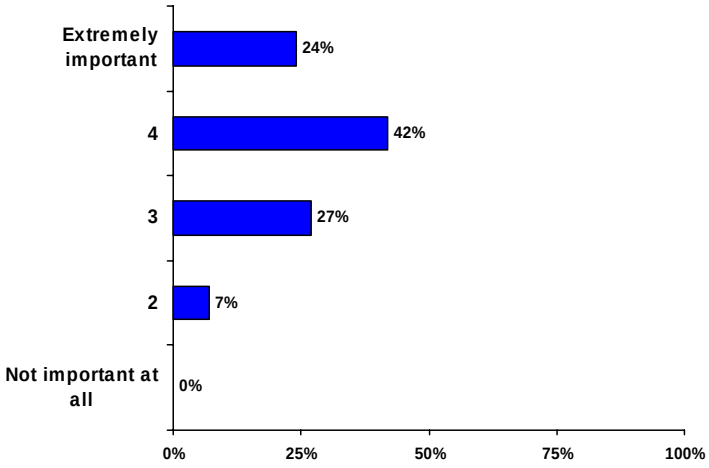
Establishes a new rule of law



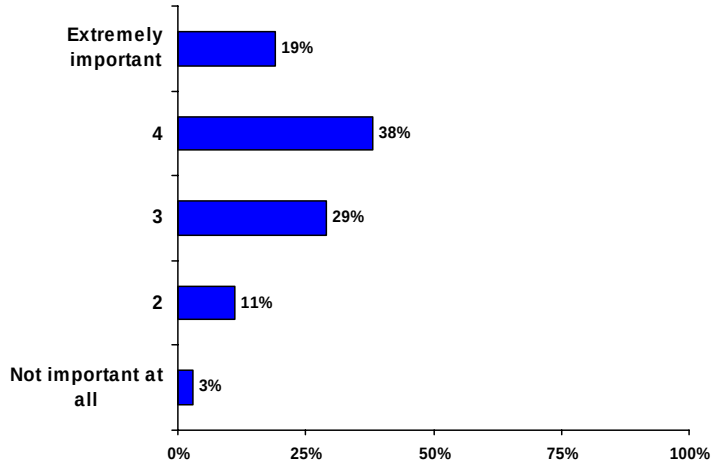
Resolves or creates an apparent conflict in the law



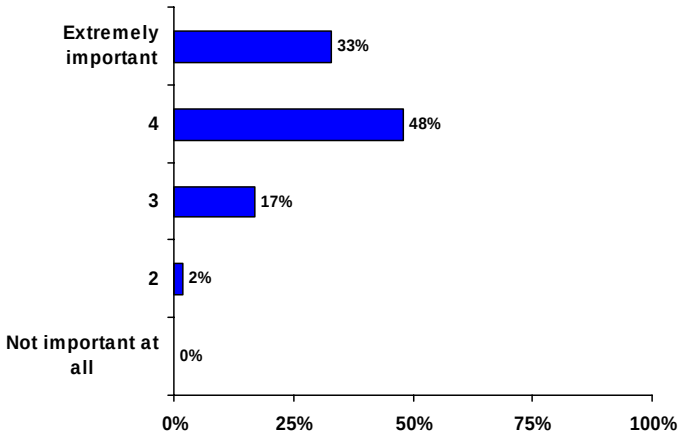
Applies an existing rule to a set of facts significantly different from those stated in published opinions



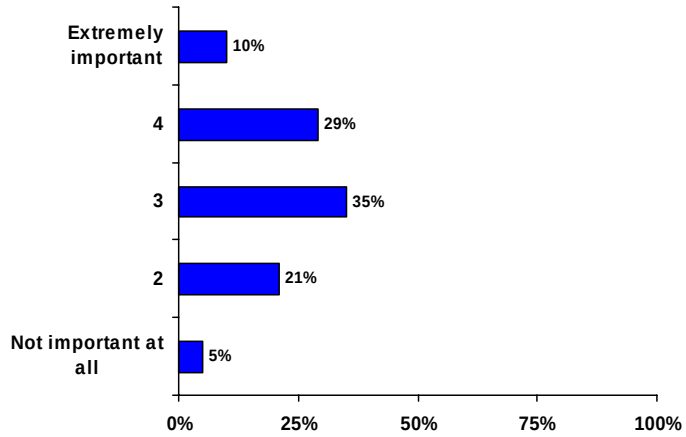
Involves a legal issue of continuing public interest



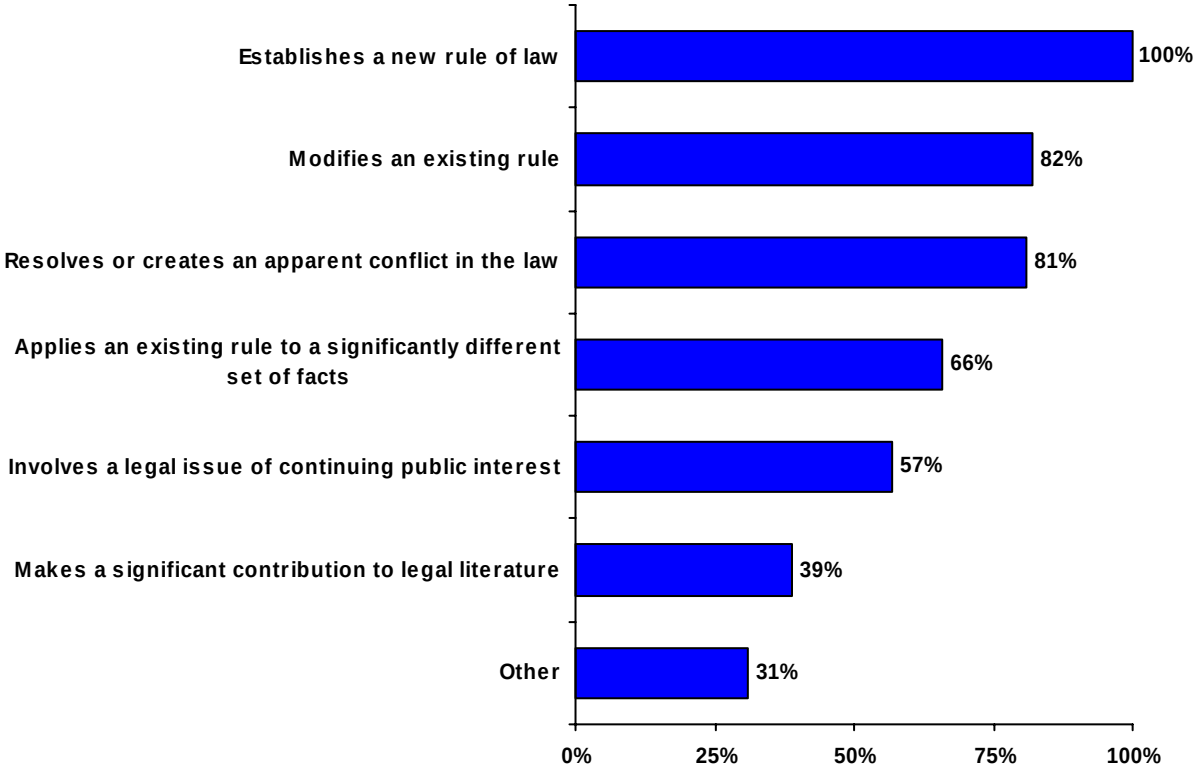
Modifies, or criticizes with reasons given, an existing rule



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



Q3: Percent responding "4" or "5 – Extremely important" in persuading them that an opinion should be published



Results

Three criteria — *establishes a new rule on law* (100%), *modifies an existing rule* (82%), and *resolves or creates an apparent conflict in the law* (81%) — were cited most often by justices as being important in persuading them that an opinion should be published.

A majority of the justices responded with either a "4" or a "5" to the following two criteria: *applies an existing rule to a significantly different set of facts* (66%) and *involves a legal issue of continuing public interest* (57%).

Justices were evenly split on the importance of the final criterion, *makes a significant contribution to legal literature*, with similar proportions responding that it is not very important ("1" or "2") and that it is an important criterion ("4" or "5").

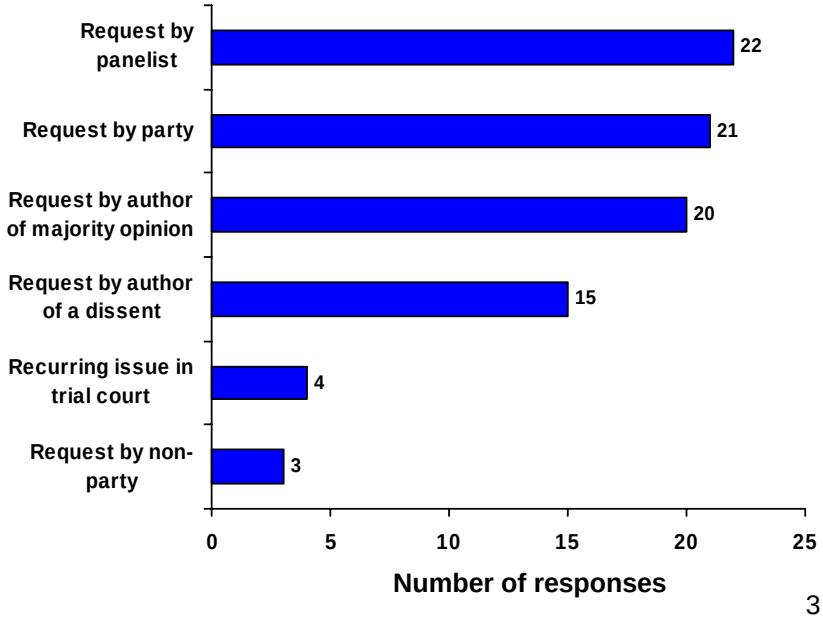
Comments

Justices cited several other criteria as important in persuading them that an opinion should be published.

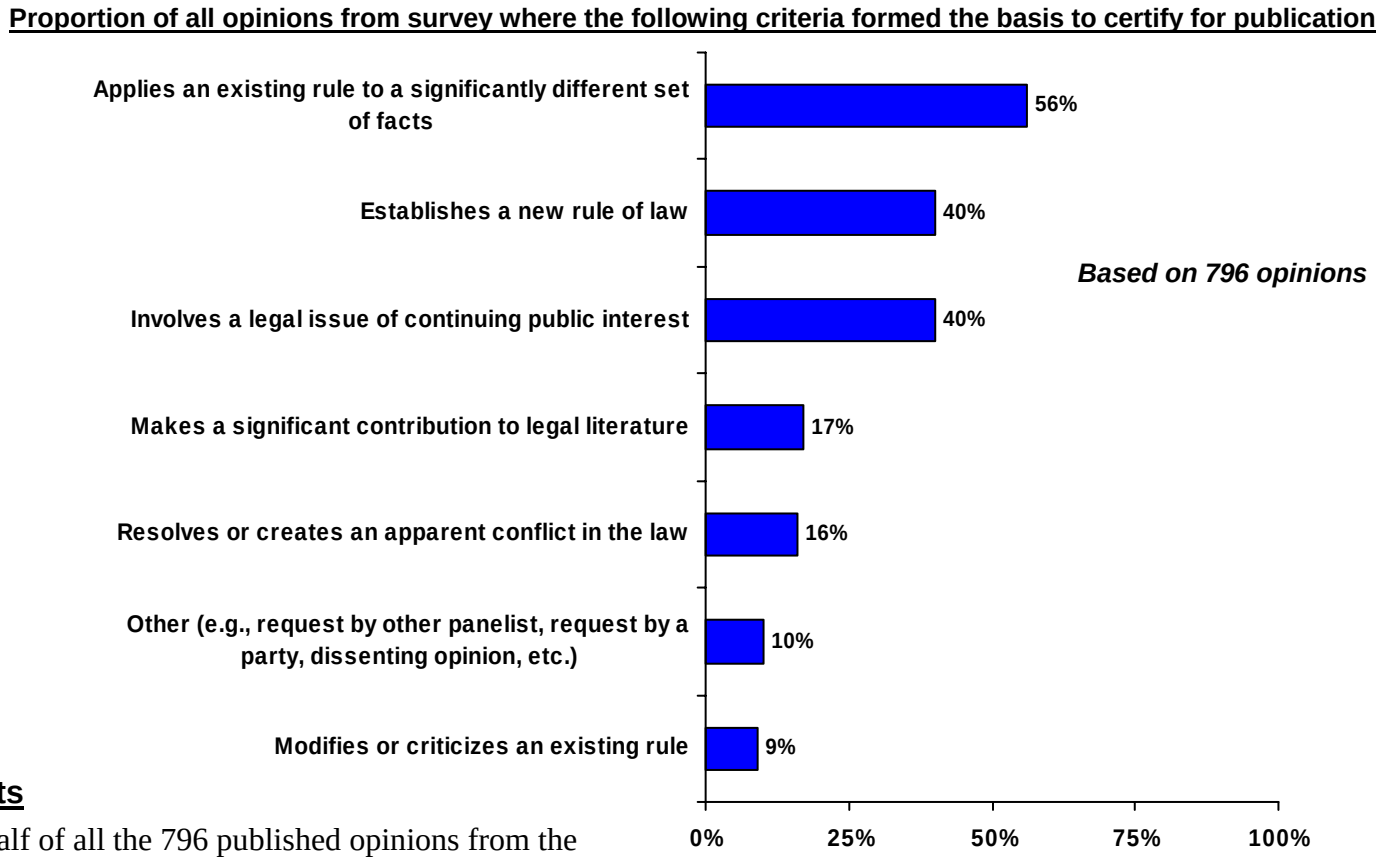
The criterion cited most often is a request by a panelist, closely followed by a request by a party, a request by the author of a majority opinion, and a request by the author of a dissent.

The remaining two criteria listed in the chart to the right were cited by only a small number of justices.

Other criteria



Q4: Which criteria formed the basis for the decision to certify for publication the 10 most recent opinions that are included with this survey?



Results

Over half of all the 796 published opinions from the survey were certified to be published, justices stated, because the case, "applies an existing rule to a significantly different set of facts."

Two other criteria — *establishes a new rule of law* and *involves a legal issue of continuing public interest* — formed the basis for certification in 40 percent of the published opinions.

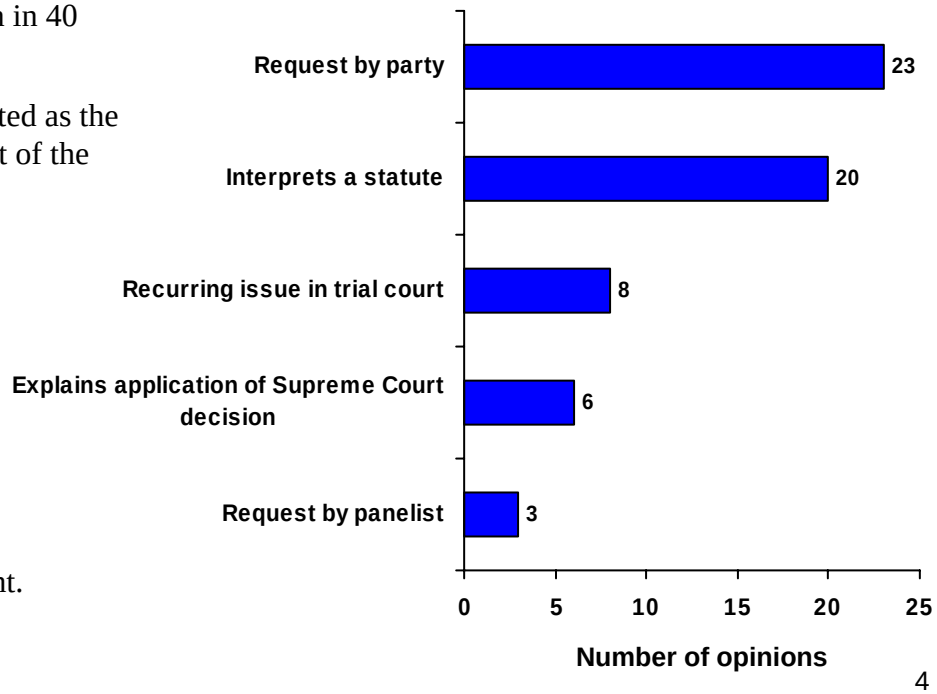
Each of the remaining three criteria were cited as the basis for certification in less than 20 percent of the published opinions from the survey.

"Other" criteria

Justices cited an "other" criterion as the basis for certification in 10 percent of the published opinions from this survey.

The other criteria cited most frequently by justices are displayed in the chart to the right.

Other criteria



Summary of Section II

Justices cited three criteria as being relatively important — *establishes a new rule on law*, *modifies an existing rule*, and *resolves or creates an apparent conflict in the law* — most often when asked how important criteria have been in persuading them that an opinion should be published.

When justices were asked which criteria formed the basis for the decision to certify for publication their 10 most recent published opinions, a different criterion, *applies an existing rule to a significantly different set of facts*, was cited most often.

The criterion *makes a significant contribution to legal literature* was cited least often by justices as "extremely important" in persuading them that an opinion should be published, and was also least likely to have formed the basis for the decision to certify the 796 published opinions from the survey.

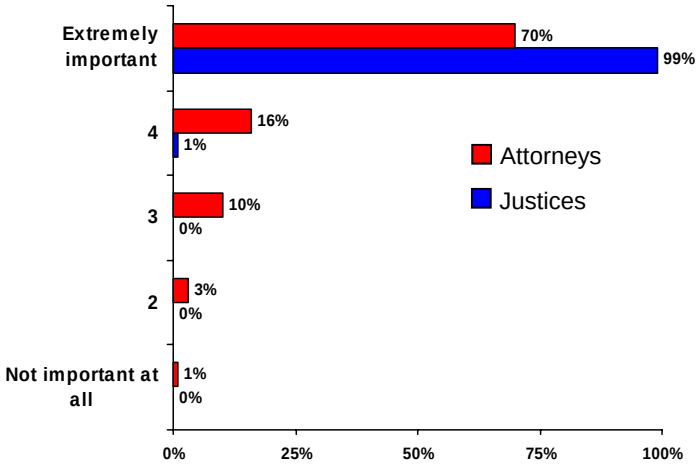
Differences by district

There are no statistically significant differences among appellate districts in this section.

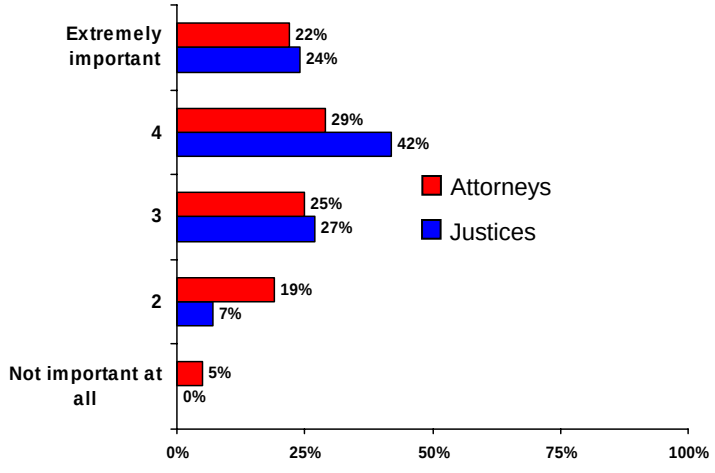
Comparison between justice and attorney responses

Q3: During the course of your career, how important has each of the following criteria been in persuading you that an opinion should be published?

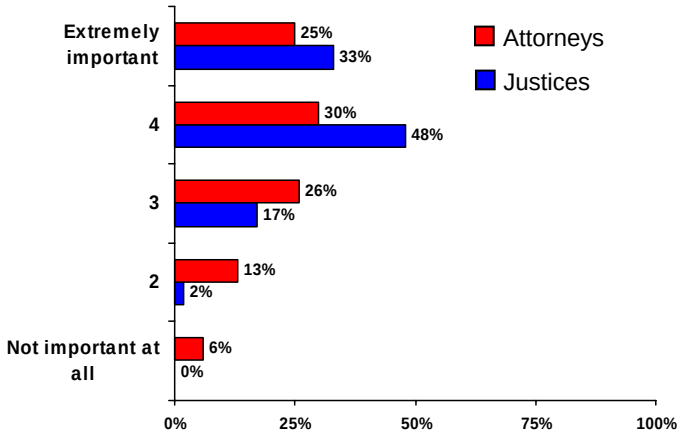
Establishes a new rule of law



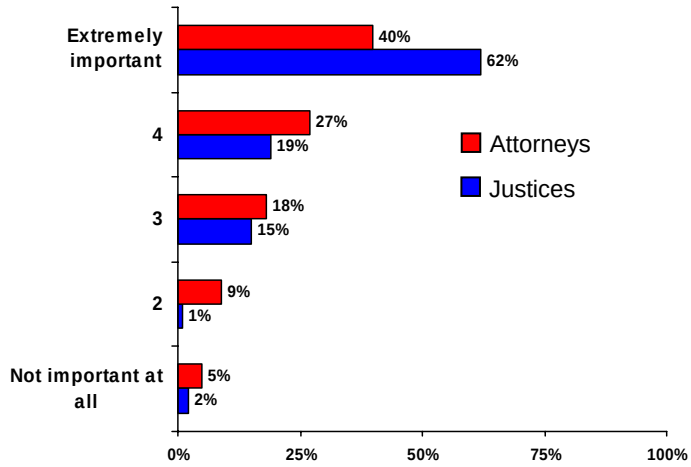
Applies an existing rule to a significantly different set of facts



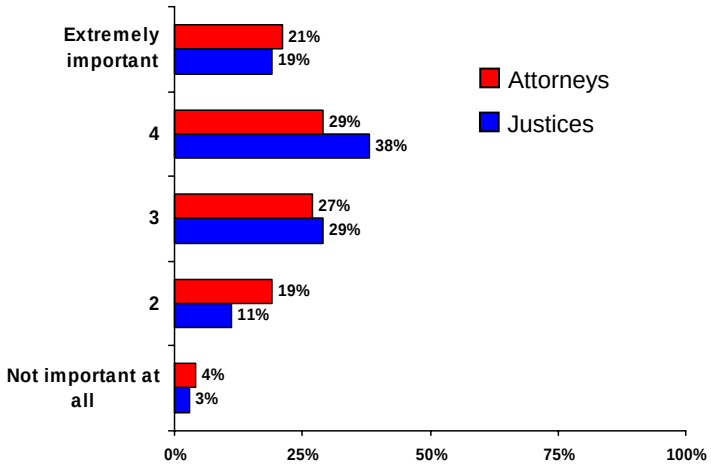
Modifies or criticizes an existing rule



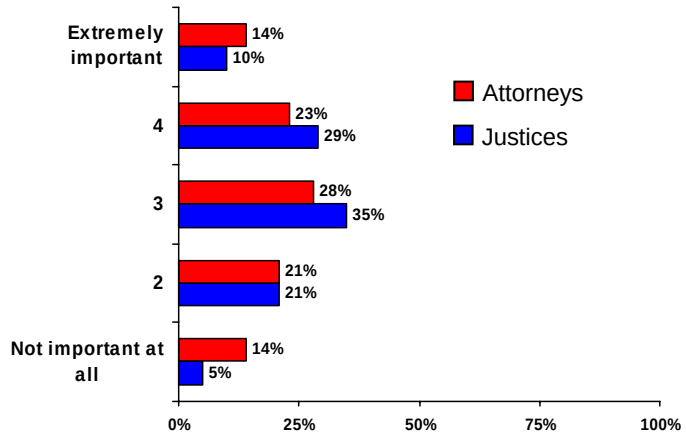
Resolves or creates an apparent conflict in the law



Involves a legal issue of continuing public interest



Makes a significant contribution to legal literature



III. Publication Process

Q5: How is the decision to certify an opinion for publication typically made?

