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PUBLISH OR PERISH: THE DESTINY OF APPELLATE OPINIONS IN CALIFORNIA

Each year California appellate courts write numerous opinions which could be of inestimable value to practicing attorneys in litigation. However, since these opinions never appear in the official reports as a result of the court of appeal's determination that they do not merit publication, only a small number of lawyers will ever learn of these cases, and even fewer will actually read or use the decisions.

A typical example is Ball v. Tobeler. In this case, plaintiff tenants, in a class action, alleged that the defendant landlord had continuously failed to maintain his apartments in accordance with various governmental health codes, and consequently that the apartments had no rental value. As a result thereof, the plaintiffs alleged that they had in fact been damaged to the extent of the rent paid over the two previous years. They sought declaratory relief and injunctive relief based, respectively, on a theory of implied warranty of habitability, and an allegation that the defendant landlord was in violation of an unfair business competition statute. As to the first claim of relief, the court of appeal declared that it was error to sustain a general demurrer to this cause of action; as to the second, the court held that "the sweeping language of [the unfair competition statute] embraces the unlawful practice of a landlord" in the complaint.

If published, the Ball opinion could markedly affect future landlord-tenant litigation, since the case expanded tenants' remedies for improperly maintained housing. As an unreported decision, however, its status will be diluted considerably.

The majority of appellate opinions, like Ball, remain unpublished because of California's policy of "selective publication,"

4. CAL. CIV. CODE § 3369 (West 1967): "2. Any person performing . . . an act of unfair competition within the state may be enjoined in any court of competent jurisdiction . . . 3. [u]nfair competition shall mean and include unlawful, unfair or fraudulent business practice . . . ." 5. Ball v. Tobeler at 20.
which spares the legal profession the time and expense of purchasing, storing, and researching the huge number of superfluous opinions that are handed down each year. Repeatedly, however, important substantive decisions are nevertheless cast aside with the unpublishables. The result is that attorneys are, in effect, denied access to valuable judicial precedent, since it is virtually impossible to find a case which is nowhere reported, digested, annotated, or indexed. With few exceptions, a written opinion is relegated to effective obscurity unless it is certified for publication by the court.

The standards and criteria pertaining to selective publication of written appellate opinions in California and the feasibility of employing the writ of mandate as one possible remedy to compel the publication of such meritorious opinions will be examined in the materials to follow.

SELECTIVE PUBLICATION

Background

The requirement of written judicial opinions in California dates back to an 1850 statute which ordered the supreme court to publish all its opinions in writing. Nine years later, the court struck down that provision, deciding that henceforth it should be within the court's discretion whether or not to issue an opinion after judgment, and if so, whether such opinions would be oral or written. The supreme court based its decision primarily on the grounds that the legislature was meddling in judicial affairs by imposing on the court a requirement of compulsory publication.

The requirement of written opinions was reinstated in 1879, this time under the authority of the California Constitution. The Constitutional Convention's rationale was based on the fact that the judicial opinions of the supreme court become part of the settled law of the state and precedents for subsequent cases. For these precedents to have value as law, the supreme court must state the grounds for its decisions in writing. Further, it was

7. See note 41 and accompanying text, infra.
8. E.g., Ball v. Tobeler.
12. CAL. CONST. art. VI, § 2 (1879).
believed that such a requirement would result in well-considered
opinions, and would tend to develop purity and honesty in the ad-
ministration of justice.\textsuperscript{13} When the California courts of appeal
were created in 1904,\textsuperscript{14} a similar requirement of publication was
made applicable to them. The practice of publishing all supreme
court and appellate decisions was continued until 1963.

The advent of the 1960's, however, witnessed mounting
criticism within the legal profession directed at the rapidly in-
creasing bulk of reported opinions,\textsuperscript{15} many of which covered set-
tled law and lacked any value as precedent. The number of vol-
umes of law reporters relative to reported decisions grew even
faster, since many opinions were published in more than one re-
porter.\textsuperscript{16} As a result, law libraries were necessarily growing at a
frenetic pace, and practicing attorneys were spending more money
than ever to keep their collections of reporters current.

The practice of publishing every appellate court opinion
was subject to scathing denunciation by critics who believed that
the primary duty of the courts was settling private disputes
rather than developing substantive law.\textsuperscript{17} According to these
commentators, there was no reason for an opinion to go beyond
the parties of the case, especially if the opinion invoked no new
point of law, proceeded on settled principles, or based its hold-
ing upon a commonplace factual situation.\textsuperscript{18} The basic fallacy,
it was contended, was the assumption that merely because an opin-
on was in writing it should be made part of the law of the state
forever.\textsuperscript{19}

**Present Standards for Publication of Opinions**

The California State Bar and the Judicial Council recognized
the problem created by the plethora of non-essential reported de-
cisions and concluded that the publication of all court of appeal decisions was no longer desirable, and that a policy of selective publication would be the best solution for the problem.

In accordance with this policy, the California legislature in 1963 adopted an act providing that “[s]uch opinions of the supreme court, of the courts of appeal, and of the appellate departments of the superior courts as the supreme court may deem expedient shall be published in the official reports.” The legislature's role in the scheme of publication was enunciated in the constitutional revision of 1966: “The legislature shall provide for the prompt publication of such opinions of the supreme court and the courts of appeal as the supreme court deems appropriate, and those opinions shall be available for publication by any person.”

