

## Response Form

**Title:** Revised Recommendations for Amendment to California Rule of Court, Rule 976

- 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](http://www.courtinfo.ca.gov/invitationstocomment).**

<b>DEADLINE FOR COMMENT: 5:00 p.m., Friday, April 28, 2006.</b>
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*Circulation for comment does not imply endorsement by the Supreme Court of California or its Advisory Committee on Rules for Publication of Court of Appeal Opinions.  
All comments will become part of the public record of the Supreme Court's action.*

Title	<b>Revised Recommendations for Amendment to California Rule of Court, Rule 976</b>
Summary	This proposal seeks comments on a revised proposal for amending rule 976. This follows an earlier request for comments on a report that similarly addressed the standards for publication of Court of Appeal opinions and recommended 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	<p><b>I. Background of the request for comment</b></p> <p>The Supreme Court asked its Advisory Committee on Rules for Publication of Court of Appeal Opinions to review the publication practices of the Courts of Appeal and to consider whether the existing publication rules could be amended to better assist the Courts of Appeal in initially determining whether to certify an opinion for publication. The committee completed an initial draft report, including a proposal 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.</p> <p>The committee circulated its draft report for public comment at the end of 2005. In February 2006, the committee met to review the comments received. Based on those comments, and after further discussion, the committee has revised its original proposal, and has tentatively concluded that further revisions to rule 976 should be recommended to the Supreme Court. As a result, the committee is circulating the attached revised version of rule 976 for public comment. The committee's original draft report, containing historical information concerning the publication rule and the results of surveys on publication practices circulated among Court of Appeal justices and interested attorneys, is available for reference at <a href="http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf">www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf</a>, or a hard copy can be obtained from the Committee Counsel as indicated above. Once the committee drafts a final version of its recommended amendments to rule 976, the report will be modified to include a description of the comments received and the committee's analysis leading to its final proposals. The revised report and recommendations will then be</p>

submitted to the Supreme Court for its consideration.

## **II. Development of the report and recommendations**

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).)

In addition to the history of the publication of opinions in California, 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 Appeal 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.

Responses to the surveys, however, highlighted several areas that the

committee concluded deserved careful consideration. Information about publication decisions being made based on criteria not cited in the rules, and doubts expressed by counsel that the criteria were always applied consistently led the committee to conclude that it would recommend various improvements and clarifications to the publication rules and practices. The focus of the improvements was to ensure that decisions that should be published are, while at the same time litigants and lawyers are not overburdened by the publication of opinions that do not add to the development and understanding of the law.

### **III. The draft report**

In its original draft report and recommendations circulated in 2005, the committee suggested that the criteria described in California Rules of Court, rule 976(c), to assist courts in determining whether an opinion should be published, be amended to provide further guidance and to include reference to factors that should *not* play a role in the decision of whether to publish an opinion. Other options were considered by the committee, including changing the presumption in 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 that time.

### **IV. Comments and revised recommendations**

The original draft report and recommendations were widely circulated for comment. Approximately 20 responses were received, including analyses and suggestions from the appellate sections of two large local bar associations, the State Bar's Litigation Section and Appellate Committee, and the Academy of Appellate Lawyers. A significant number of these responses, while endorsing the recommended changes, urged that further reconsideration of the presumption against publication occur. It was also noted that rule 976 currently is silent with respect to whether opinions that meet the publication criteria should be published. Several responses also suggested various modifications to the draft amendments to the criteria in the rule.

The committee carefully considered the comments, particularly those from the groups representing experienced appellate practitioners and litigators. After discussion and analysis, the committee determined that additional amendments were warranted. Most significantly, the committee concluded that it should recommend deleting the presumption against publication in rule 976 and changing the rule to provide that if any one of the enumerated factors applies, the court

should publish the opinion. The committee did not suggest that the presumption be shifted to favor publication, but rather recommended removal of the presumption against publication and addition of the admonition that an opinion should be published if a criterion is met.

In the committee's view, these proposed revisions should result in the more consistent publication of those decisions that meet the stated criteria, thereby contributing to the development of the law and increasing public confidence in the appellate process. The committee concluded that the proposed changes will help courts to focus on the relevant factors in determining whether to publish a particular opinion, while avoiding the publication of large numbers of cases that would not be helpful to the bench and bar. The committee also will recommend in its report to the court that, if the proposed amendments to rule 976 are adopted, the Supreme Court appoint a committee to monitor publication rates and other statistical measures to assess the effect of the rule changes and to report to the Supreme Court.

Because the revisions to rule 976 recommended by the committee have changed substantially in response to the first round of comments, the committee is now circulating its revised proposal for comment. The committee contemplates that it will consider the comments received and make appropriate modifications, if any, to the recommended draft rule and its report, which it will then submit to the Supreme Court.

The committee's newly revised draft amendments to the rule are attached. The committee's draft report contains useful information background and other information, and it may be useful to consult the report before reviewing and commenting on the proposals. As noted, the report may be found at [www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf](http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf), or a hard copy may be obtained by contacting Lyn Hinegardner, Committee Counsel, at 415-865-7698 or [lyn.hinegardner@jud.ca.gov](mailto:lyn.hinegardner@jud.ca.gov).

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Attachment

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

1 **Rule 976. Publication of Appellate Opinions**

**DRAFT**  
**2/7/06**

2  
3 (a) \* \* \*

4  
5 (b) \* \* \*

6  
7 (c) **Standards for certification**

8  
9 ~~No~~ An opinion of a Court of Appeal or a superior court appellate division ~~may~~  
10 should be certified for publication in the Official Reports ~~unless~~ if the opinion:

- 11
- 12 (1) establishes a new rule of law;;
- 13
- 14 (2) applies an existing rule of law to a set of facts significantly different
- 15 from those stated in published opinions;;
- 16
- 17 (3) ~~or~~ modifies, explains, or criticizes with reasons given, an existing rule
- 18 of law;
- 19
- 20 (4) advances a new interpretation, clarification, criticism, or construction of
- 21 a provision of a constitution, statute, ordinance, or court rule;
- 22
- 23 (25) ~~resolves~~ addresses or creates an apparent conflict in the law;
- 24
- 25 (36) involves a legal issue of continuing public interest; ~~or~~
- 26
- 27 (47) makes a significant contribution to legal literature by reviewing either
- 28 the development of a common law rule or the legislative or judicial
- 29 history of a provision of a constitution, statute, or other written law;;
- 30
- 31 (8) invokes a previously overlooked rule of law, or reaffirms a principle of
- 32 law not applied in a recently reported decision; or
- 33
- 34 (9) is accompanied by a separate opinion concurring or dissenting on a
- 35 legal issue, and publication of the majority and separate opinions would
- 36 make a significant contribution to the development of the law.
- 37

38 Factors such as the workload of the court, or the potential embarrassment of a

39 litigant, lawyer, judge, or other person should not affect the determination of

40 whether to publish an opinion.

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1 (d) \* \* \*

2

3 (e)

\* \* \*