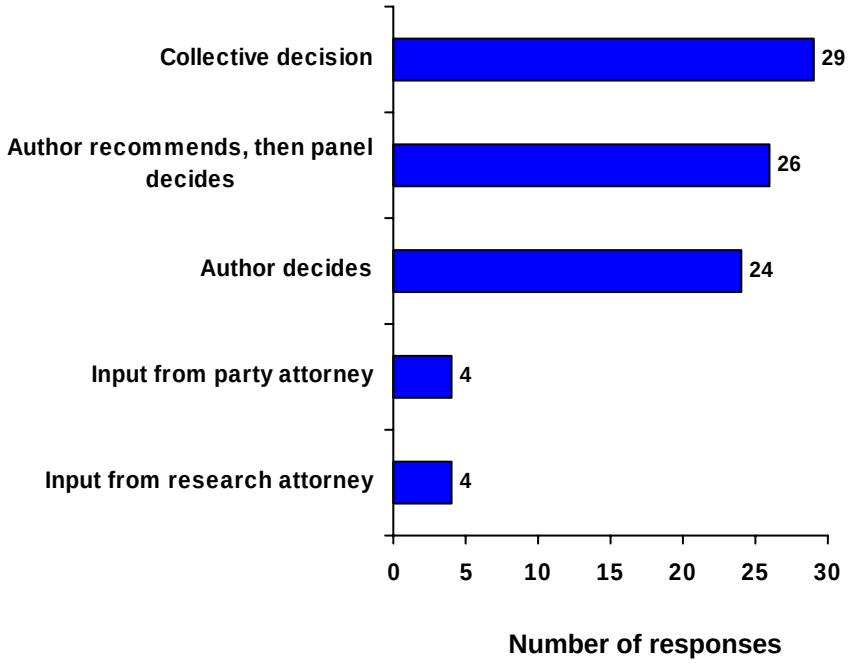
Results

Justices were asked to provide a description of how the decision to certify an opinion for publication typically is made in their court.

Three main themes that are somewhat interrelated emerged from the responses, and are listed below.

- A collective decision is made by the entire panel.
- The author makes a recommendation regarding publication to the panel, and the panel votes to reach consensus.
- The author primarily makes the determination whether or not to publish.

Input from either a party attorney or a staff research attorney was cited by only a small number of justices.



Examples of responses

"Collectively, after discussion with the panel members."

"Generally, the decision is made after a recommendation for or against publication by the author based on the rules for publication."

"Initially by the authoring justice, then in consultation with the other members of the panel that heard the case, all based on Rules of Court criteria."

"By the recommendation of the author of the opinion. Sometimes other panel members will suggest publishing an opinion that had not been recommended by the author, but it is very rare for the other panelists to suggest that an opinion not be published if the author so recommends."

"We typically ask input from counsel during oral argument as we provide counsel with tentative opinions that are marked for publication."

"If the research attorney who prepared the case memorandum thinks the opinion will merit publication, the attorney recommends this. If I agree, I circulate it with a notation that it is certified for publication. If another panel member disagrees, I consider that and may change my mind."

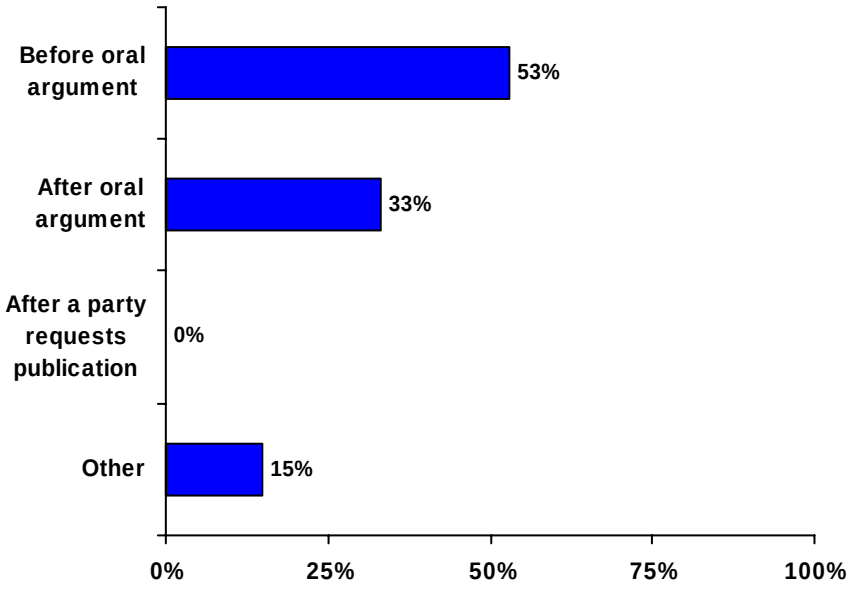
Q6: When is the decision regarding whether to certify an opinion for publication typically made?

Results

A slight majority of justices (53%) indicated that a decision is made concerning publication before oral argument.

About one-third of the justices responded that a decision is made after oral argument, while no justices indicated that a decision is typically made after a party requests it.

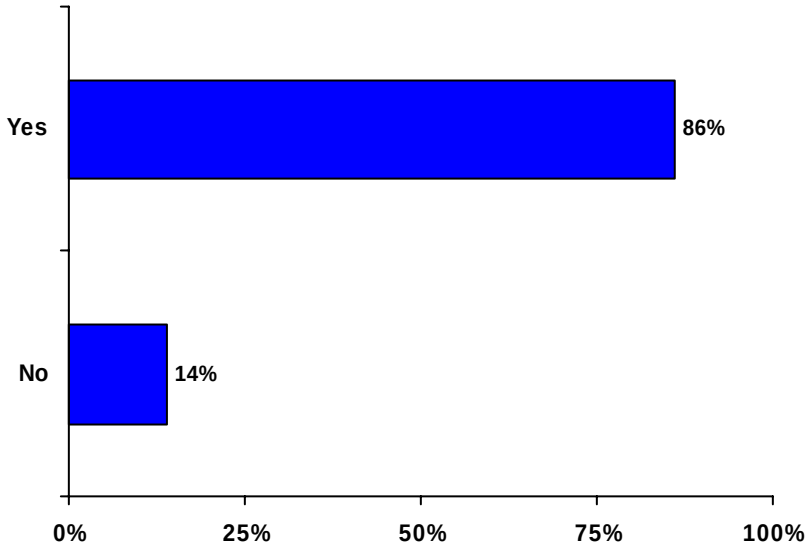
Of those who responded "other," most indicated that the timing varies between the two categories.



Q7: Is deference to the author of an opinion a major factor in the decision concerning whether to certify an opinion for publication?

Results

A vast majority of justices (86%) indicated that deference to the author is a major factor in the decision to certify an opinion for publication.



Comments

"Deference in this context does not mean abdication but the author's insights are important."

"The Author has spent the greatest time on the subject, has prepared a calendar draft, has presented the matter at pre-hearing conference and states why the case merits publication. While not a blanket approval, great deference is given to the author's request."

"A factor, but not a major factor. The author's publish/non-publish suggestions are usually followed, but not due to deference to the author. They are followed primarily because they satisfy publication criteria. Author deference may tip balance in close question."

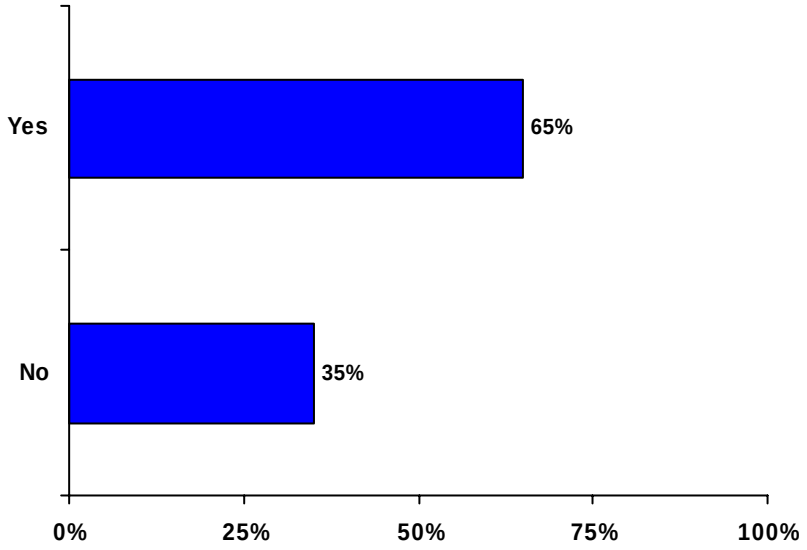
"This is a major consideration in our court; because the author tends to be the most knowledgeable person on the panel, the author's opinion carries considerable weight. There are times when the suggestion to publish is made by a panel member, but, in those circumstances, the panel almost always defers to the author."

Q8: Is deference to other panel members a major factor in the decision concerning whether to certify an opinion for publication?

Results

Almost two-thirds of the justices (65%) responded that deference to other panel members is a major factor in publication decisions.

This is less than the 86 percent of justices who stated in the previous question that deference to the author is a major factor.



Comments

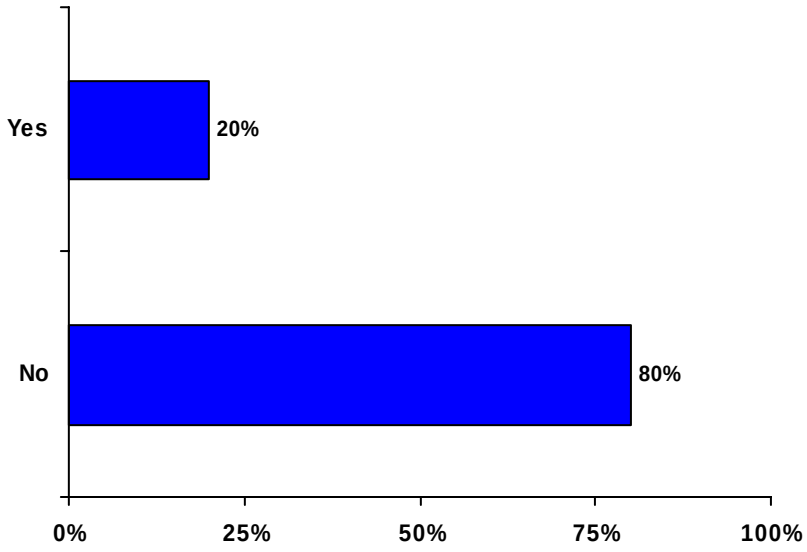
"We believe it salutary to defer to panel members not only because it enhances collegiality, but because it tends to discourage opinions that are legally untenable."

"Collegiality demands substantial deference to the author on the decision to publish. Much more so than the decision to concur or not concur with another's decision."

Q9: Does anything other than the rules, such as local traditions, standards, or practices, also influence the determination whether or not to certify an opinion for publication?

Results

A solid majority (80%) of justices stated that no factors other than the rules influence their determination whether or not to certify an opinion for publication.



Comments

Some examples of comments from justices who responded "Yes" are presented below.

"Sometimes, not often, there is a feeling sent out by the author that we are being critical of a trial judge or attorney and should 'protect' them. This has happened (although rarely) even when the issue is one of critical importance."

"A multitude of factors: the quality of the briefing, the thoughtfulness and thoroughness of the trial judge, the peculiarity of the facts, the procedural snafus, the pressure of the workload."

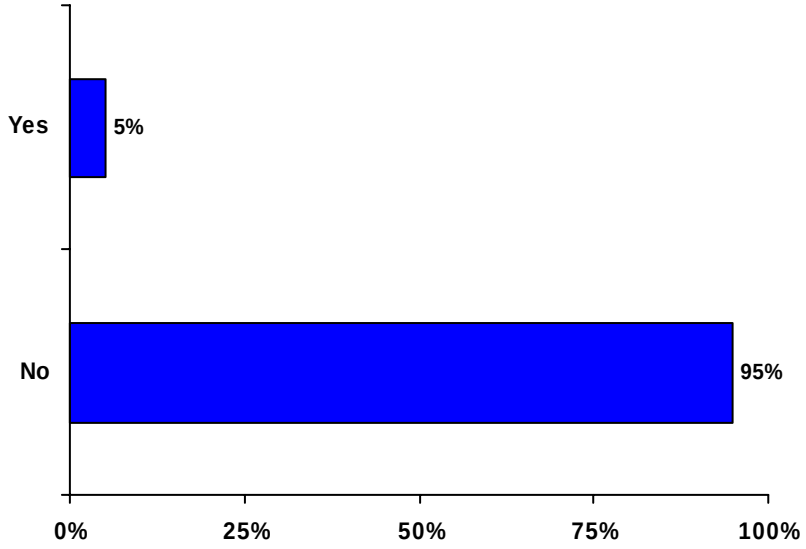
"We have had issues that frequently come before us that we feel need to be resolved or revisited by the Supreme Court. Some panel members feel that publication is more likely to get the Court's attention."

"If the circumstances of the litigation or case are so bizarre that they are unlikely to arise in the future, we might not publish. If a trial court persists in not following/misreading the law and has been reversed in earlier unpublished opinion(s), or if attorney persists in advancing legally unsound arguments."

Q10: Are there differences in the way civil and criminal opinions are treated with respect to certification for publication?

Results

There is almost unanimous agreement among justices that there are no differences in the way civil and criminal cases are treated with respect to certification for publication.



Summary of Section III

The decision to certify an opinion for publication is typically made in one of three somewhat interrelated manners.

A collective decision is made by the entire panel.

The author makes a recommendation regarding publication to the panel, and the panel votes to reach consensus.

The author primarily makes the determination whether or not to publish.

A slight majority of justices indicated that a decision is made concerning publication before oral argument, while about one-third responded that a decision is made after oral argument.

Deference to the author and, to a lesser degree, deference to other panel members are major factors in the decision to certify an opinion for publication.

A solid majority of justices affirmed that nothing other than the publication rules influence their determination whether or not to certify an opinion for publication.

Justices indicated that there are no differences in the way civil and criminal cases are treated regarding publication.

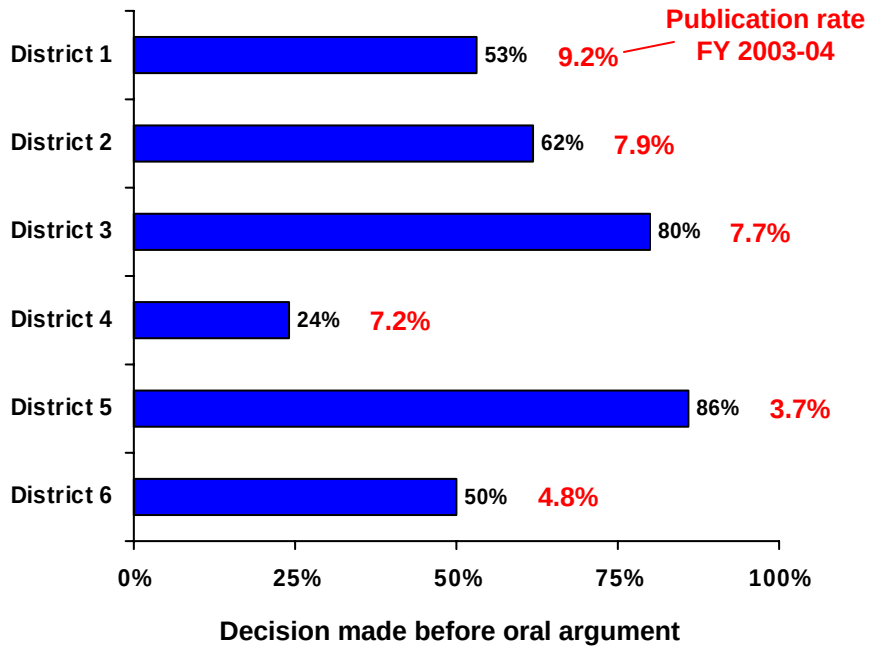
Differences by District

In the responses to two of the questions in this section there are statistically significant differences among justices from different districts. Charts for these two questions are presented below, with the publication rate for fiscal year 2003-04 also displayed on each chart.

Justices from District 4 are less likely than justices from the other districts to make a decision regarding whether to certify an opinion for publication before oral argument, while justices from District 3 and District 5 are more likely to make a decision at this stage.

District 5, with the lowest publication rate, 3.7 percent in fiscal year 2003–04, had the highest proportion of justices (86%) that indicated they typically make a decision to certify an opinion for publication before oral argument. This relationship between publication rate and making a decision about publication before oral argument is not apparent in any of the other districts.

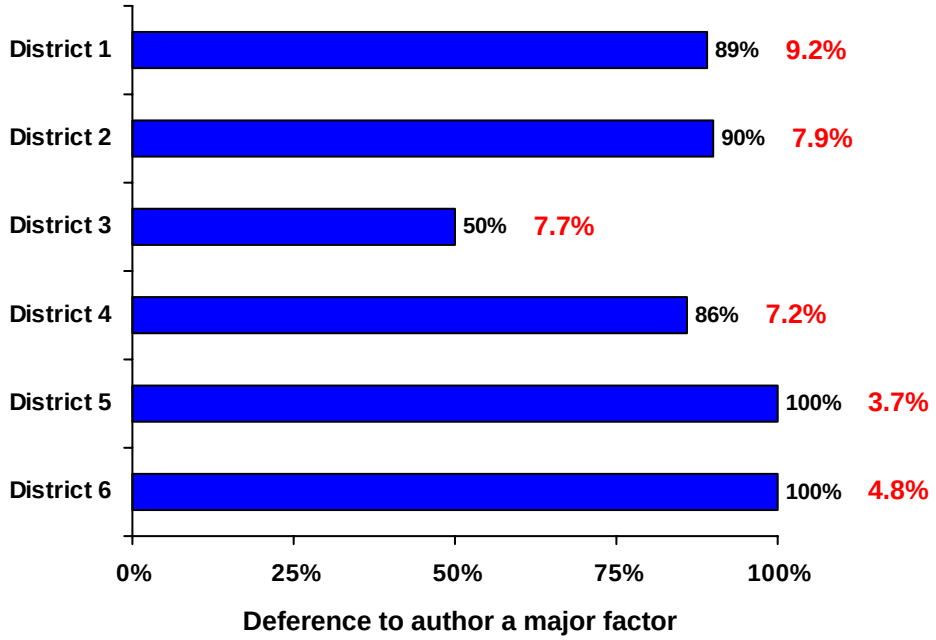
Q6: When is the decision regarding whether to certify an opinion for publication typically made?



Justices from District 3 are less likely than justices from the other districts to respond that deference to the author of an opinion is a major factor in the decision whether to certify an opinion for publication.

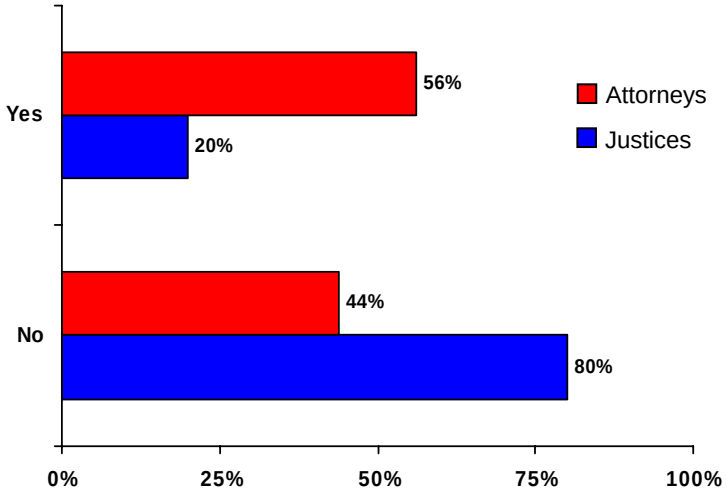
Here there appears to be a relationship between the publication rate and whether deference to the author of an opinion is a major factor in the decision to certify. Districts 5 and 6, with the lowest publication rates in fiscal year 2003–04, are the only two districts where all of the justices indicated that deference to the author is a major factor in publication decisions.

Q7: Is deference to the author of an opinion a major factor in the decision concerning whether to certify an opinion for publication?



Comparison between justice and attorney responses

Does anything other than the rules, such as local traditions, standards, or practices, also influence the determination whether or not to certify an opinion for publication?



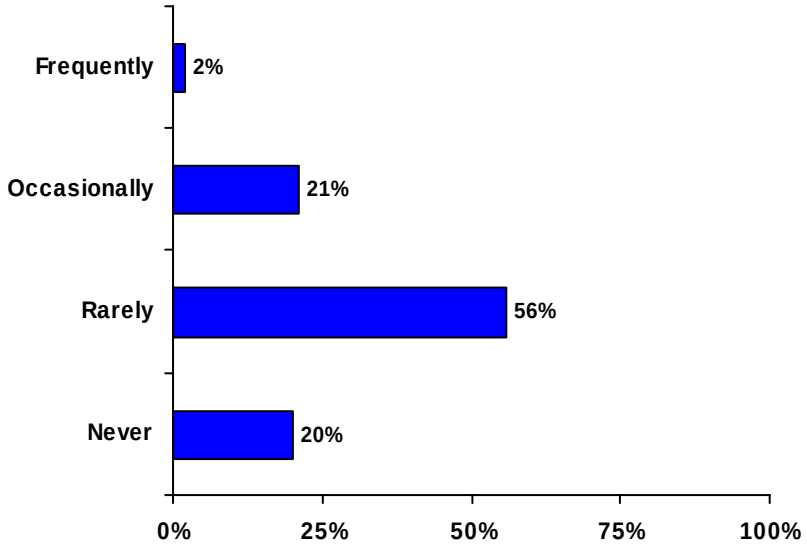
IV. Unpublished Opinions

Q11: How often have you been involved in a case that resulted in an unpublished opinion that you thought should have, or could have, been published because it met the rule 976(c) criteria?

Results

About one-quarter of the justices have been involved either occasionally or frequently in a case that resulted in an unpublished opinion that they thought should have, or could have, been published because it met the rule 976(c) criteria.

One in five (20%) justices have never been involved in this type of case.



Comments

"Sometime panel members think that the facts are too unusual to warrant publication, making the opinion of limited use in the future. Sometimes the panel just does not think that the case is a good vehicle to create case law with."

"I was of the opinion the case involved application of existing law to a different set of facts than in published opinions and deserved to be published. I was outvoted by the other two, who believed the fact situation presented was too convoluted to be of help to the public."

"Usually it has involved application of law to new set of facts but the author did not agree that facts were really 'new.'"

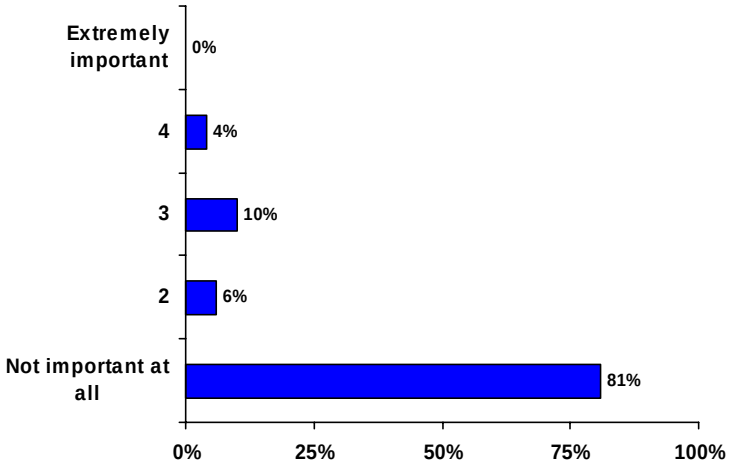
"It met the criteria, but it concerned an issue that the Supreme Court is issuing 'grant and hold' orders on."

"In general this occurs when the opinion has not been prepared for and is analytically not suitable for publication."

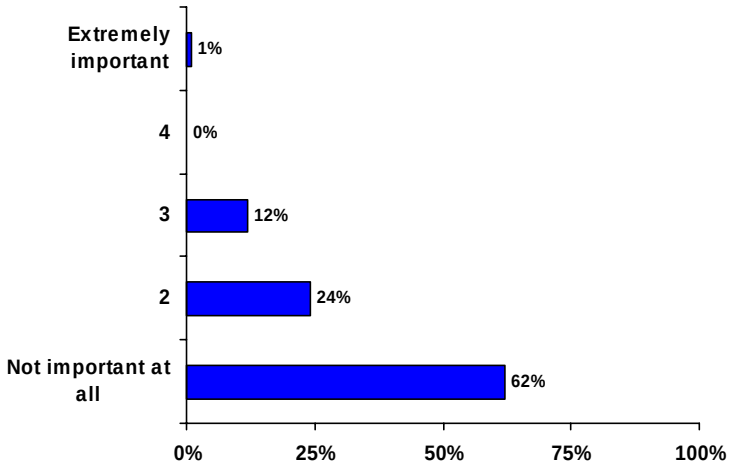
"Time constraints are the major factor in cases that could have been published. If the case is not drafted with publication in mind, it takes many hours to revise and amplify."

Q12: How important is each of the following factors in deciding not to publish a case that appears to meet the rule 976(c) criteria?

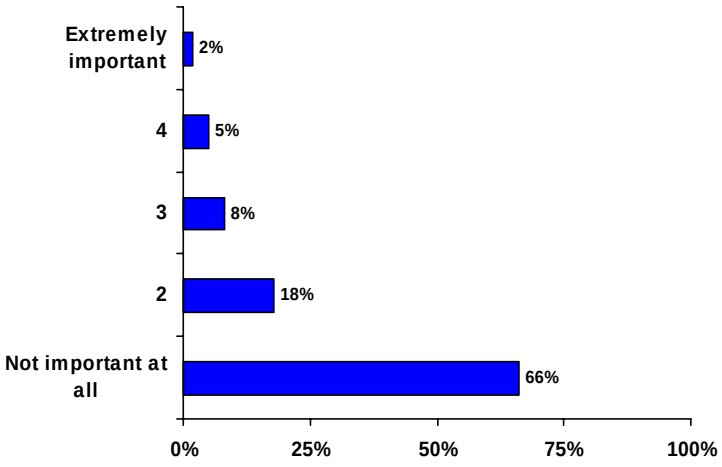
The case is controversial



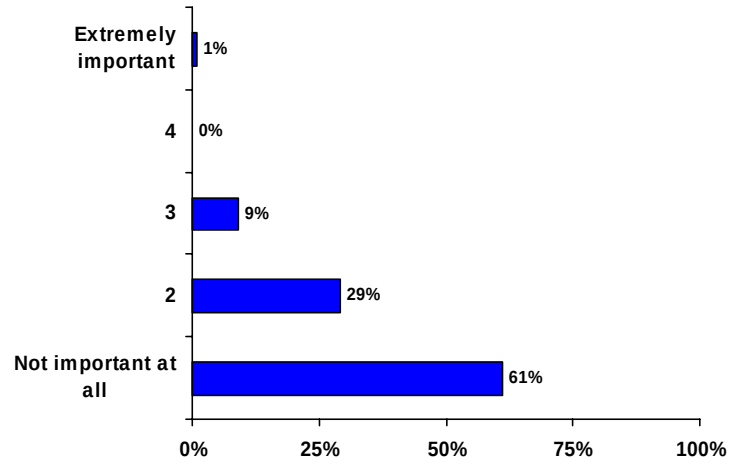
Potential embarrassment of trial judge



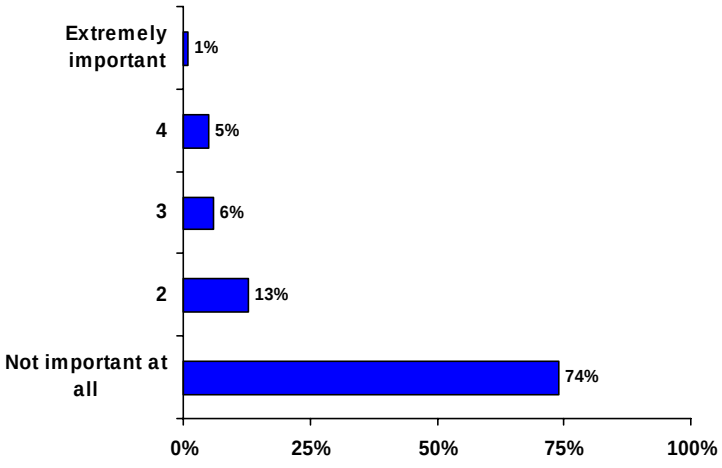
Workload issues do not allow enough time to prepare a published opinion



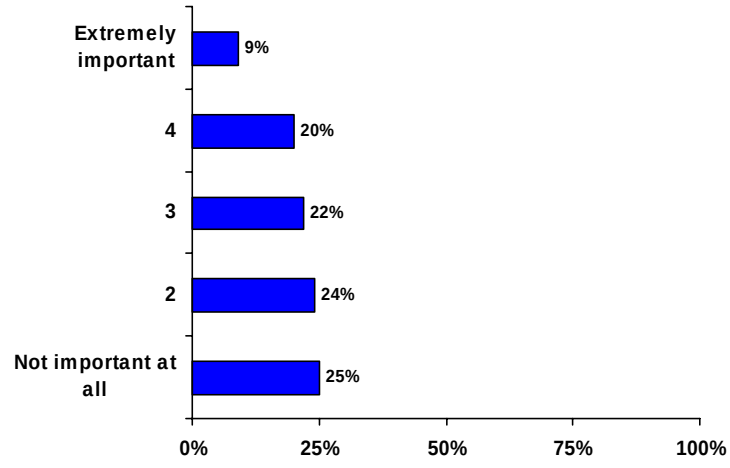
Potential embarrassment of litigants or lawyers



The tone or content of the dissenting opinion



Other (e.g., request by other panelist, request by a party, dissenting opinion, etc.)



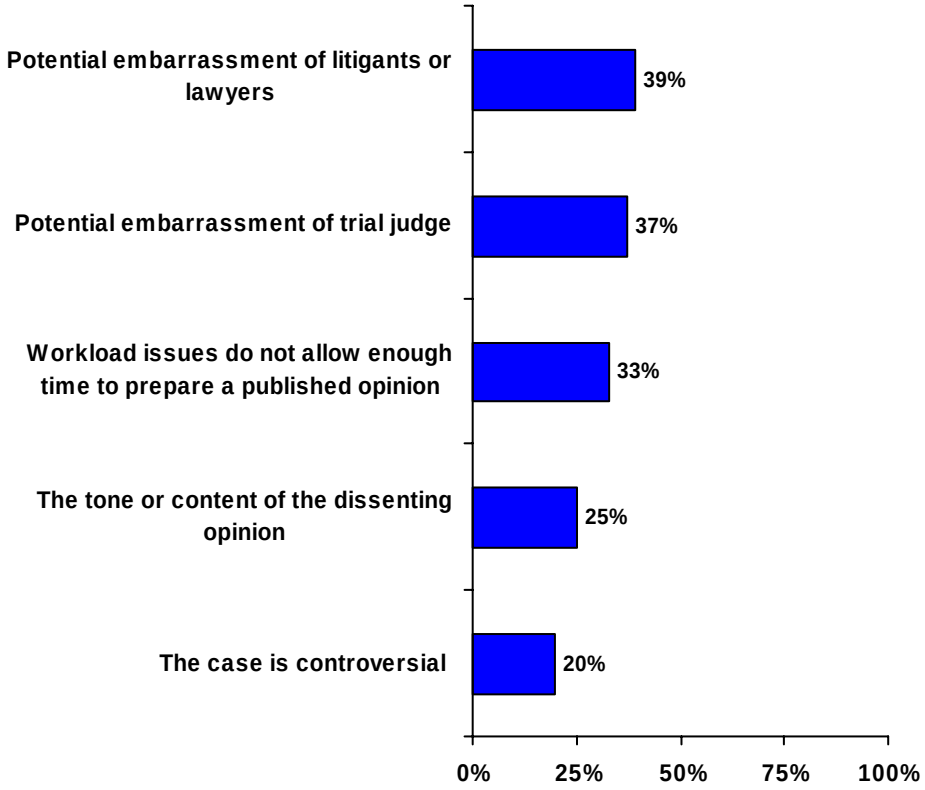
Results

The chart to the right lists the factors that have some importance (i.e., responses "2" through "5") to the justices in deciding not to publish a case that appears to meet the rule 976(c) criteria.

Potential embarrassment of litigants/lawyers (39%) or the trial judge (37%) were the factors cited most frequently by justices as having some importance in a decision not to publish a case that appears to meet the rule 976(c) criteria. However, each of these factors was considered "not important at all" by over 60 percent of justices.

Workload issues were considered to have some importance in publication decisions by one-third of the responding justices.

Percent responding that the factor has some importance



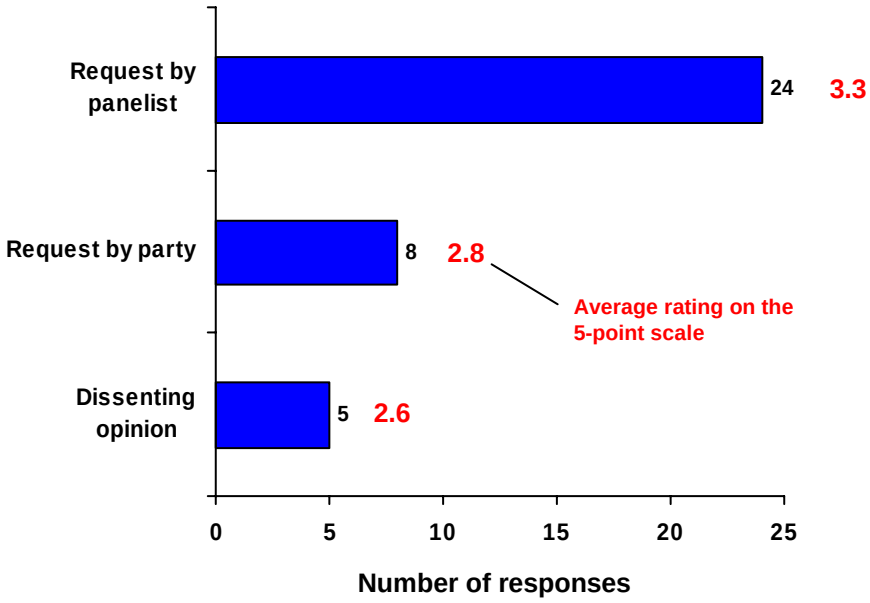
"Other" responses

Justices cited several other factors as having some importance in a decision not to publish a case that appears to meet the rule 976(c) criteria.

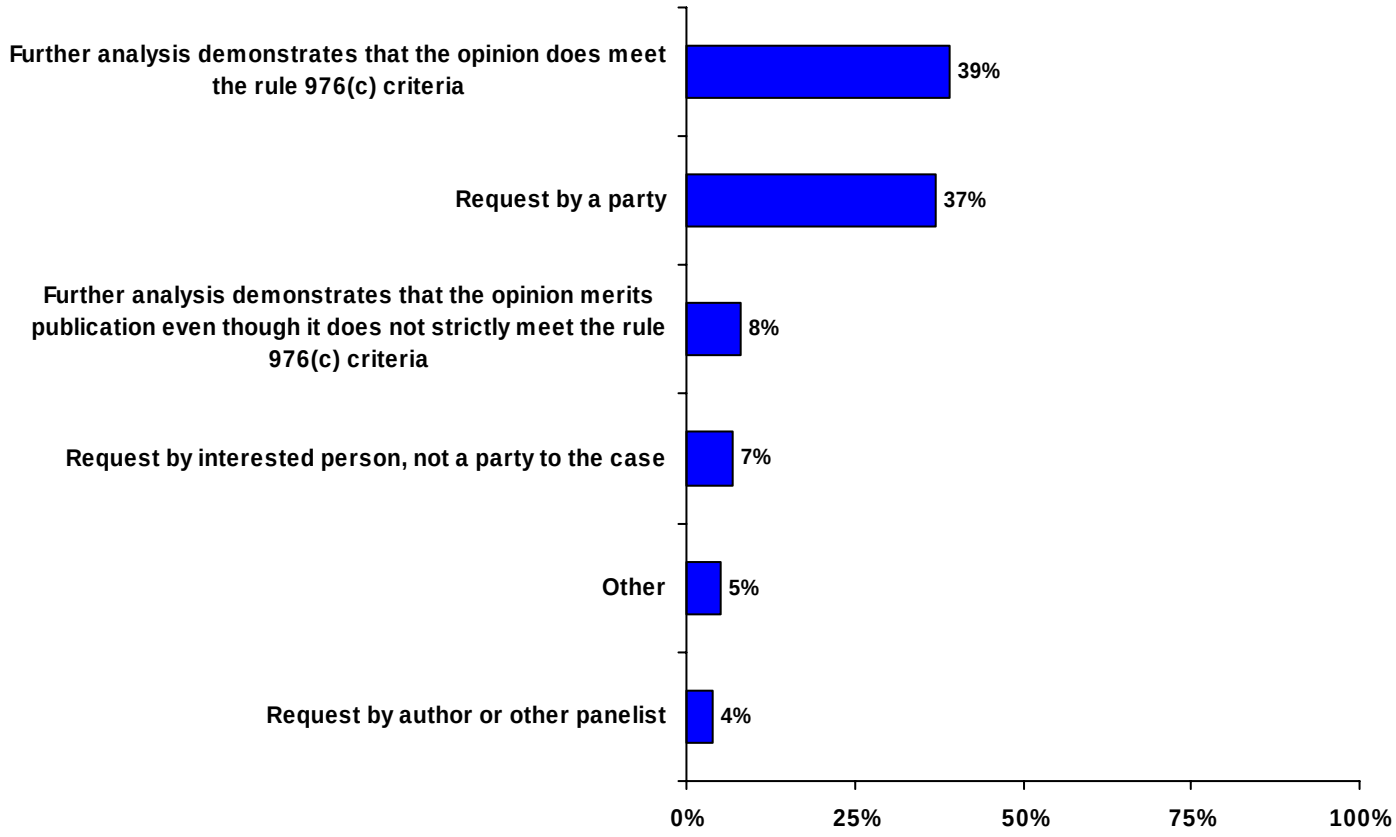
A request by a panelist not to publish an opinion was cited most frequently by justices as an important factor. Justices gave this factor an average rating of 3.3 on the 5-point scale.

Justices cited two other factors — a request by a party not to publish and a dissenting opinion — as having some importance in a decision not to publish a case that appears to meet the rule 976(c) criteria.

Other factors



Q13: In your experience, what is the most common reason after filing for reconsidering a decision not to publish a case?



Results

Two reasons were cited by justices as the most common, after filing, for reconsidering a decision not to publish a case.

Almost 40 percent of the justices indicated that the most common reason for reconsidering a decision not to publish a case was that, “further analysis demonstrates that the opinion does meet the rule 976(c) criteria.”

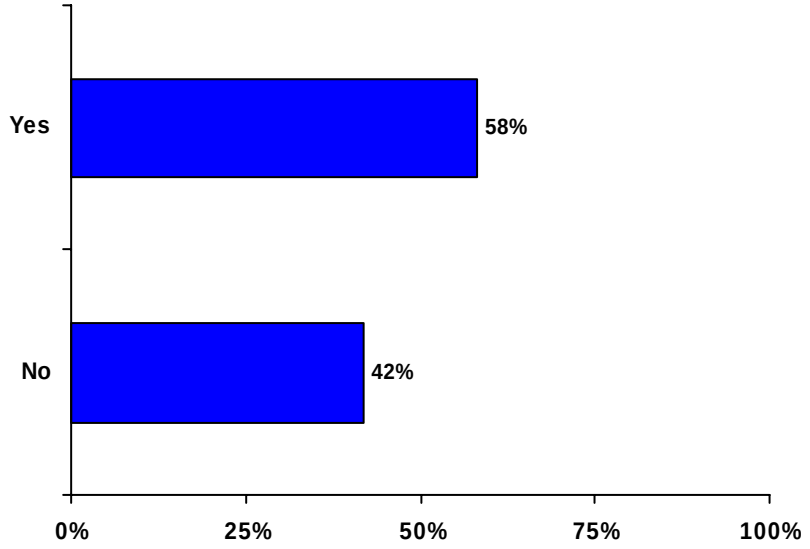
A request by a party was cited by 37 percent of the justices as the most common reason.

Each of the remaining reasons in the above chart was cited by less than 10 percent of justices as the most common, after filing, for reconsidering a decision not to publish a case.

Q14: Do you ever rely on unpublished opinions when drafting your opinions?

Results

Justices were evenly split on whether they rely on unpublished opinions, with a slight majority (58%) responding that they do use them when drafting their opinions.



Comments

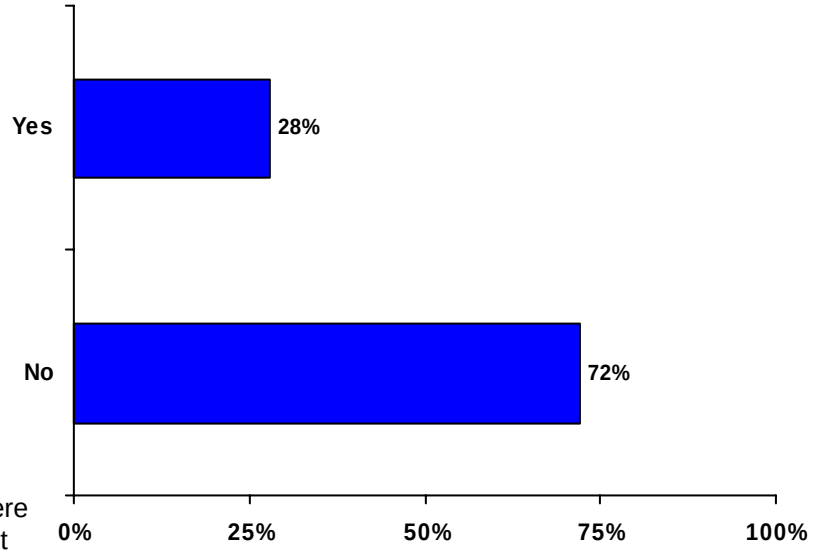
Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division.

Some justices also use unpublished opinions as a source of boilerpoint language.

Q15: Should parties be permitted, in a petition for review or an answer, to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?

Results

Almost three-quarters (72%) of the justices believe parties should not be permitted to draw the Supreme Court's attention to unpublished opinions.



Comments

Justices who responded "Yes" indicated that they believe the Supreme Court should have a complete picture of all relevant issues when there is a conflict with a decision.

"It should be important to the Supreme Court to know there are conflicts between the lower courts which have not yet been resolved, whether the cases are published or not."

Justices who responded "No" generally did so because they believe the permission would remove any distinction between published and unpublished opinions, and that the practice could be abused.

"'Arguably conflict' is such a vague phrase that it could be misused to circumvent the rule against citing unpublished opinions."

"Were that the case, there would be no practical difference between published and unpublished cases."

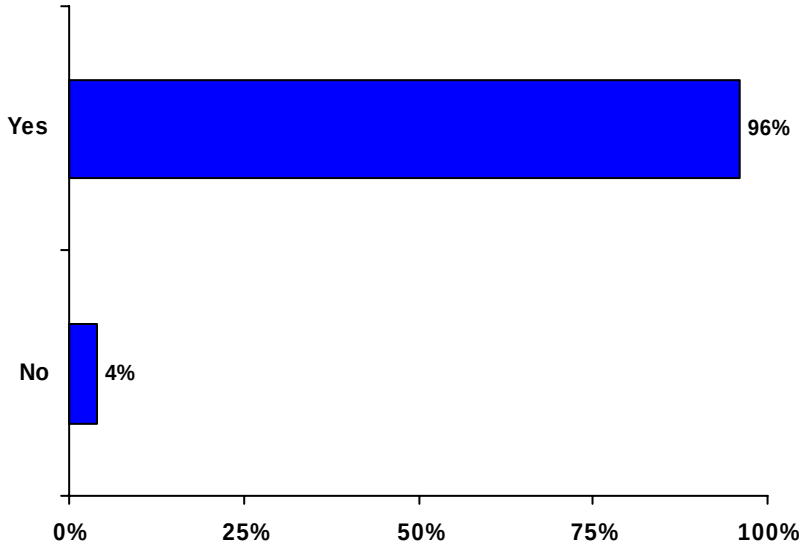
"Unpublished cases often do not receive the detailed analysis that published cases receive."

V. Partial Publication

Q16: Have you ever certified only part of an opinion to be published (i.e., partial publication) pursuant to rule 976.1?

Results

Almost all of the justices who responded to this question have certified only part of an opinion to be published.



Comments

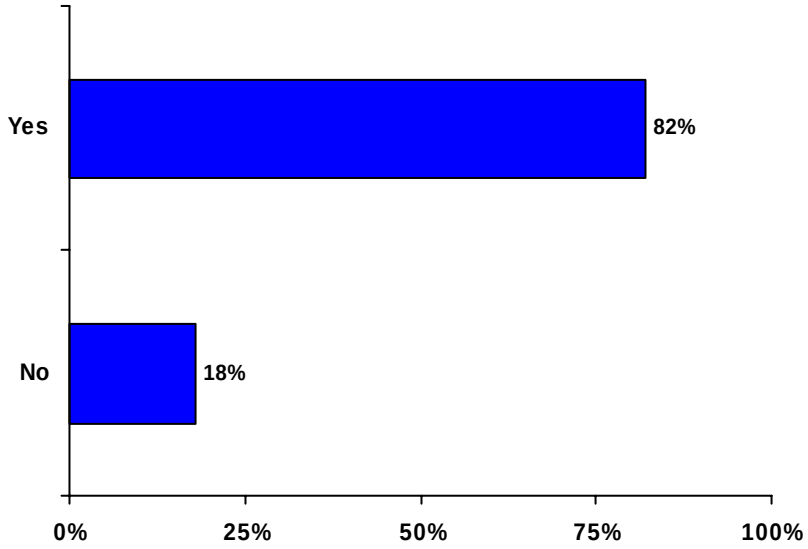
Most comments highlighted that justices certified only part of an opinion to be published because only that part of the opinion merited publication while the other part of the opinion did not meet the rule 976 criteria.

Some justices indicated that they rarely publish only part of an opinion because of a personal or panel preference against partial publication.

Q17: Should the Supreme Court be able to order partial publication of an opinion of a Court of Appeal?

Results

Justices strongly affirmed (82%) that the Supreme Court should be able to order a partial publication of an opinion of a Court of Appeal.



Comments

Justices who responded "Yes" indicated that they see no distinction between the Supreme Court's authority to order full publication or depublication, and its authority to order partial publication or depublication.

"If the Supreme Court believes only part of an opinion is significant, it should have the ability to order that part published."

"If the Supreme Court can order full publication, why shouldn't it be able to order partial publication where an opinion addresses more than one issue which does not meet the criteria for publication."

Several justices who responded "No" indicated that partial publications could lose some context.

"I'm not sure how I feel about this. Not all facts are put in or stressed in an opinion. Publishing a small portion after the fact might result in confusion for the parties."

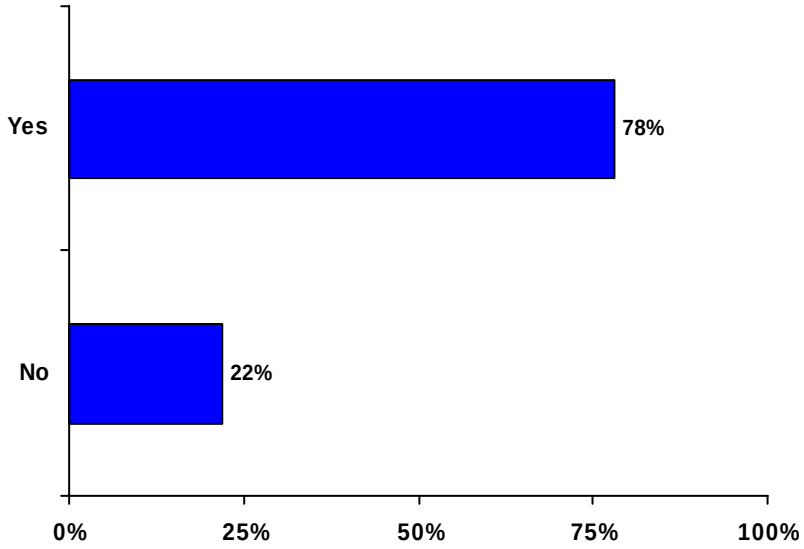
"It would either create an incoherent case or turn the court of appeal justice into a supreme court law clerk."

Q18: Should the Supreme Court be able to order a partial depublication of an opinion of a Court of Appeal?

Results

Over three-quarters of the justices indicated that the Supreme Court should be able to order a partial depublication of an opinion of a Court of Appeal.

This is slightly less than the percentage of justices who responded "Yes" to the previous question on partial publication.



Comments

As in the previous question on partial publication, justices who responded "Yes" indicated that they see no distinction in the Supreme Court's authority to order full publication or depublication, and its authority to order a partial publication or depublication.

> "If a whole opinion can be depublished because it is incorrect or causes mischief it seems to me that part of an opinion should be as well, especially if the rest of the opinion meets the publication criteria and the Supreme Court agrees with the conclusions."

> "I am not in favor of depublication, but as long as we have the rule the Supreme Court should be able to do partially what it can do completely."

Several justices, regardless of their response, indicated that they would like this decision to be a collaborative one involving input from the author.

> "Other parts may be worthy of publication. Again, the author should have an opportunity to weigh in on any necessary editing."

> "It should be all or nothing. Partial publication should be done by the authors."

> "Partial publication would present serious problems, unless the opinion was sent back to the CA first for editing in light of the Supreme Court's order to depublish part. If any part is deleted that was significant to the CA's reasoning, it might alter the meaning or intention of original authors."

> "Partial publication often requires some careful crafting of the opinion so that the reader has enough of the factual and procedural background to understand the issues considered in the published portion of the opinion without burdening the reader with unnecessary information (since one of the primary reasons to engage in partial publication, in my view, is to limit the material that must be consulted when doing future research). If the opinion's author has not had the opportunity to do this, an order of partial publication or partial depublication by the Supreme Court could produce less-than-optimal results. To the extent this is not a problem, however, I think an order of partial publication or partial depublication would be fine."

Summary of Sections IV and V

Over three-quarters of the justices have been involved either never or rarely in a case that resulted in an unpublished opinion that they thought should have, or could have, been published because it met the rule 976(c) criteria.

The factors cited most frequently by justices as having some importance in a decision not to publish a case that appears to meet the rule 976(c) criteria include potential embarrassment of litigants, lawyers, or the trial judge.

Workload issues were considered to have some importance in publication decisions, as well as requests from a panelist or from a party to a case.

A slight majority of justices rely on unpublished opinions when drafting their own opinions, primarily to consider the analysis used in similar decisions or to ensure consistency in their district and with their own rulings.

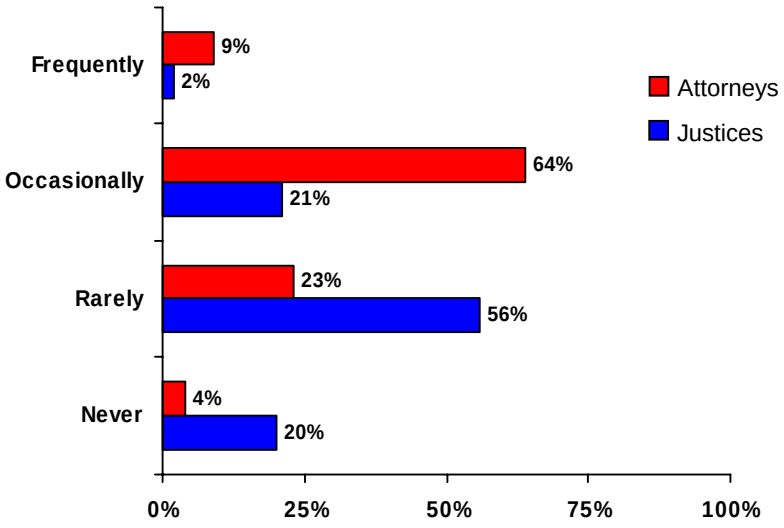
Almost all of the justices have certified only part of an opinion to be published, and most justices agree that the Supreme Court should be able to order a partial publication or depublication of an opinion.

Differences by district

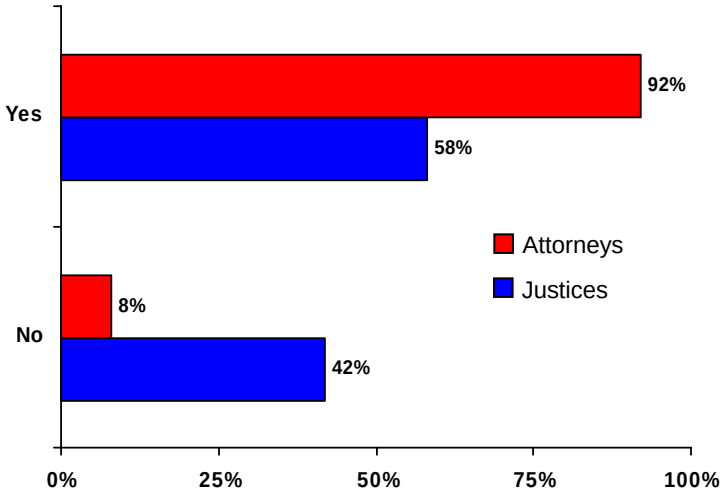
There were no statistically significant differences among appellate districts in this section

Comparison between justice and attorney responses

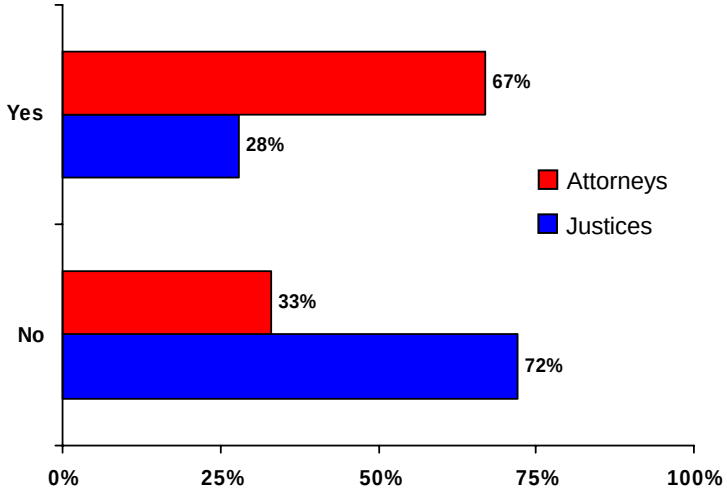
Q11: How often have you been involved in a case that resulted in an unpublished opinion that you thought should have, or could have, been published because it met the rule 976(c) criteria?



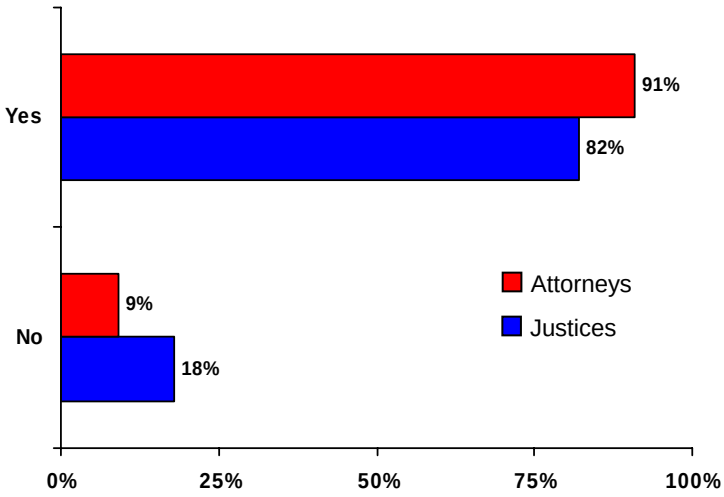
Q14: Do you ever rely on unpublished opinions?



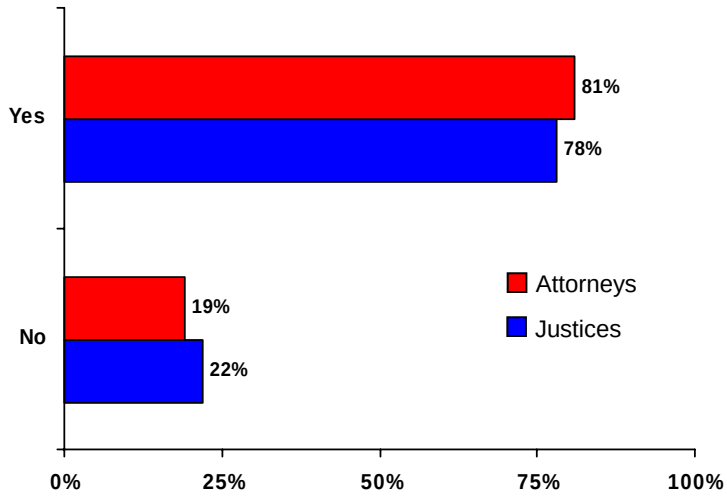
Q15: In a petition for review, should parties be permitted to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?



Q17: Should the Supreme Court be able to order a partial publication of an opinion of a Court of Appeal?



Q18: Should the Supreme Court be able to order a partial depublication of an opinion of a Court of Appeal?

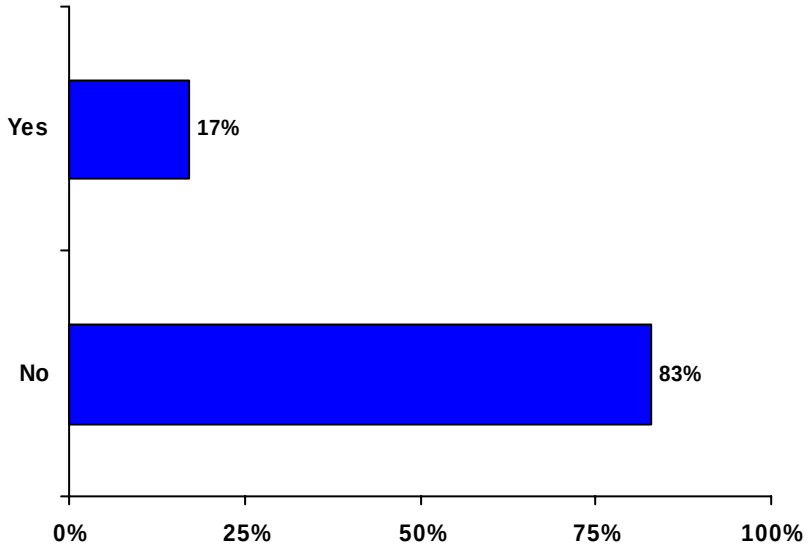


VI. Potential Changes to Rule 976 and Rule 976.1

Q19: Should changes to any of the existing criteria in rule 976 be considered?

Results

A large majority (83%) believe no changes should be considered to any of the existing criteria in rule 976.



Comments

Justices who indicated no changes should be considered believe that the current rules are clear and work well.

"I am not adverse to change; however, I feel strongly the current rules work well and should remain as currently stated."

"They are well thought out and have served the bench, bar, and public well."

"I believe the current system works very well. The decision to publish is very carefully considered. The opinions that are published require much more work. I am not aware of any instance where there is a conflict between a published and an unpublished opinion within a district or division. The vast majority of cases we deal with are very fact specific and do not lend themselves to publication. If litigants feel otherwise, they can request publication, and it will be considered very carefully."

"The rule works as is. There is no reason to publish cases not worthy of publication. It would simply add to the time and expense of research in weeding out those cases. As to a concern for secrecy, having all cases available on line and on the AOC website ensures public access."

Several justices that indicated that changes should be considered generally believe that the rules could be clarified or expanded upon in some manner.

"They could be more specific — e.g., break down #1 into two or more criteria."

"The criteria should more clearly cover opinions that construe a statute, ordinance, or rule."

"To provide that any opinion with a dissent should be published, and (to the extent possible) to refine the rules in a manner that will promote uniformity among the divisions in deciding whether to publish."

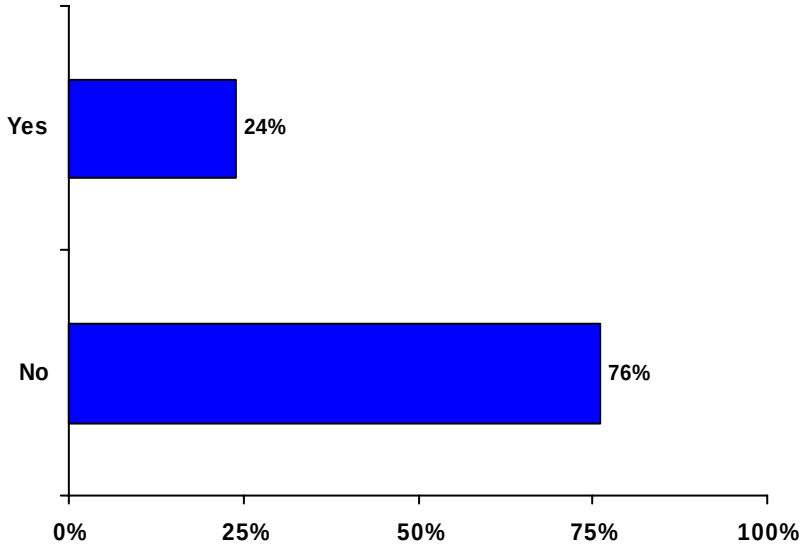
"If the opinion directs attention to shortcomings of existing common law or inadequacies in the statutes."

Q20: Should additional criteria be added?

Results

Over three-quarters of the justices indicated that no additional criteria should be added.

The remaining justices indicated that they believe additional criteria should be added to the existing criteria in rule 976.



Potential additional criteria

Justices were provided with samples of criteria used in other jurisdictions. The table below lists criteria that justices cited in the comment section of this question, in order of criteria that received the most responses.

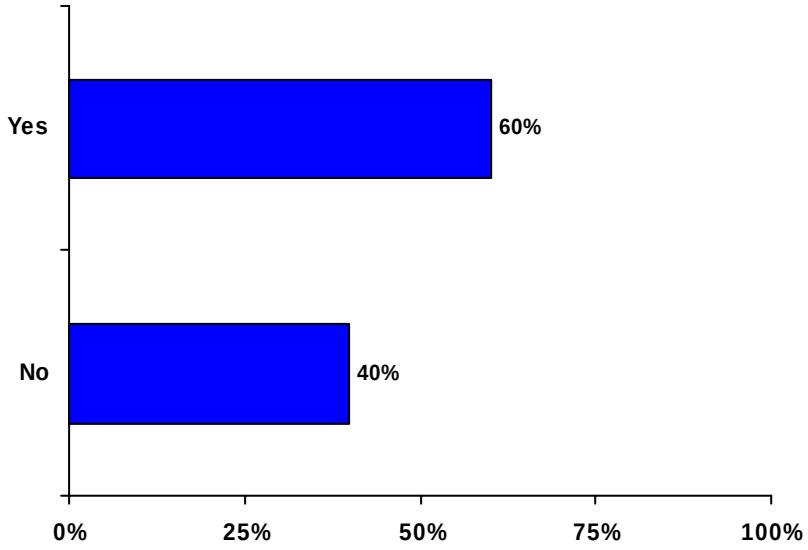
Criteria used in other jurisdictions	Responses
13. The disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published.	5
14. The opinion directs attention to the shortcomings of existing common law or inadequacies in statutes.	5
10. The opinion treats a previously overlooked rule of law.	4
16. The opinion reaffirms a principle of law not applied in a recently reported decision.	4
5. The opinion resolves a legal issue of substantial public interest, which the court has not sufficiently treated recently.	3
8. The opinion treats an issue of first impression.	3
15. The opinion construes a provision of a constitution, statute, ordinance, or court rule.	3
9. The opinion treats a new constitutional or statutory issue.	2
21. The opinion reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order.	2
6. The case involves a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case.	1
7. The case is a test case.	1
19. Although not otherwise meriting publication, the opinion constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar.	1
22. The opinion is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.	1

Q21: Does the presumption set forth in rule 976 (against publication) affect your decision on whether to publish an opinion ?

Results

On the question whether the presumption set forth in rule 976 against publication affects their decision on whether to publish an opinion, justices were more evenly split than they were on other questions.

A majority of justices (60%) indicated that the presumption against publication does affect their decision.



Comments

Justices who responded "Yes" generally believe this presumption serves several important purposes.

"Rightly so. The presumption serves the important purpose of compelling panels to justify publication and, thus, not burden counsel and courts with the time-consuming and costly task of wading through opinions not worthy of precedential value."

"The presumption focuses me on publishing a narrow range of cases. It results in fewer publications. This is okay. It is a different issue than WHAT cases should be published. That is, I think the presumption affects numbers not the quality."

"I believe intermediate appellate courts are courts of correctness and that publication decisions should be made cautiously."

"The criteria are stringent. The shelves are overflowing with official reports. Lawyers and judges need a well-reasoned, intelligently, and clearly written body of law. Time is precious. Resources must be saved."

"It's a valid presumption which prompts close scrutiny of one's opinion that publication may be merited."

"We should only publish cases that 'strictly' meet the criteria; the presumption underscores this concept."

Justices that responded "No" commented that they simply follow the rule and that the presumption does not affect their decision.

"The question of whether an opinion qualifies for publication does not really turn on presumptions. Either it qualifies or it does not."

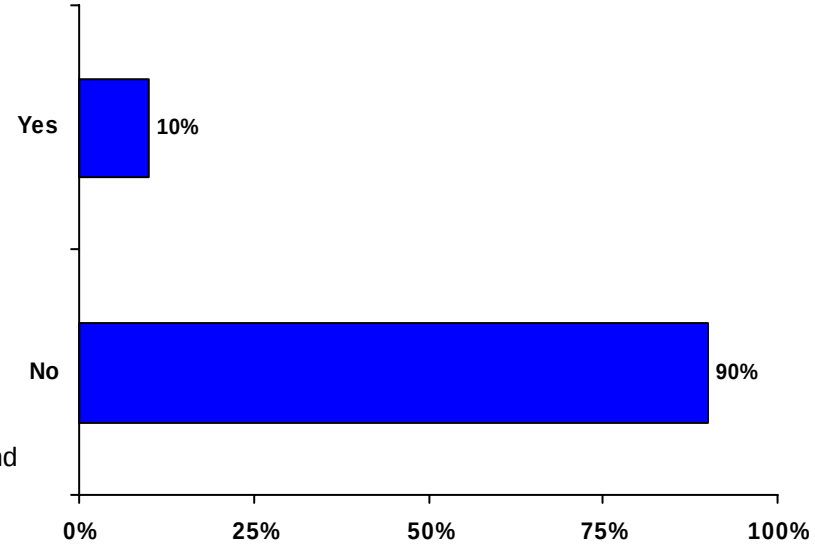
"Regardless of the 'presumption,' if the opinion meets the criteria I vote to publish."

"I only consider the criteria set forth."

Q22: Should the presumption against publishing set forth in rule 976 be changed to an affirmative presumption that requires publication unless the opinion does not meet any of the criteria?

Results

Justices overwhelmingly believe that the presumption set forth in rule 976 should not be changed to an affirmative presumption, with 90 percent responding "No" to this question.



Comments

"This might be a good compromise with those individuals wanting all cases to be published."

"It will greatly increase the number of published cases and I think increase the number of cases that should not be published. Such a presumption rests on the assumption all cases are of publication value. They are not."

"Given the routine nature of many cases, the presumption against publication requires more careful scrutiny to the decision to publish and the reasons that support that decision."

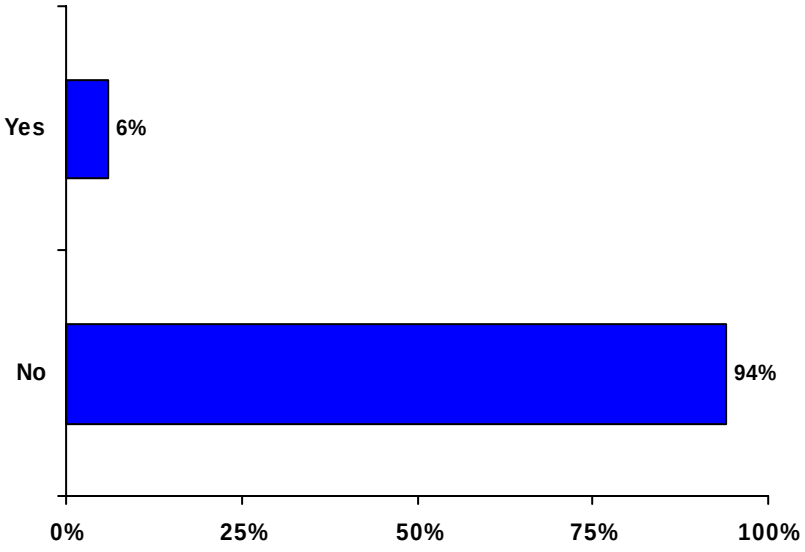
"As presently drafted there is no principle to guide the discretion of the court in deciding whether to publish once it determines at least one of the criteria has been met. I think this contributes to the perception that we employ illegitimate factors in reaching our publication decisions. As a practical matter I doubt there will be more cases published if the presumption is changed, but I think it would have a beneficial impact on how the integrity of the process is viewed by some of our critics."

"The vast majority of appellate cases do not merit publication by any stretch of the imagination. Creating an affirmative presumption would require an explanation anytime the panel decided not to publish but a party or someone else requested publication. We don't have time for that."

Q23: Do you think rule 976.1, setting forth the basis for partial publication, should be revised or repealed?

Results

Justices just as strongly believe that rule 976.1, setting forth the basis for partial publication, should not be revised or repealed.



Summary of Section VI

Justices by a large majority believe that no changes should be considered to any of the existing criteria in rule 976, nor should any additional criteria be added.

Several justices that indicated that changes should be considered commented that the rules could be clarified or expanded upon in some manner, and also cited several criteria used in other jurisdictions that could be added.

Justices were more evenly split on whether the presumption set forth in rule 976 against publication affects their decision on whether to publish an opinion; however, many justices believe this presumption serves several important purposes.

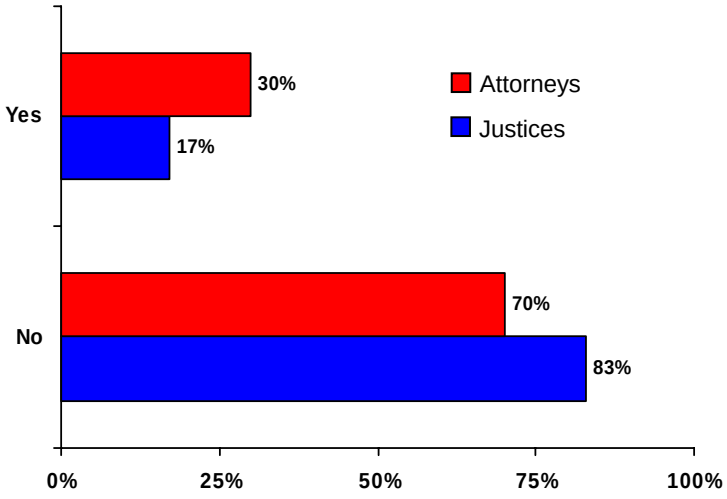
Justices overwhelmingly believe the presumption against publication set forth in rule 976 should not be changed to an affirmative presumption, and just as strongly believe that rule 976.1, setting forth the basis for partial publication, should not be revised or repealed.

Differences by district

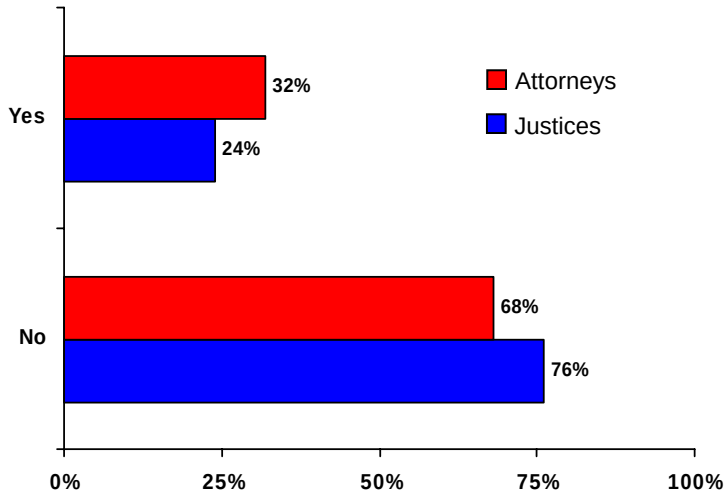
There were no statistically significant differences among appellate districts in this section.

Comparison between justice and attorney responses

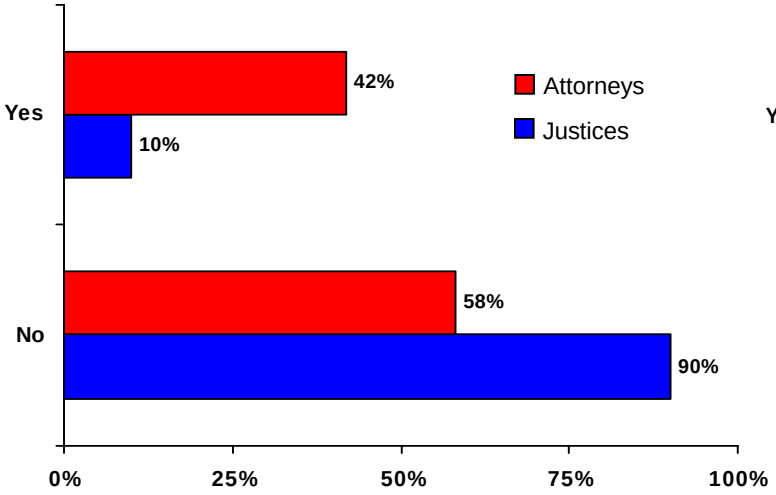
Q19: Should changes to any of the existing criteria in rule 976 be considered?



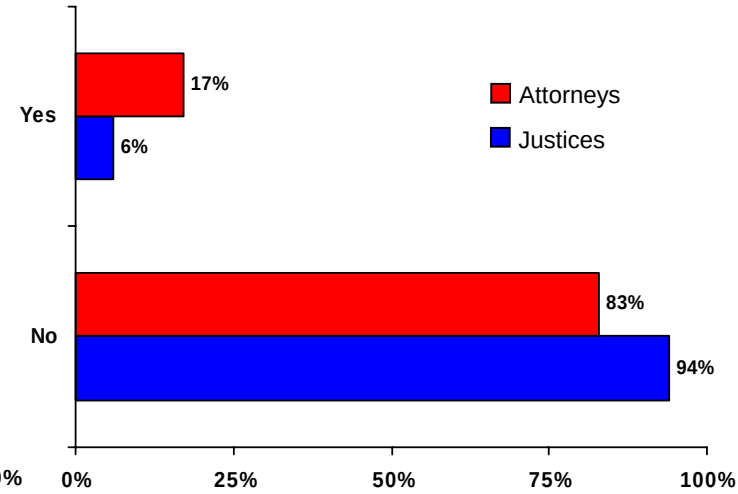
Q20: Should additional criteria be added?



Q22: Should the presumption against publishing set forth in rule 976 be changed to an affirmative presumption that requires publication unless the opinion does not meet any of the criteria?



Q23: Do you think rule 976.1, setting forth the basis for partial publication, should be revised or repealed?



Appendix H:
List of Attorneys and Organizations Contacted for Survey

Marilyn W. Alper
Chair, Appellate Courts Committee
Court of Appeal
Second Appellate District, Division Three
300 South Spring Street
Los Angeles, CA 90013-1230

Colin Leis
Chair, State Bar Appellate Courts Committee
Court of Appeal
Second Appellate District, Division Eight
300 South Spring Street
Los Angeles, CA 90013-1230

George T. Patton, Jr.
President, Appellate Bar
Bose McKinney & Evans LLP
1120 20th Street N.W.
Washington, DC 20036

David Hewes Bent
Attorney at Law
4354 Auburn Boulevard
Sacramento, CA 95841-4107

Anthony Murray
President, California Appellate Project
Loeb & Loeb, LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067

Richard Sherman
President, California Academy of Appellate Lawyers
DeGoff & Sherman
1916 Los Angeles Avenue
Berkeley, CA 94707

Gerald Blank
ADI, Inc. Board President
444 West C Street, Suite 210
San Diego, CA 92101

Elaine A. Alexander
Executive Director
Appellate Defenders, Inc.
555 West Beech Street, #300
San Diego, CA 92101

Jay Kohorn
Assistant Director
California Appellate Project, Los Angeles
520 South Grand Avenue, Suite #400
Los Angeles, CA 90017

Jonathan B. Steiner
Executive Director
California Appellate Project, Los Angeles
520 South Grand Avenue, Suite #400
Los Angeles, CA 90017

Michael G. Millman
Executive Director
California Appellate Project, San Francisco
101 Second Street, Suite 600
San Francisco, CA 94105

George Bond
Executive Director
Central California Appellate Project
2407 'J' Street, Suite 301
Sacramento, CA 95816

Ezra Hendon
Attorney at Law
FDAP Board President
1837 Berryman Street
Berkeley, CA 94703

Matthew Zwerling
Executive Director
First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107-1260

Michele Vague
Attorney at Law
SDAP Board Chair
303 Water Street
Santa Cruz, CA 95060

Michael A. Kresser
Executive Director
Sixth District Appellate Program
100 North Winchester Boulevard
Santa Clara, CA 95050

Bar Assn. of San Francisco
Appellate Practice Section
465 California St., Suite 1100
San Francisco, CA 94104

Brian P. Worthington, Chair
San Diego County Bar Assn.
Appellate Court Committee
Ryan Mercaldo & Worthington LLP
3636 Nobel Drive, Suite 200
San Diego, CA 92122

Michael Laurence
Executive Director
Habeas Corpus Resource Center
50 Fremont Street, #1800
San Francisco, CA 94105

Manuel M. Medeiros
State Solicitor General
Office of Attorney General
1300 I Street, P.O. 944255
Sacramento, CA 94244-2550

Michael Hersek
State Public Defender
800 K St., Suite 1100
Sacramento, CA 95814-3518.

Brent Riggs
Los Angeles County District Attorney's Office
Appellate Division
320 West Temple St., Suite 540
Los Angeles, CA 90012

Bay Area Dependency Group
Cal. Appellate Defense Counsel
c/o Carole Greeley
521 Americano Way
Fairfield, CA 94533

John Hamilton Scott
Los Angeles County Public Defender
Appellate Division
590 Hall of Records
320 West Temple Street
Los Angeles, CA 90012

Debbie Lew
Office of the Los Angeles City Attorney
Appellate Branch
1600 City Hall E
200 N Main St
Los Angeles, CA 90012

Kyle Gee, President
California Appellate Defense Counsel
2626 Harrison Street
Oakland, CA 94612

Don H. Schaefer, Chair
Appellate Practice Section
Alameda County Bar Association
4415 Bennett Place
Oakland, CA 94602

Orange County Bar Assn
Appellate Law Section
P.O. Box 17777
Irvine, CA 92623-7777

Mr. Kenneth J. Schmier
Chairman, Committee for the Rule of Law
1475 Powell Street, Suite 201
Emeryville, CA 94608

Peter Scheer
Executive Director
First Amendment Coalition
534 Fourth Street, Suite B
San Rafael, CA 94901

Gerald F. Uelmen
University Of Santa Clara
School Of Law
Santa Clara, CA 95053

Steve R. Barnett
UC/School of Law
Boalt Hall #443NA
Berkeley, CA 94720

George Alexander McKray
Law Chambers Building
345 Franklin Street, CA 94102

Appendix I:
Survey of Appellate Attorneys

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions
Survey for Appellate Attorneys

Purpose of this survey:
Under the state Constitution, the Supreme Court has the authority to determine which opinions of the Courts of Appeal are published and may therefore be cited as precedent in state courts. Pursuant to this authority, the court has established standards for publication of appellate opinions in rules 976 and 977 of the California Rules of Court.

The survey that follows is intended to inform the Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions. Chaired by Supreme Court Justice Kathryn Werdegar, the 13-member committee is charged with reviewing the current standards used by the Courts of Appeal and the Supreme Court in determining which Court of Appeal opinions should be certified for publication and with making recommendations to the Supreme Court on what changes, if any, should be instituted to ensure that the standards result in the publication of appropriate cases.

The committee will report to the Supreme Court concerning its findings and conclusions and make recommendations, if appropriate, for improving the standards for publication of opinions to ensure the publication of those opinions that may assist in the reasoned and orderly development of the law.

Deadline:
Please return this survey by mail or fax no later than **May 13, 2005** to the following address:

Clifford Alumno
Office of General Counsel
Administrative Office of the Courts
455 Golden Gate Ave.
San Francisco CA 94102-3688
voice: 415-865-7683 fax: 415-865-7664
clifford.alumno@jud.ca.gov

Questions, comments:
Please address all questions and comments to:

Lyn Hinegardner
Attorney, Office of General Counsel
415-865-7698
lyn.hinegardner@jud.ca.gov

This survey may be accessed online at: www.courtinfo.ca.gov/courts/supreme/comm

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Survey for Appellate Attorneys

BACKGROUND

1. How long have you been in practice?

   _____ year(s)

   please round to the nearest year

2. How long have appeals been a significant portion of your practice?

   _____ year(s)

   please round to the nearest year

3. What is the current primary focus of your practice? (please check one)

   Civil ____

   Criminal ___

   Juvenile ___

   Probate ___

   Other ___ *(please specify):* _____

4. What is the current nature of your practice? (please check one)

   Private ___

   Court attorney ___

   Government (not a court employee) ___

   In-house counsel ___

   Other ___ *(please specify):* _____

PUBLICATION FREQUENCY AND CRITERIA

Rule 976

The Supreme Court has established standards for publication of appellate opinions, set forth in the California Rules of Court, rule 976 et seq. The current rules provide that all opinions of the Supreme Court are published. An opinion of the Court of Appeal or the appellate division of the Superior Court may not be published unless it meets one of four specified criteria: 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." (Rule 976(c).)

The following question refers to the body of published cases in which you represented one or more of the litigants, or participated as amicus.

5. In your experience, how important do you believe each of the following criteria has been in determinations made by the Courts of Appeal to certify decisions for publication?

   For example, if you believe that an extremely important factor in determining whether to certify a decision for publication has been that the opinion established a new rule of law, you would mark "5" for the first criterion listed below.

Criteria	**Please circle your response for each criteria**				
	Not important at all ▼	▼	▼	▼	***Extremely important*** ▼
establishes a new rule of law	1	2	3	4	5
applies an existing rule to a set of facts significantly different from those stated in published opinions	1	2	3	4	5
modifies, or criticizes with reasons given, an existing rule	1	2	3	4	5
resolves or creates an apparent conflict in the law	1	2	3	4	5
involves a legal issue of continuing public interest	1	2	3	4	5
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	1	2	3	4	5
other (e.g., request by a party, dissenting opinion, etc.) ***please specify***: _____ _____ _____ _____	1	2	3	4	5

6. Do you believe that anything other than the criteria currently set forth in Rule 976, such as local traditions, standards, or practices, influence a court's determination whether or not to certify an opinion for publication?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

7. In your view, are the publication rules uniformly followed?

Yes _____

No _____

if no, please explain: _____

_____

_____

_____

8. How often have you encountered cases that were not certified for publication that you considered worthy of publication pursuant to the rule 976(c) criteria?

Never _____

Rarely _____

Occasionally _____

Frequently _____

If you so desire, please provide an example of a case you believe should have been, but was not, published. Please provide name, case number, and court: _____

_____

_____

_____

_____

9. Have you ever requested publication of an opinion?

Yes _____

No _____

if yes, how often?

Rarely _____

Occasionally _____

Frequently _____

10. If you answered yes to question 9, please indicate how often you have relied on each criterion in support of your request for publication.

Criteria	***Never*** ▼	***Rarely*** ▼	***Occasionally*** ▼	***Frequently*** ▼
establishes a new rule of law	__	__	__	__
applies an existing rule to a set of facts significantly different from those stated in published opinions	__	__	__	__
modifies, or criticizes with reasons given, an existing rule	__	__	__	__
resolves or creates an apparent conflict in the law	__	__	__	__
involves a legal issue of continuing public interest	__	__	__	__
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	__	__	__	__

11. If you answered yes to question 9, how often has your request been granted?

_____

12. In your experience, what arguments or factors have been most persuasive in convincing a panel to reconsider a decision not to publish an opinion? (***please rate the following)***

Factors	**Please circle your response for each factor**				
	Not persuasive at all ▼	▼	▼	▼	***Extremely persuasive*** ▼
Further analysis demonstrates that the opinion does meet the rule 976(c) criteria	1	2	3	4	5
Further analysis demonstrates that the opinion merits publication even though it does not strictly meet the rule 976(c) criteria	1	2	3	4	5
Request by a party	1	2	3	4	5
Request by interested person, not a party to the case	1	2	3	4	5
other (e.g., dissenting opinion, etc.) ***please specify***: _____ _____ _____	1	2	3	4	5

13. Do you ever use unpublished opinions to assist you in your work?

Yes _____

No _____

if yes, please explain: _____

_____

_____

_____

_____

_____

14. All opinions not certified for publication are available online. Do you regularly read these opinions?

No _____

Yes, I read almost all of them _____

Yes, I read a portion of them _____

If you read only a portion of the opinions, please explain how you decide which ones to read: _____

_____

_____

15. How often do you find dispositions or useful information in unpublished opinions that is not otherwise available from a citable source?

Never _____

Rarely _____

Occasionally _____

Frequently _____

16. Should parties be permitted, in a petition for review or an answer, to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?

Yes _____

No _____

please explain: _____

_____

_____

17. Should parties be permitted to refer, in the petition or answer, to unpublished decisions from any appellate district?

Yes _____

No _____

please explain: _____

_____

_____

18. Should the Supreme Court be able to order partial publication of an opinion of a Court of Appeal?

Yes _____

No _____

please explain: _____

_____

_____

_____

19. Should the Supreme Court be able to order partial depublication of an opinion of a Court of Appeal?

Yes _____

No _____

please explain: _____

_____

_____

_____

POTENTIAL CHANGES TO RULE 976 AND RULE 976.1

20. Should changes to any of the existing criteria in rule 976 be considered?

Yes _____

No _____

if yes, which criteria, why, and in what way?: _____

_____

_____

_____

21. Should additional criteria be added? (*Please see attached sheet for samples of criteria used in other jurisdictions*)

Yes _____

No _____

if yes, please specify which criteria and why: _____

_____

_____

_____

_____

22. Currently, rule 976 does not require publication of decisions that meet the criteria set forth in subdivision (c). Should the presumption against publishing set forth in rule 976 be changed to an affirmative presumption that requires publication unless the opinion does not meet any of the criteria?

Yes _____

No _____

please explain: _____

_____

_____

_____

23. Should rule 976.1, setting forth the basis for partial publication, be revised or repealed?

Yes _____

No _____

please explain: _____

_____

_____

_____

Please provide additional comments or suggestions to the Advisory Committee regarding any of the rules relating to publication (Rules 976 to 979).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Your name (*optional*) _____

Please feel free to attach additional sheets as necessary. Thank you for your participation.

Appendix J:
Report on Survey of Appellate Attorneys

Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions

Survey for Appellate Attorneys

Survey Results

9/14/2005

Contents

I. Survey Administration and Profile of Appellate Attorney Respondents

Results

618 visits to the online survey site:

288 attorneys completed entire survey

132 attorneys completed part of survey

Survey results based on both partial and completed survey responses for each question

Administration

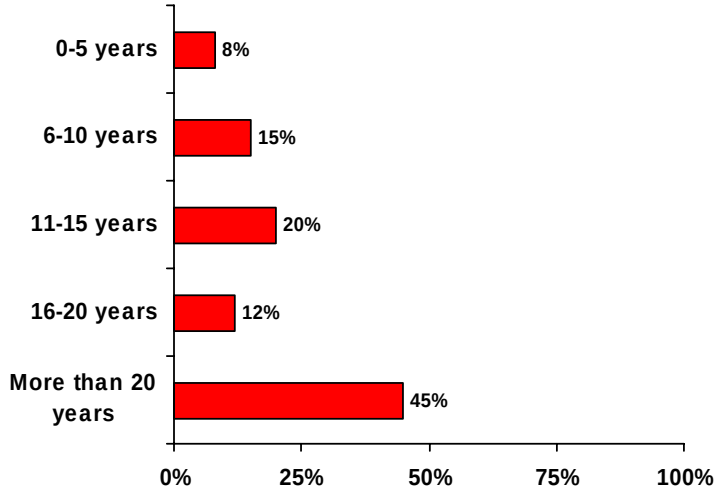
30 appellate attorney organizations contacted by letter

Announcement posted on California Courts Web site with link to online survey

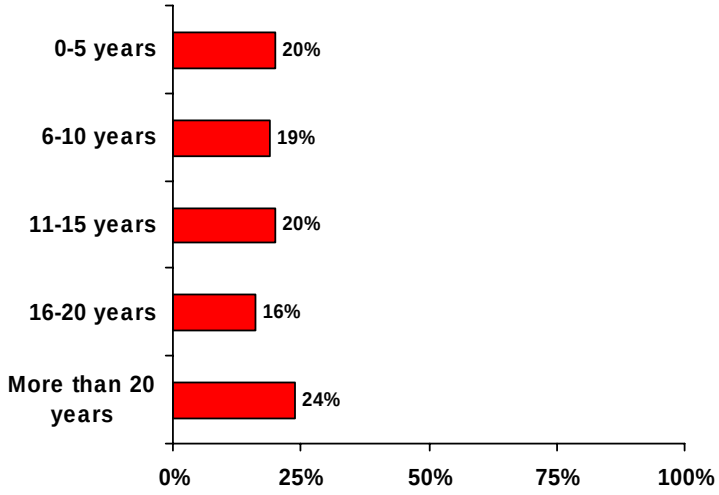
Survey made available in hard copy on request

Experience

Almost half (46%) of the attorneys who responded to this survey have been in practice for more than 20 years, while about one-quarter have been in practice for 10 years or less.

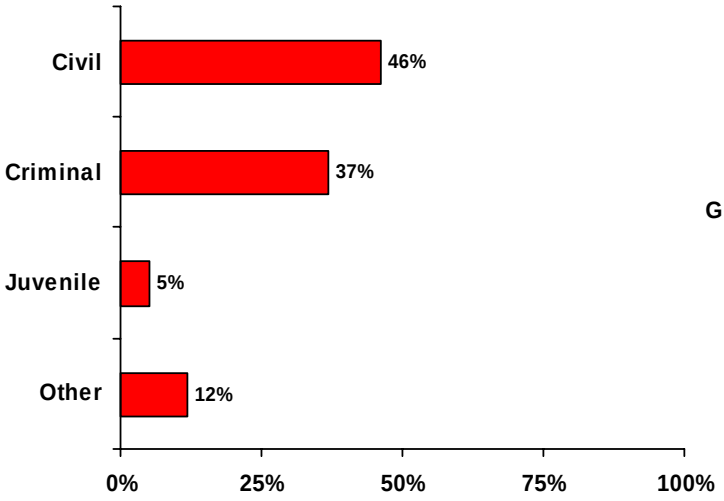


Just about one-quarter of the attorneys have had appeals as a significant portion of their practice for more than 20 years.

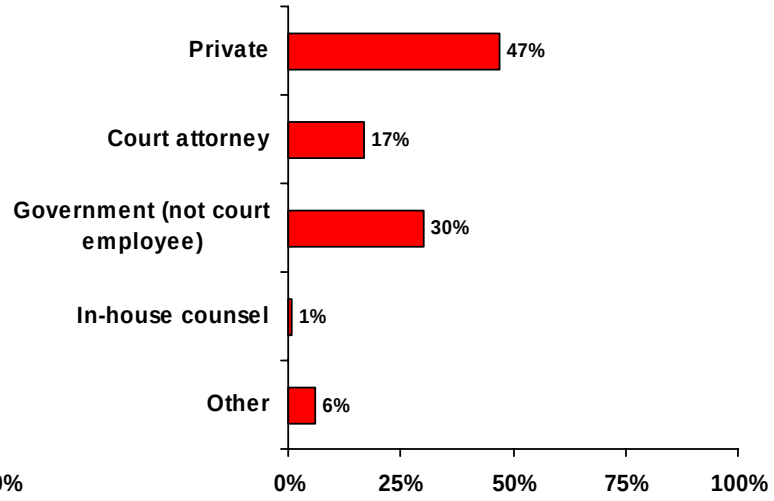


Nature of practice

Most attorneys who responded to this survey focus their practice on either civil (46%) or criminal (37%) law.



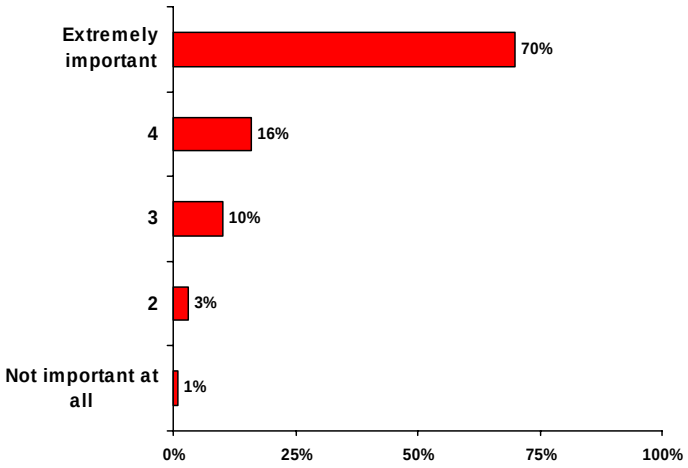
Almost half of the attorneys are in private practice, with a similar proportion in public service as either a court attorney or a government attorney.



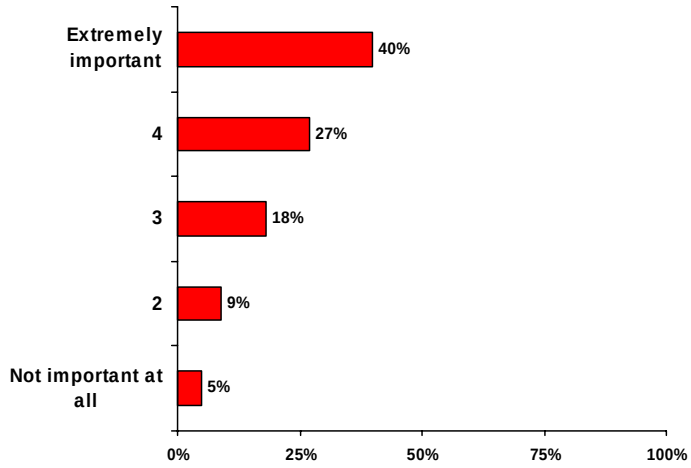
II. Publication Criteria

Q5: In your experience, how important do you believe each of the following criteria has been in determinations made by the Courts of Appeal to certify decisions for publication?

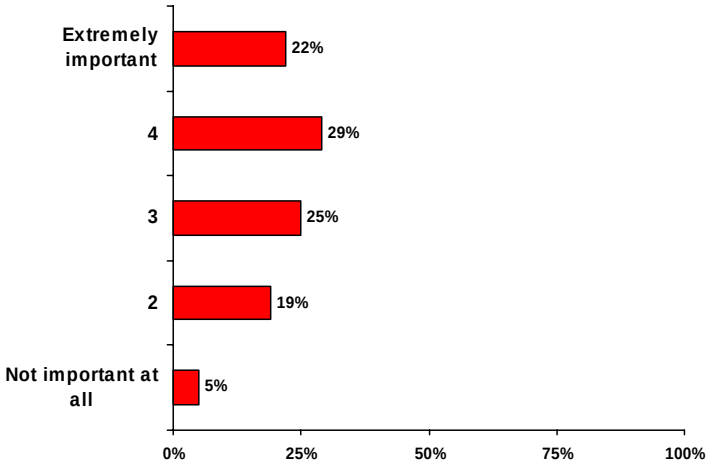
Establishes a new rule of law



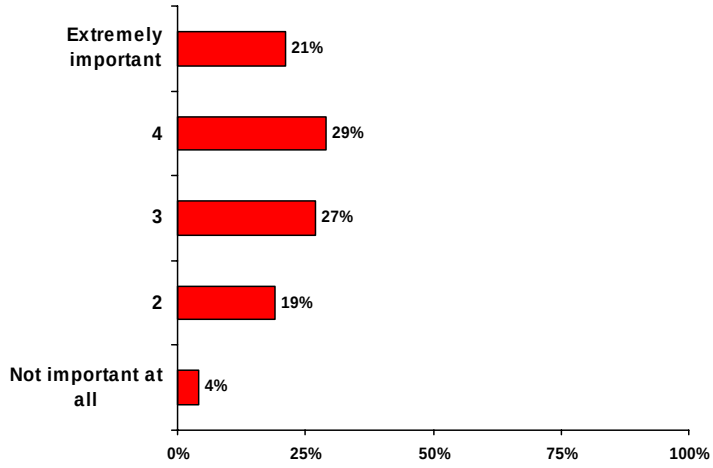
Resolves or creates an apparent conflict in the law



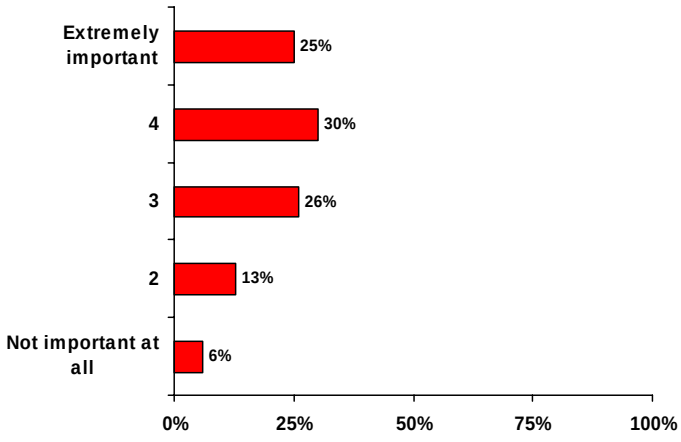
Applies an existing rule to a set of facts significantly different from those stated in published opinions



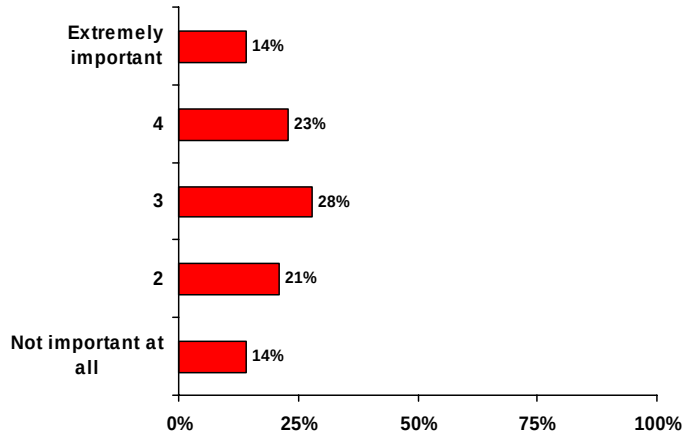
Involves a legal issue of continuing public interest



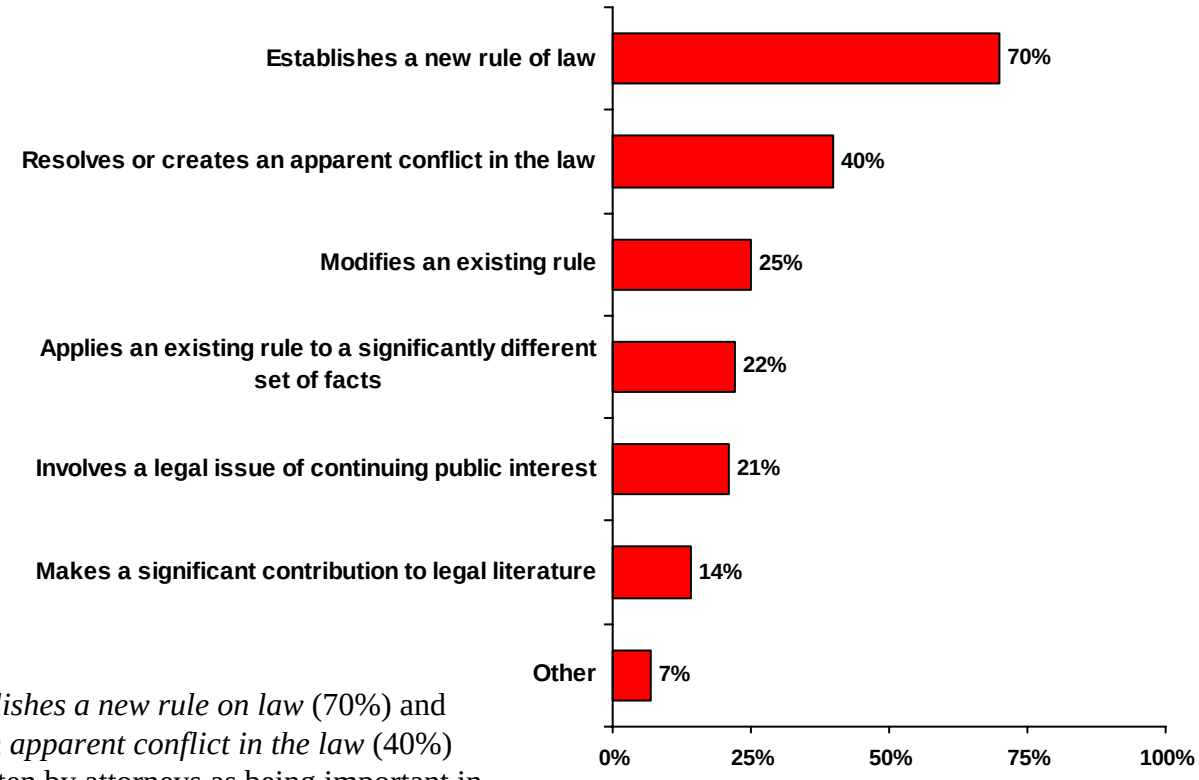
Modifies, or criticizes with reasons given, an existing rule



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



Q5: Percent responding "4" or "5 – Extremely important" in persuading them that an opinion should be published



Results

Two criteria — *establishes a new rule on law* (70%) and *resolves or creates an apparent conflict in the law* (40%) — were cited most often by attorneys as being important in persuading them that an opinion should be published.

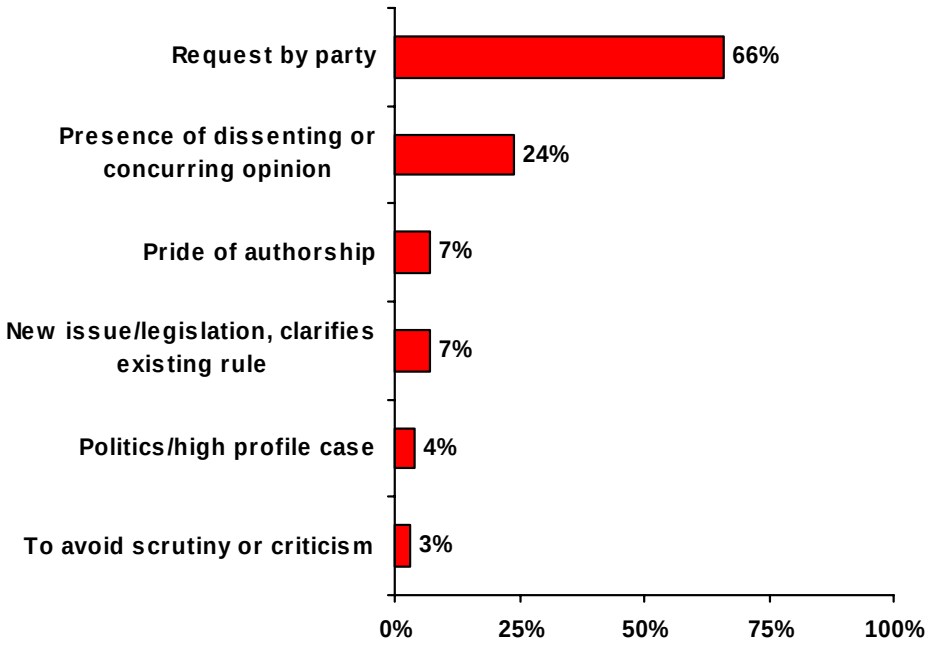
Around one-quarter of the attorneys responded with either a "4" or a "5" to the following three criteria: *modifies an existing rule*; *applies an existing rule to a significantly different set of facts*; *involves a legal issue of continuing public interest*.

"Other" responses

There were 119 attorney responses naming "other" criteria used in determinations made by the Courts of Appeal to certify decisions for publication.

Two-thirds of these attorneys believe a request by a party is a criterion used in determinations made by the Courts of Appeal to certify decisions for publication.

About one-quarter stated that the presence of a dissenting or concurring opinion is a criterion used by the Courts of Appeal.

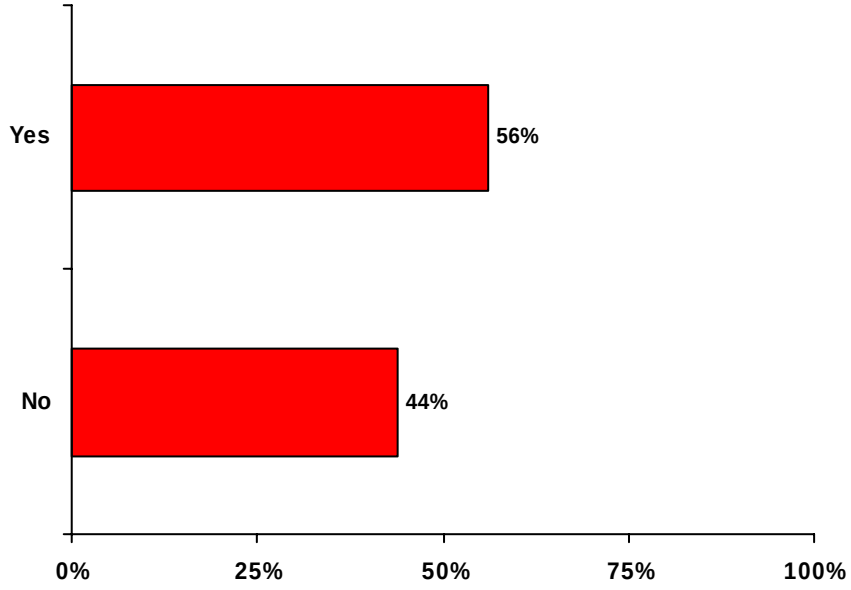


III. Publication Process

Q6: Do you believe that anything other than the criteria currently set forth in rule 976, such as local traditions, standards, or practices, influence a court's determination whether or not to certify an opinion for publication?

Results

A slight majority of attorneys (56%) believe there are things other than the criteria in rule 976 that influence a court's determination whether or not to certify an opinion for publication.

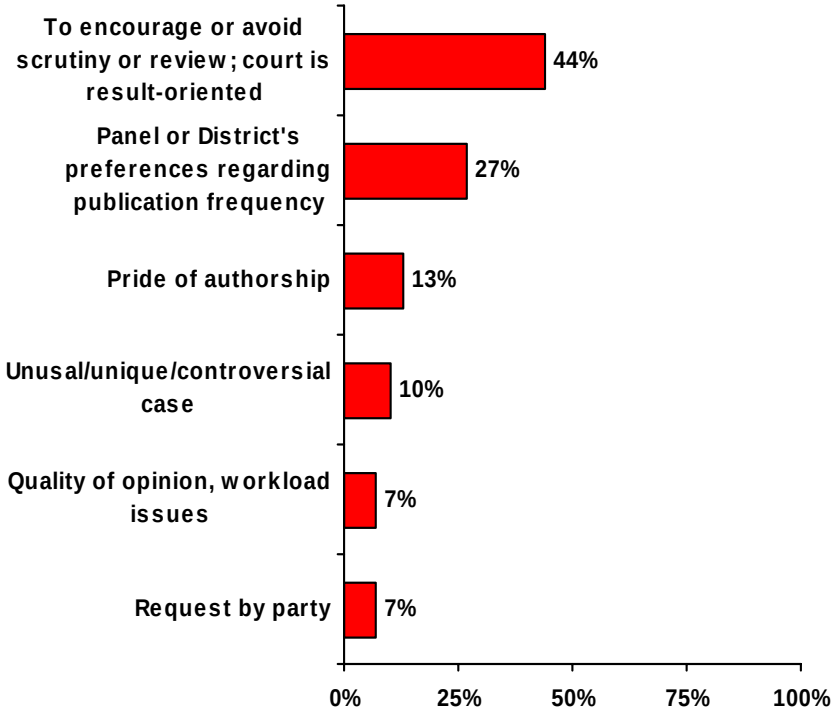


"Other" responses

There were 163 attorney responses for "other" things beside the criteria in rule 976 that influence a court's determination whether or not to certify an opinion for publication.

Slightly less than one-half (44%) of these attorneys indicated that an "other" thing they believe influences a court's decision is the desire to encourage or avoid scrutiny or review.

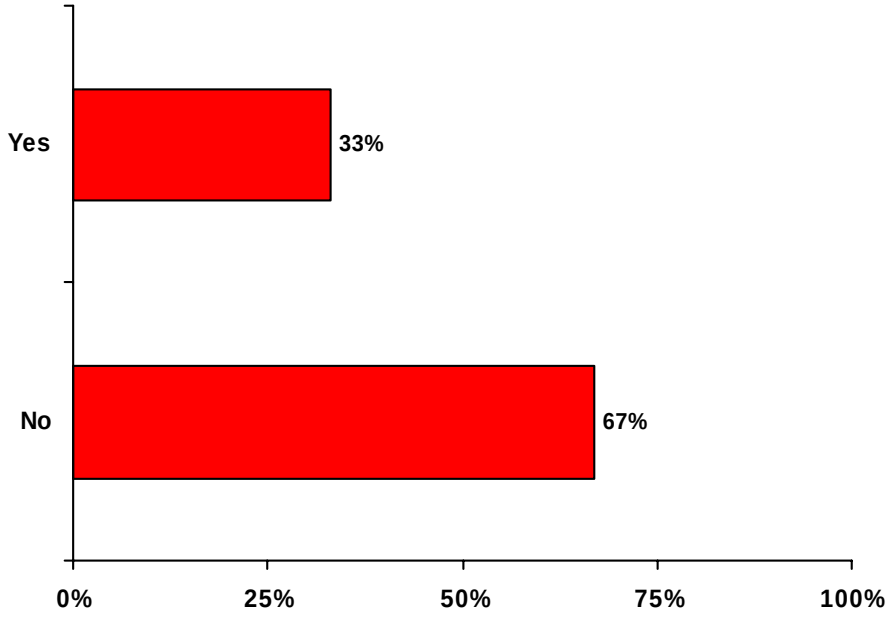
About one-quarter (27%) believe that a panel's or district's preference regarding publication frequency influences a court's determination whether or not to certify an opinion for publication.



Q7: In your view, are the publication rules uniformly followed?

Results

One-third of the attorneys believe the publication rules are uniformly followed, with the remaining two-thirds responding that they do not believe they are uniformly followed.

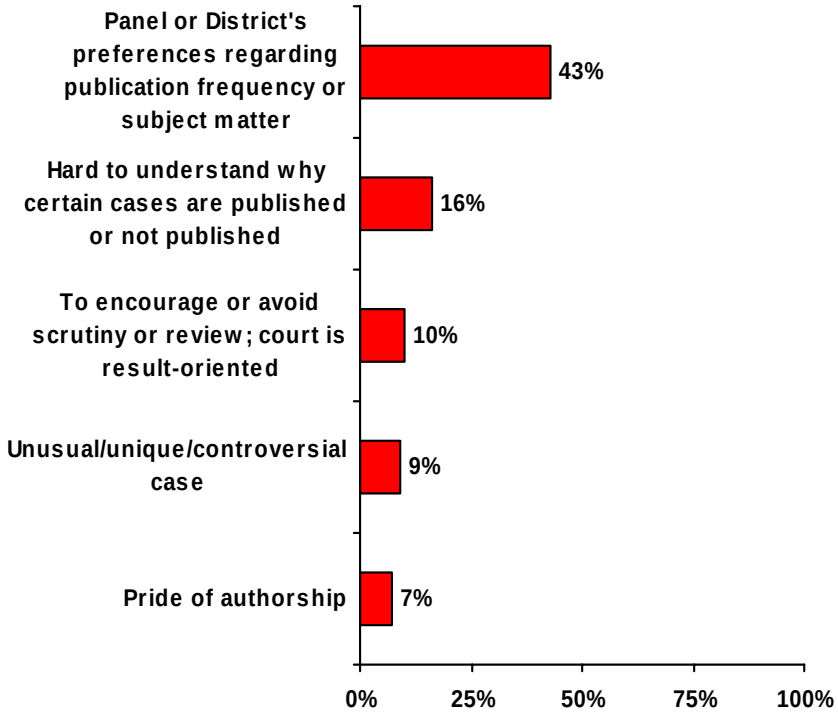


"Other" responses

There were 165 attorneys who explained why they do not believe the publication rules are uniformly followed.

Slightly less than one-half (43%) of these attorneys indicated that a panel's or district's preference regarding publication frequency is a reason that they do not believe the publication rules are uniformly followed.

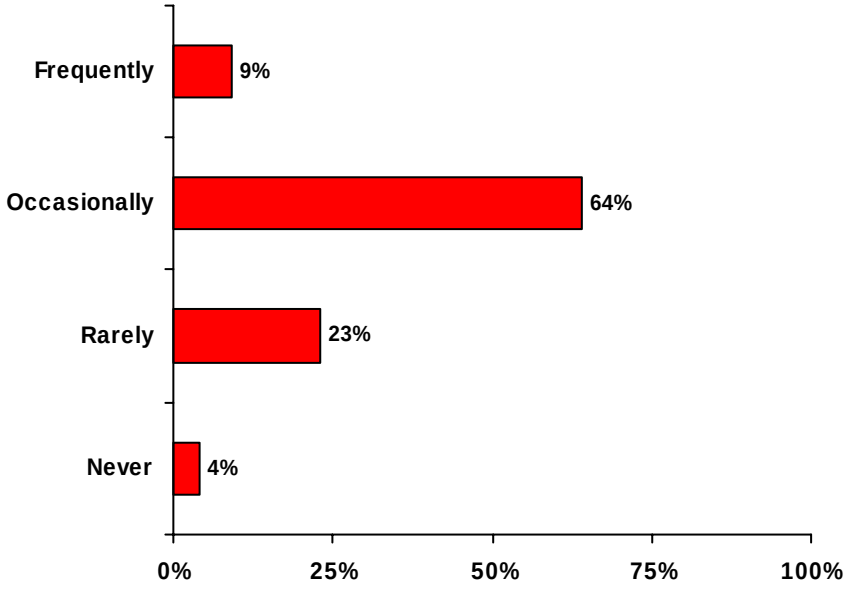
Each of the other main reasons was cited by less than 20 percent of the attorneys.



Q8: How often have you encountered cases that were not certified for publication that you considered worthy of publication pursuant to the rule 976(c) criteria?

Results

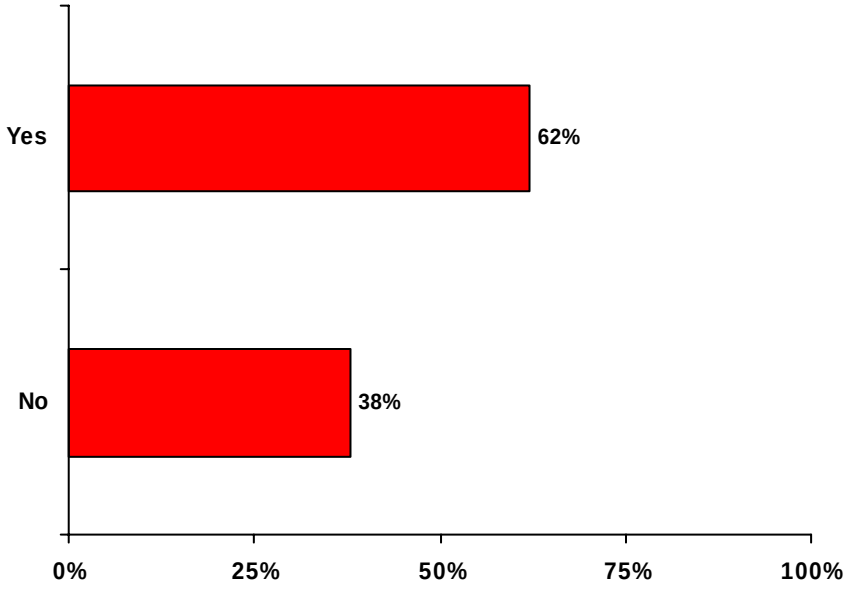
Almost two-thirds of the attorneys (64%) responded that they occasionally have encountered cases that were not certified for publication that they considered worthy of publication, while about one-quarter indicated that this has happened either rarely or never.



Q9: Have you ever requested publication of an opinion?

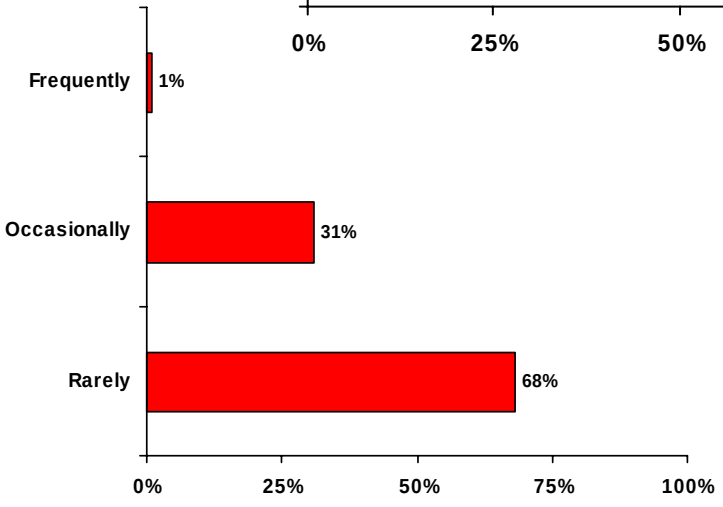
Results

Slightly fewer than two-thirds of attorneys (62%) have requested publication of an opinion.



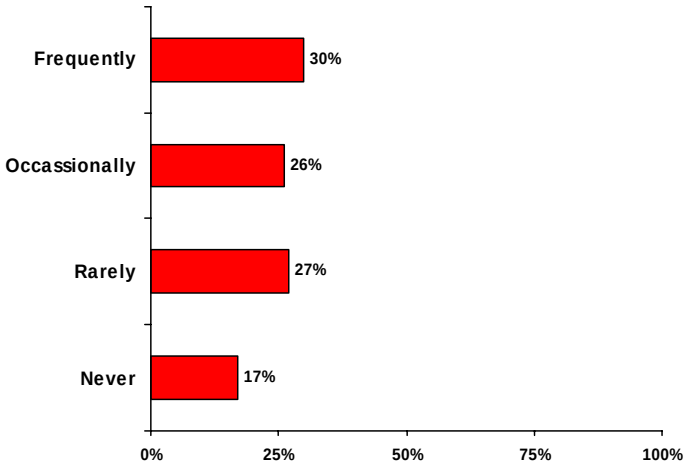
If yes, how often?

Over two-thirds of the attorneys (68%) who have requested publication of an opinion have done so only rarely, while only 1 percent have frequently requested publication of an opinion.

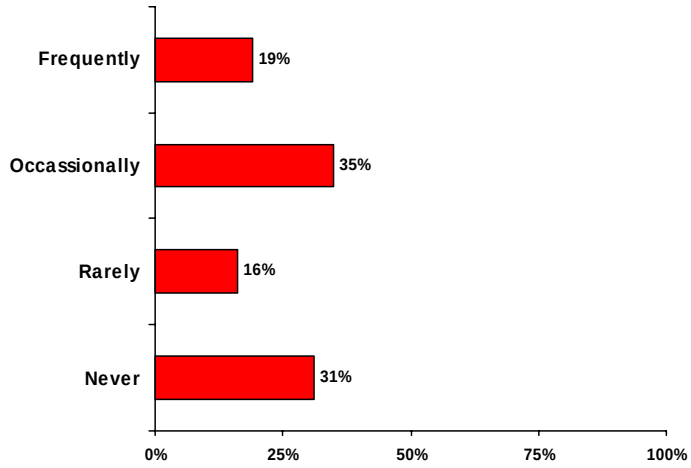


Q10: If you answered yes to question 9, please indicate how often you have relied on each criteria in support of your request for publication?

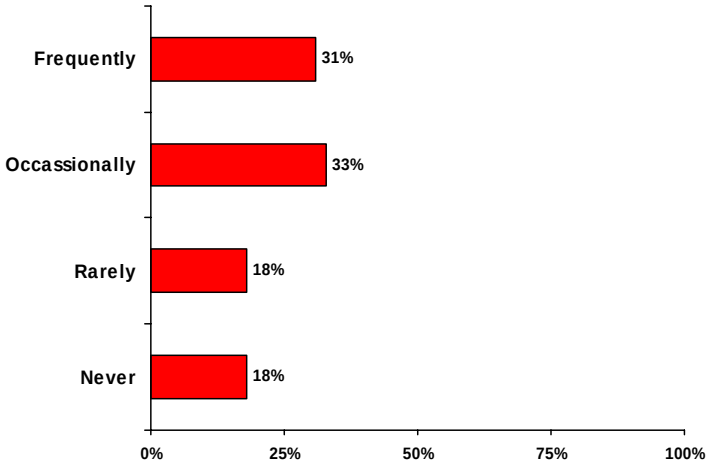
Establishes a new rule of law



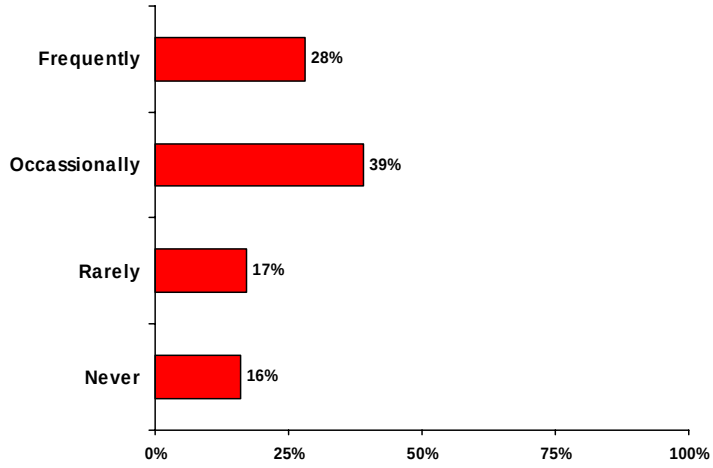
Resolves or creates an apparent conflict in the law



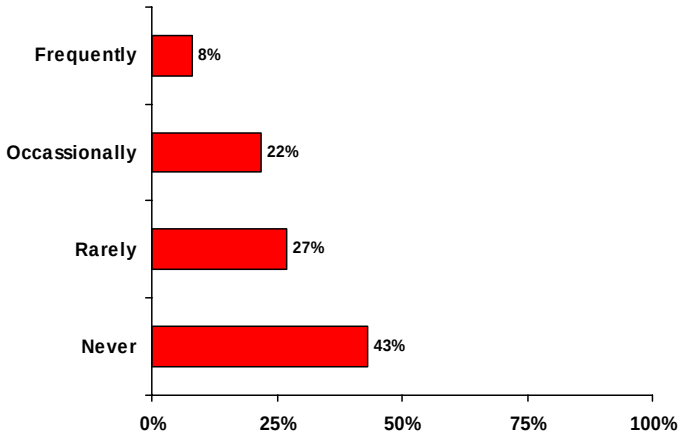
Applies an existing rule to a set of facts significantly different from those stated in published opinions



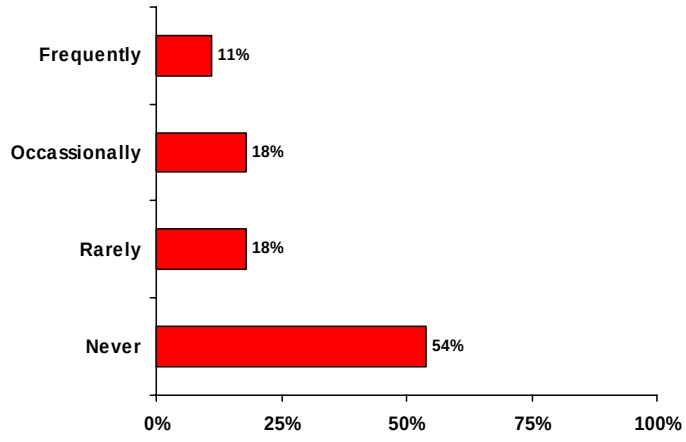
Involves a legal issue of continuing public interest



Modifies, or criticizes with reasons given, an existing rule

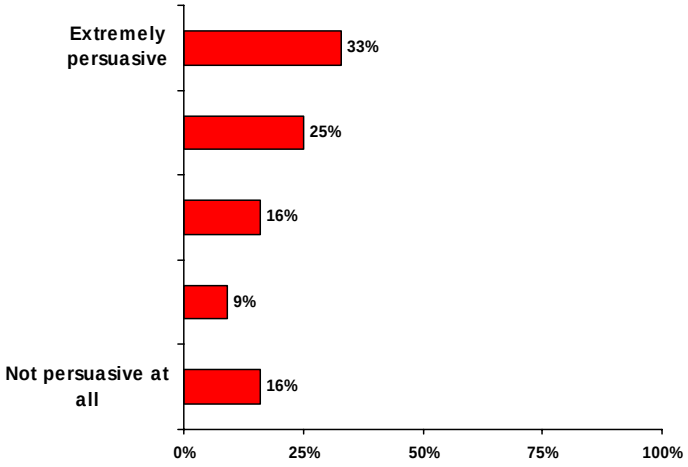


Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law

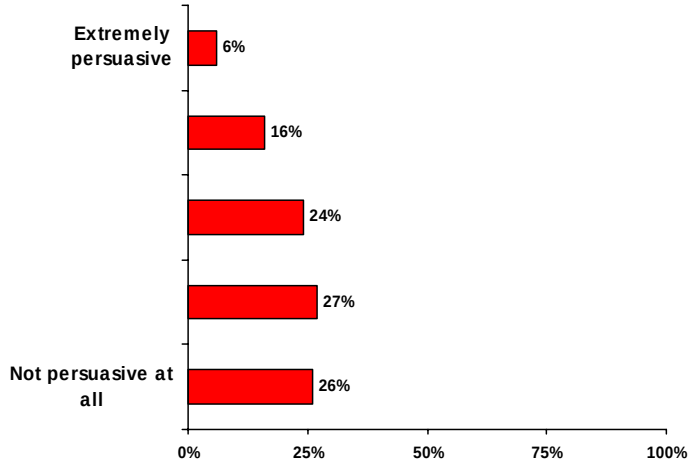


Q12: In your experience, what arguments or factors have been most persuasive in convincing a panel to reconsider a decision not to publish an opinion?

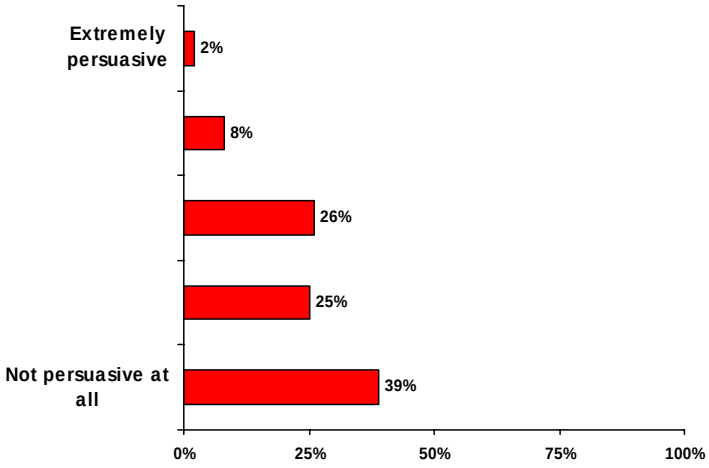
Further analysis demonstrates that the opinion does meet the rule 976(c) criteria



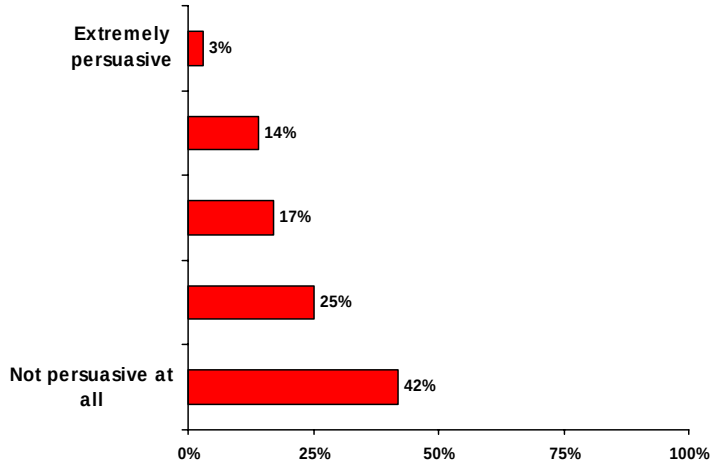
Request by a party



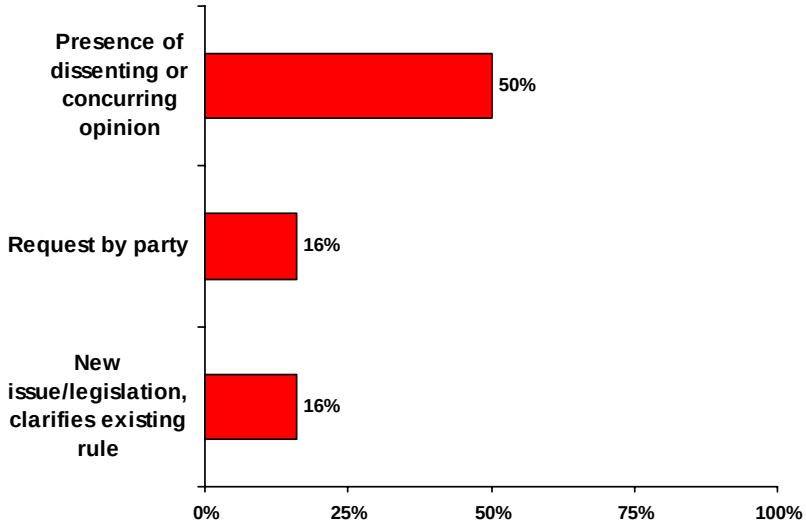
Further analysis demonstrates that the opinion merits publication even though it does not strictly meet the rule 976(c) criteria



Request by interested person, not a party to the case



Other factors



"Other" responses

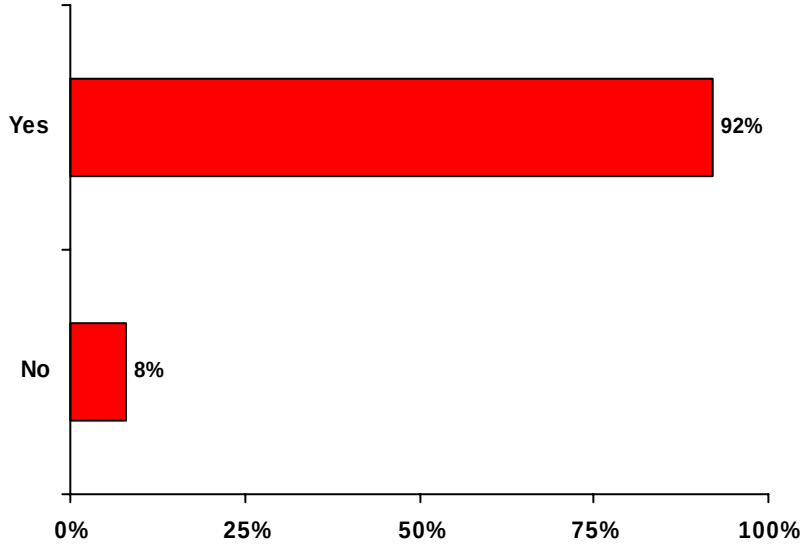
Of the 32 attorneys that provided an "other" factor, half believe that the presence of a dissenting or concurring opinion has been persuasive in convincing a panel to reconsider a decision not to publish an opinion.

IV. Unpublished Opinions and Partial Publication

Q13: Do you ever use unpublished opinions to assist you in your work?

Results

Almost all attorneys that responded to this survey use unpublished opinions to assist them in their work, while only 8 percent do not use unpublished opinions.

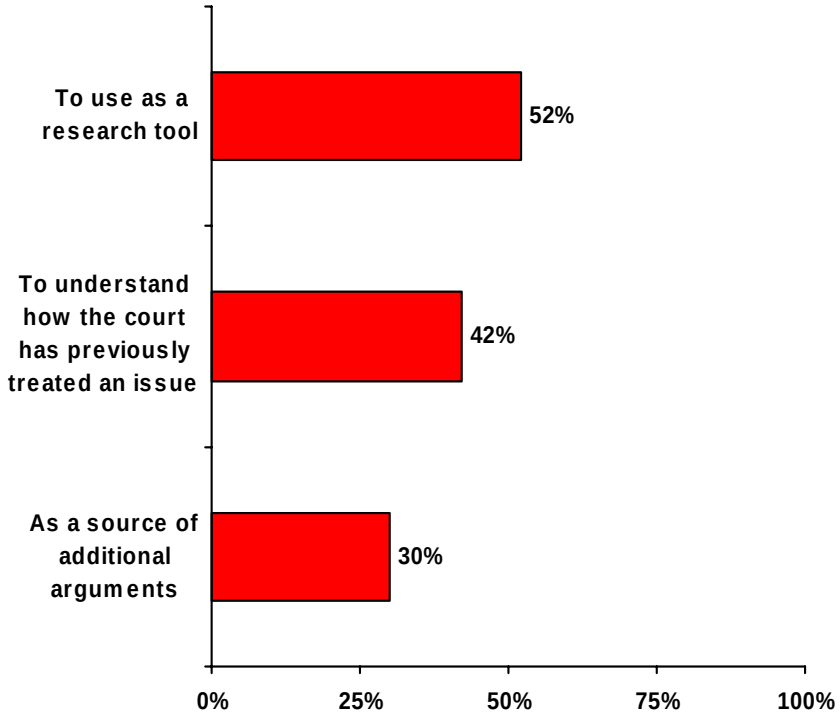


"Other" responses

There were 261 attorneys who explained why they have ever used unpublished opinions to assist them in their work.

About half (52%) of these attorneys indicated that they have used unpublished opinions as a research tool, while 42 percent used them to understand how the court has treated an issue previously.

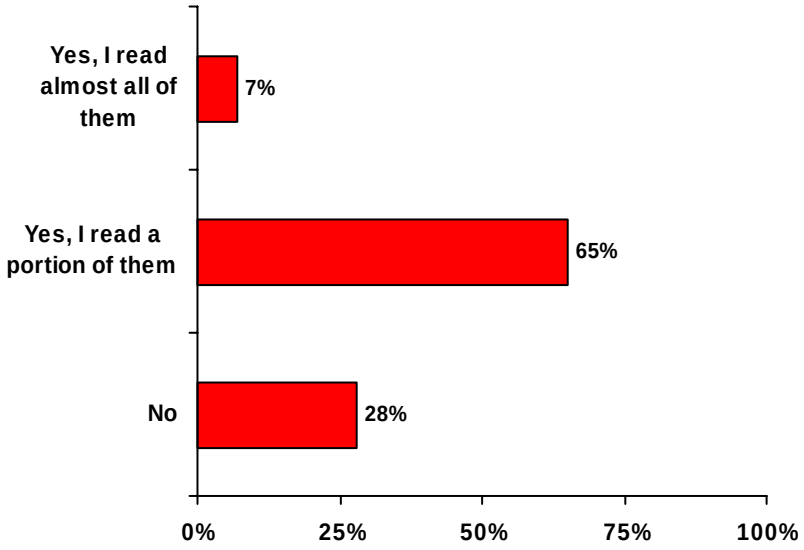
Slightly less than one-third (30%) of these attorneys have used unpublished opinions as a source of additional arguments in their work.



Q14: All opinions not certified for publication are available online. Do you regularly read these opinions?

Results

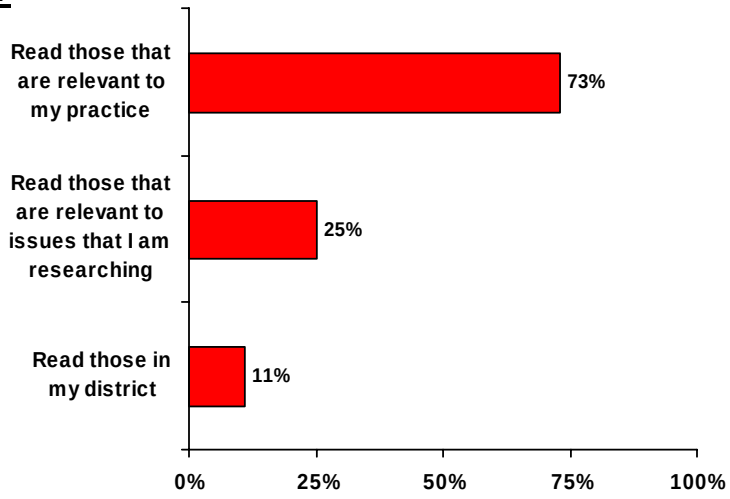
A majority of attorneys (65%) read a portion of opinions not certified for publication, while less than 10 percent stated that they read almost all of them. Just over one-quarter (28%) indicated that they do not read these opinions.



Which opinions do you read?

Attorneys cited one primary factor — relevance to their practice (73%) — in deciding which opinions to read.

The two other factors cited most frequently by attorneys are shown in the chart to the right.

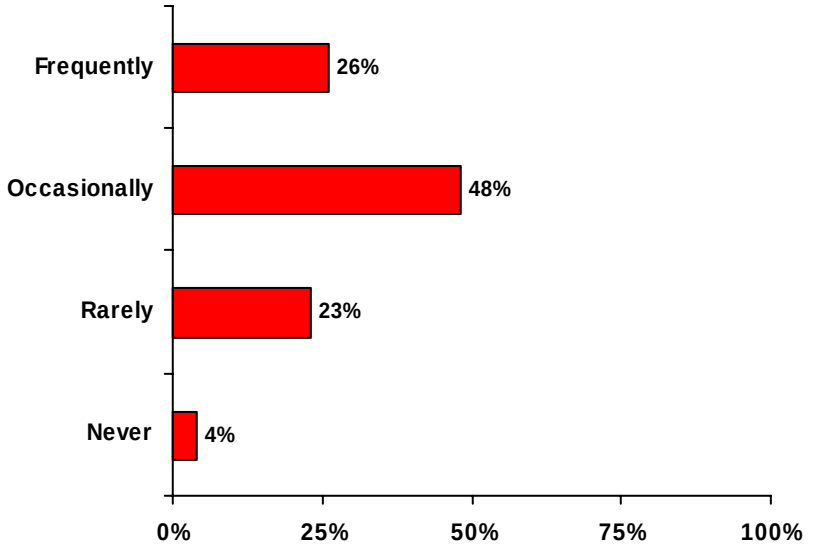


Q15: How often do you find dispositions or useful information in unpublished opinions that is not otherwise available from a citable source?

Results

About one-quarter of attorneys (26%) stated that they frequently find dispositions or useful information in unpublished opinions, while a similar proportion of attorneys either rarely or never find dispositions or useful information in unpublished opinions.

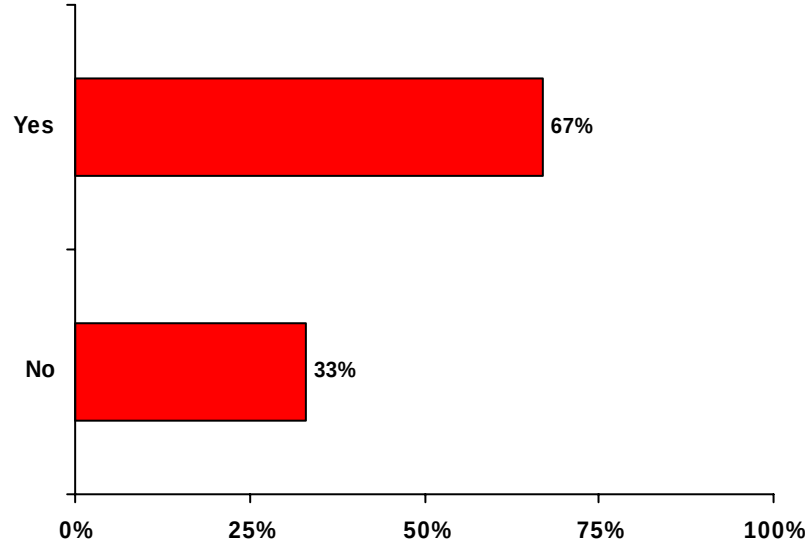
Just under half of the attorneys (48%) indicated that they occasionally find useful information in unpublished opinions.



Q16: Should parties be permitted, in a petition for review or an answer, to draw the Supreme Court's attention to unpublished opinions within the relevant appellate district that arguably conflict with the decision made by the Court of Appeal in their case?

Results

Two-thirds of attorneys stated that parties should be permitted to draw the Supreme Court's attention to unpublished opinions within the relevant district that conflict with the decision made by the Court of Appeal in their case.



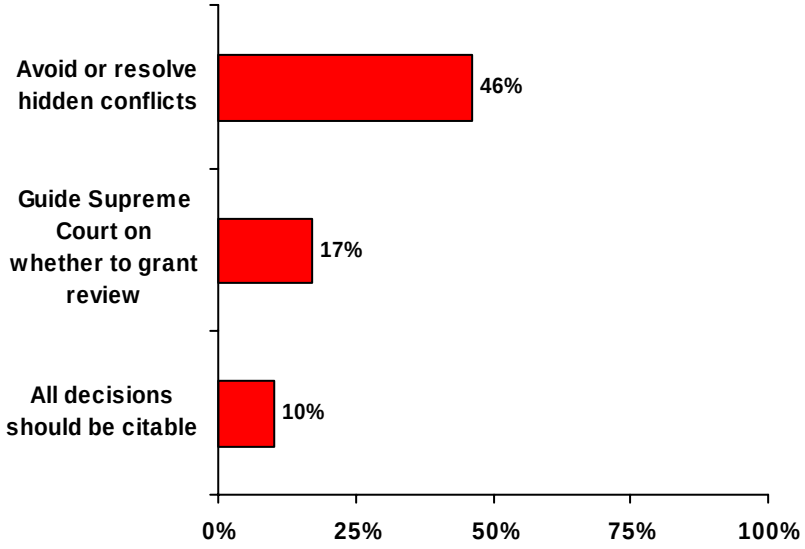
Comments

There were 223 attorneys who explained their responses to this question. These attorneys are separated below into the "Yes" responses and the "No" responses.

"Yes" responses

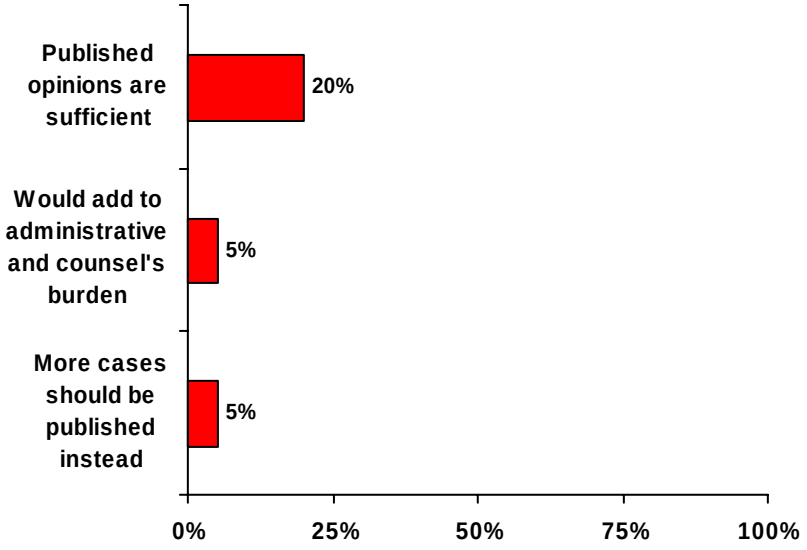
Almost half (46%) of the attorneys who provided explanations answered "Yes" because they believe the permission will help avoid or resolve any hidden conflicts.

A small proportion believe it will guide the Supreme Court on whether to grant review or indicated that all decisions should be citable.



"No" responses

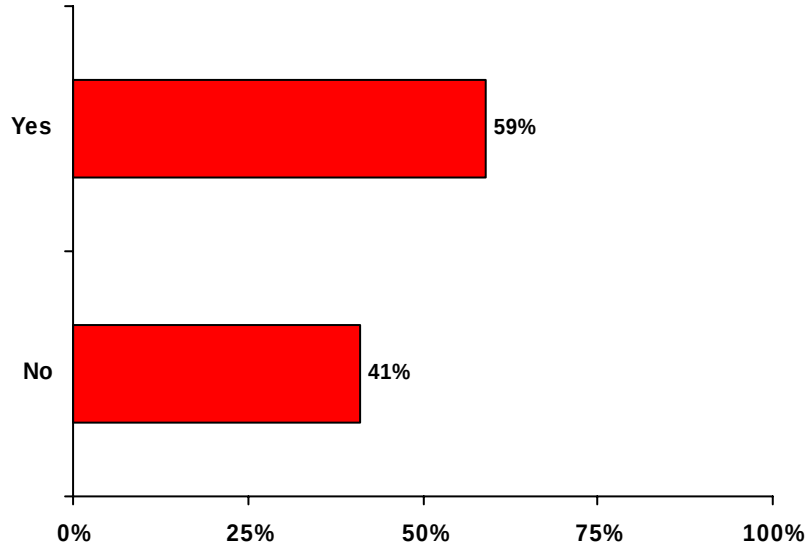
One in five (20%) of the attorneys who provided explanations answered "No" because they believe published opinions are sufficient.



Q17: Should parties be permitted to refer, in the petition or answer, to unpublished decisions from any appellate district?

Results

A slight majority of attorneys (59%) believe parties should be able to refer to unpublished opinions from any appellate district.

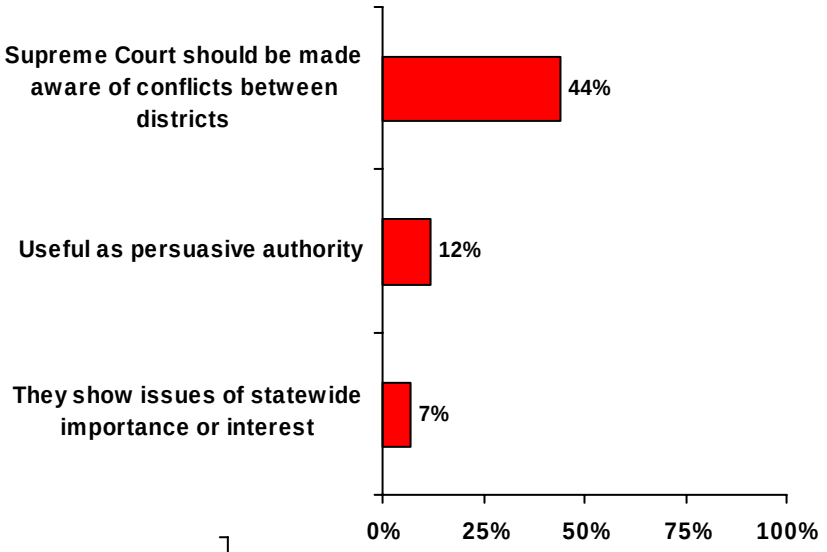


Comments

There were 211 attorneys who explained their responses to this question. These attorneys are separated below into the "Yes" responses and the "No" responses.

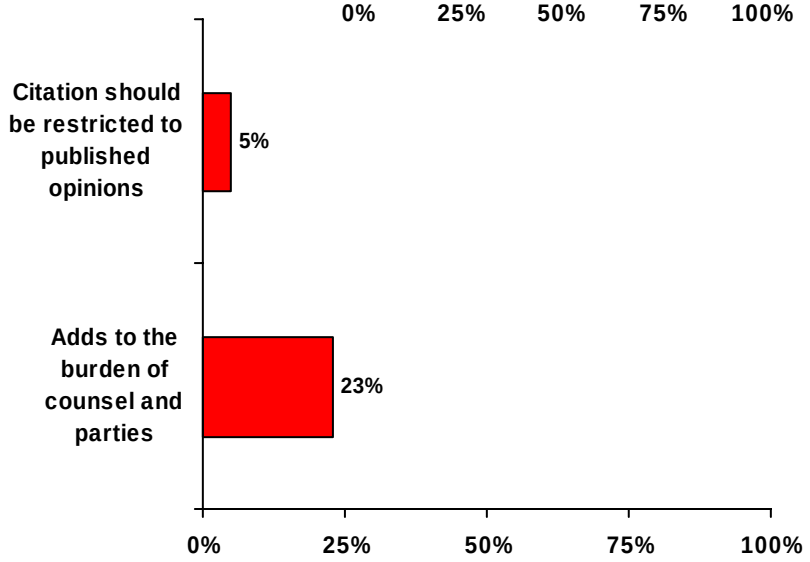
"Yes" responses

As in the previous question, almost half (46%) of the attorneys who provided explanations answered "Yes" because they believe the permission will help avoid or resolve any hidden conflicts.



"No" responses

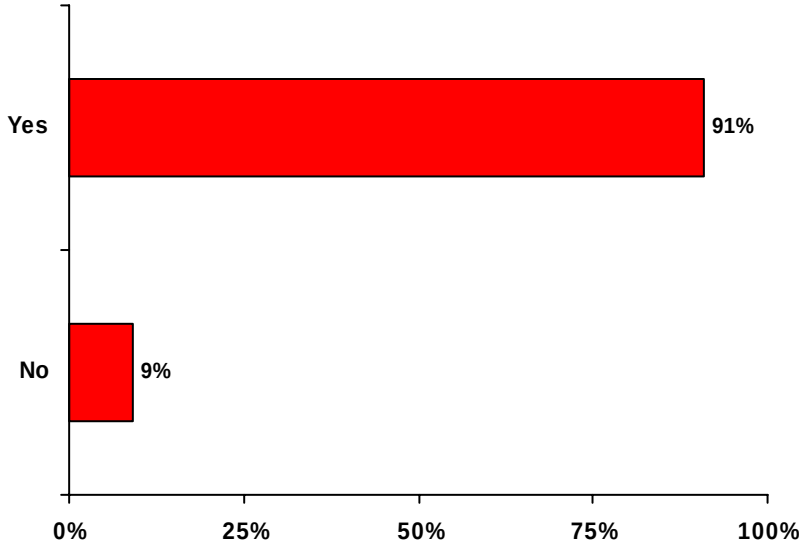
About one-quarter of the attorneys (23%) who provided explanations answered "No" because they believe the permission will add to the burden of counsel and parties.



Q18: Should the Supreme Court be able to order partial publication of an opinion of a Court of Appeal?

Results

Attorneys overwhelmingly affirmed (91%) that the Supreme Court should be able to order partial publication of an opinion of a Court of Appeal.



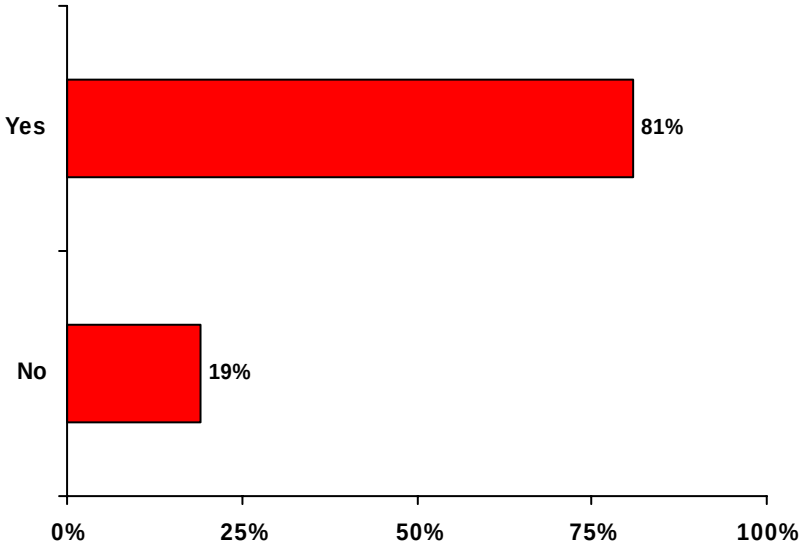
Comments

Attorneys cited two main reasons that they believe the Supreme Court should be able to order partial publication: only a portion of an opinion may fall within criteria or be of interest to litigants, and the Supreme Court should have the power to partially publish as the Court of Appeal does.

Q19: Should the Supreme Court be able to order partial depublication of an opinion of a Court of Appeal?

Results

Attorneys also strongly agree (81%) that the Supreme Court should be able to order partial depublication of an opinion of a Court of Appeal, though slightly less so than for partial publication.



Comments

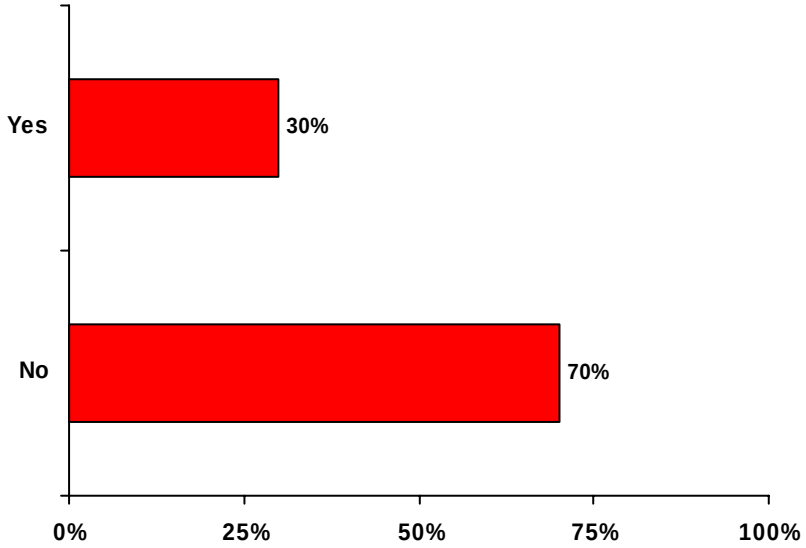
Again, there were two main reasons that attorneys believe the Supreme Court should be able to order partial depublication: the Supreme Court could approve only a portion of the opinion, and it would ensure that the case is worthy of publication.

V. Potential Changes to Rule 976 and Rule 976.1

Q20: Should changes to any of the existing criteria in rule 976 be considered?

Results

More than two-thirds of attorneys (70%) believe no changes should be considered to the existing criteria in rule 976.



Comments

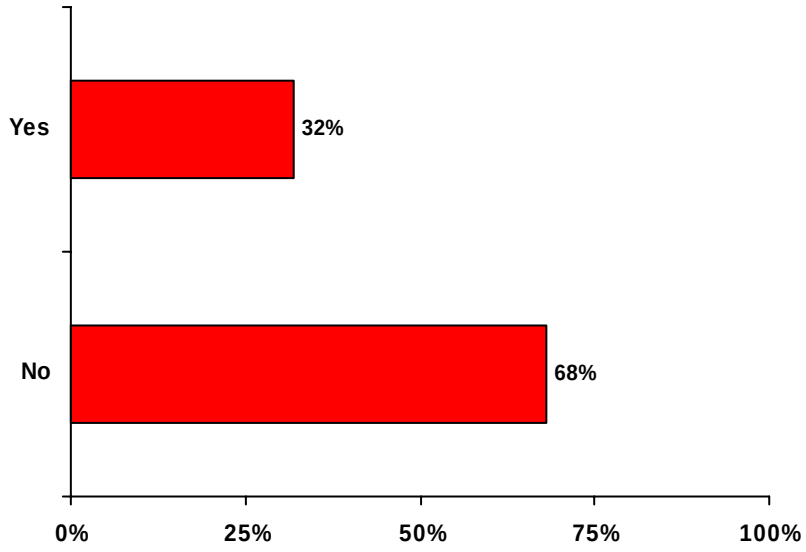
Attorneys cited three types of changes when provided an opportunity to comment: add more criteria, publish all opinions or allow citation to some/all unpublished opinions, and make existing criteria more specific.

Q21: Should additional criteria be added?

Results

Consistent with the last question, about two-thirds of attorneys (68%) indicated that no criteria should be added.

For the one-third of all attorneys who believe criteria should be added, the table on the following page lists the criteria that they cited, in order of criteria that received the most responses.



Q21, continued

Potential additional criteria

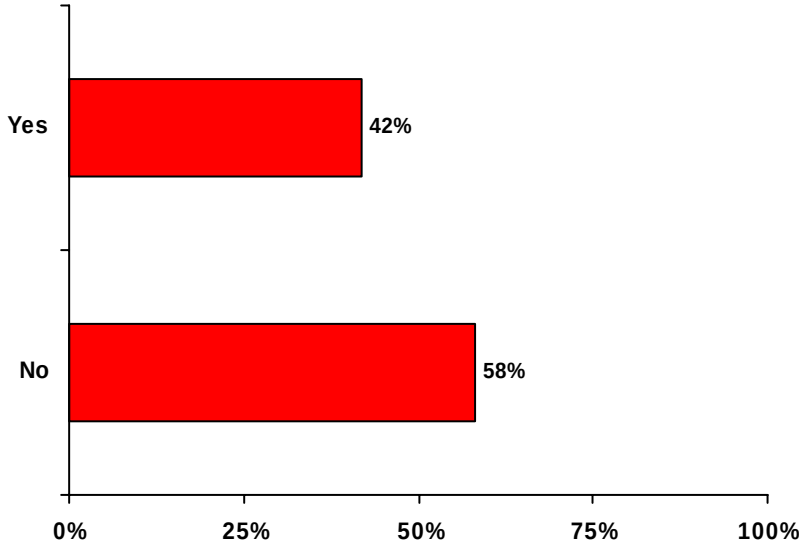
Attorneys were provided with samples of criteria used in other jurisdictions. The table below lists criteria that attorneys cited in the comment section of this question, in order of criteria that received the most responses.

Criteria used in other jurisdictions	Responses
The opinion reaffirms a principle of law not applied in a recently reported decision.	14
The disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published.	12
The opinion treats an issue of first impression.	11
The opinion directs attention to the shortcomings of existing common law or inadequacies in statutes.	10
The opinion treats a new constitutional or statutory issue.	9
The opinion construes a provision of a constitution, statute, ordinance, or court rule.	9
Although not otherwise meriting publication, the opinion constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar.	9
The opinion resolves a legal issue of substantial public interest, which the court has not sufficiently treated recently.	8
The opinion treats a previously overlooked rule of law.	8
The opinion criticizes, clarifies, explains, alters, or modifies an existing rule of law.	7
The case involves a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case.	7
The opinion involves a substantial question under the federal or state constitutions.	7
The opinion reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order.	7
The opinion applies an existing rule of law to facts significantly different from those to which that rule has previously been applied.	6
An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued by the opinion.	6
The case is a test case.	6
A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.	6
The opinion decides an appeal from a lower court order ruling that a provision of the state constitution, a statute, an administrative rule or regulation, or any other action of the legislative or executive branch of state government is invalid.	6
The opinion is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.	6
The opinion establishes a new rule of law.	5
The opinion corrects procedural errors, or errors in the conduct of the judicial process, whether by remand with instructions or otherwise.	4
The opinion affirms or reverses a lower court decision on different grounds.	3

Q22: Should the presumption against publishing set forth in rule 976 be changed to an affirmative presumption that requires publication unless the opinion does not meet any of the criteria?

Results

A majority of attorneys (58%) stated that the presumption against publishing set forth in rule 976 should not be changed to an affirmative presumption, though over 40 percent believe that it should be changed to require publication unless the opinion does not meet any of the criteria.

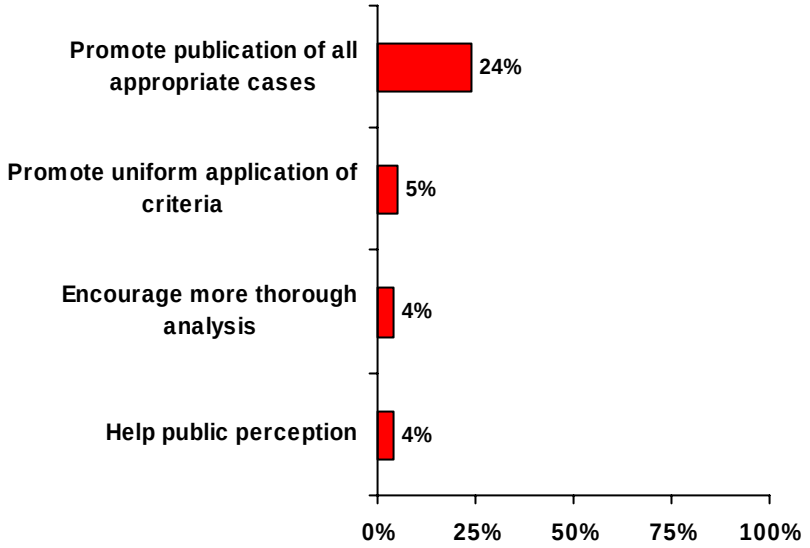


Comments

There were 108 attorneys who explained their responses to this question. These attorneys are separated below into the "Yes" responses and the "No" responses.

"Yes" responses

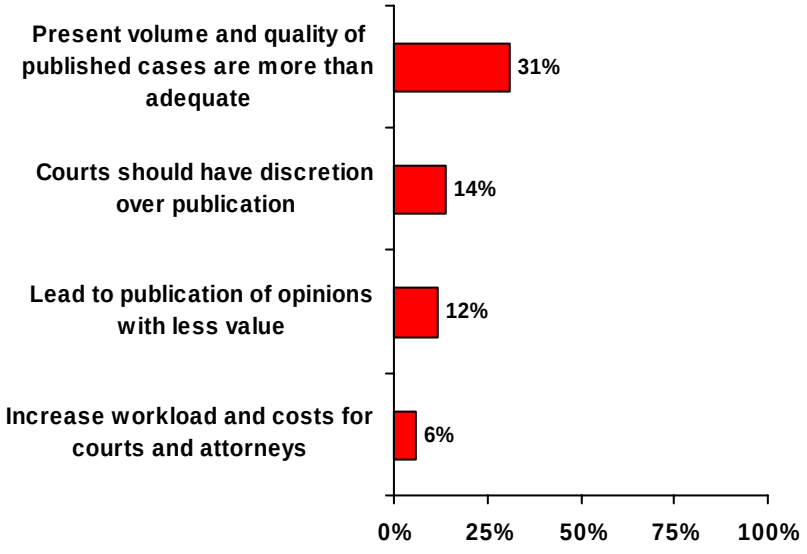
Almost one-quarter (24%) of the attorneys who provided explanations believe the presumption should be changed because it will promote publication of all appropriate cases.



"No" responses

Almost one-third of the attorneys (31%) believe the presumption should not be changed because the present volume and quality of published cases are more than adequate.

Slightly more than 10 percent of the attorneys believe the presumption should not be changed for each of two reasons: that the courts should have discretion over publication (14%) and that this change would lead to publication of opinions with less value (12%).



Q23: Do you think rule 976.1, setting forth the basis for partial publication, should be revised or repealed?

Results

A strong majority (83%) of attorneys believe that rule 976.1, setting forth the basis for partial publication, should not be revised or repealed.