Thus, only appellate opinions which the supreme court “deems appropriate” will be published, and “any person” may have access only to those opinions made available for publication. It appears, therefore, that an appellate opinion may not be published privately unless it first is “deemed appropriate” by the California supreme court for inclusion in the official reports.

In order to carry out the legislative mandate implicit in article VI, section 4 of the California Constitution, the supreme court in 1964 adopted California Rule of Court 976. This rule declares that all supreme court opinions shall be published in the official reports, and sets the standards for publication of lower court opinions. According to the criteria of publishability set forth by Rule 976, no opinions of a court of appeal or of an appellate department of the superior court shall be published unless one of the following criteria is satisfied:

22. CAL. CONST. art. VI, § 14 (West 1972).
23. E.g., West’s California Reporter or Pacific Reports.
24. See note 60 and accompanying text, infra. Prof. Seligson and Mr. Warnlof, however, do not appear to recognize this point of view. Indeed, they hypothesize a situation where an “enterprising entrepreneur” may defeat the benefit of Rule 976 by commercially publishing unreported cases. Seligson and Warnlof 52.
28. Rule 976(b) originally provided for publication if the opinion involved “a new and important issue of law, a change in an established principle of law, or a matter of general public interest.” The 1972 revision made the present criteria of the rule more specific, and added explanatory footnotes.
1) the opinion establishes a new rule of law or alters or modifies an existing rule. “This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or [a] change [in] existing rules [of law].” Publication, however, is not justified if an established rule or principle is merely applied to a substantially new factual situation.

2) the opinion involves a legal issue of continuing public interest. This requires that the legal issue, and not merely the factual case or controversy, be of public interest. “Public interest” does not mean “public curiosity,” but is defined as an interest of a continuing, and not merely transitory, nature. This requirement is satisfied if the legal issue is of continuing interest to a substantial public group, i.e. public officers, agencies or entities, members of an economic class, or a business or professional group. This criterion also includes opinions that clarify a controlling rule of law that is not well established or clearly stated in prior reported opinions, those which reconcile conflicting authorities, or those which test “the present validity of a settled principle in the light of modern authorities elsewhere,” provided, of course, that the requirement of continuing public interest is satisfied.

3) the opinion criticizes existing law. “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.”

The Certification Process

Originally, Rule 976(c) was slanted in favor of publication of appellate opinions, although the ultimate determination of publishability rested in the hands of the court which decided the case. Every state appellate court’s opinion was “deemed” to meet the standard, and was published unless a majority of the court rendering the opinion certified that it did not meet the standard, and specified that it not be published.

As revised in 1972, however, the certification process has been inverted, and an opinion is presently published only if “a ma-

30. Id. n.2.
31. Id.
32. Id. n.3.
33. Cal. R. Ct. 976(c) (1964).
majority of the court rendering the opinion certifies prior to the de-

cision becoming final in that court that it meets the standard.” An opinion is now deemed “unpublishable” until “certified for publication.” The supreme court has retained some supervisory power over the publication of appellate opinions, since an opinion not certified for publication by the court of appeal “shall nevertheless be published in the Official Reports upon” the highest court’s order. This provision also applies to the appellate departments of the superior court.

Rule 976 further provides that “no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports,” and details the procedure to be followed after an opinion is certified for publication.

The selective publication system adopted by the California courts has been a quantitative success. Of the 3746 majority opinions written by the courts of appeal in 1970-71, 71% were not certified for publication, a 10% rise over that of 1969-70.

CRITICISMS OF SELECTIVE PUBLICATION

The Role of Judicial Discretion

A closer examination of the statistics compiled during 1970-

71 by the Judicial Council shows a significant disparity in the application of Rule 976 among the individual divisions of the appellate court districts. For example, division one of the First Appellate District was consistently below the state average (71%) in terms of the percentage of majority opinions unpublished (total opinions unpublished 56%—civil appeals 57%, criminal appeals 61%, original proceedings 17%), while division two of the Fourth Appellate District was just as consistently above average in

35. CAL. R. CT. 976(c) (West 1973).
36. Id.
37. Id.(d).
38. Id.(e): “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 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.”
39. ANNUAL REPORT, supra note 6, at 76. The REPORT further points out that the 2657 opinions not published during 1970-71 were greater in number than the 2371 majority opinions written in 1966-67, and “represents a large saving in the number of printed volumes of California Appellate Reports.”
40. Id.
each category (total 80%—civil appeals 78%, criminal appeals 85%, original proceedings 67%).\footnote{41}

Even assuming variances in the number and type of cases decided by each division,\footnote{42} it is difficult to avoid the obvious conclusion that the standards for publication administered throughout the state are applied in a manner which is something less than uniform.

This situation is certainly not surprising, since the application of Rule 976 is entrusted to the discretion of the very judges who decide the cases and author the opinions. It has been suggested that judges are guided by criteria extrinsic to those of Rule 976 when they consider whether or not a particular opinion should be certified for publication:

When the author of an opinion thinks that all the world should have the opportunity to read his brilliant dissertation, it is a touchy matter for his two colleagues to decide that the opinion does not merit publication under the rules.\footnote{43}

If indeed it is true that a judge can exert pressure to publish an opinion which meets none of the three criteria of Rule 976, there is no reason to believe that the converse situation is not

\begin{tabular}{|l|c|c|c|c|}
\hline
Courts of Appeal & Total & Civil appeals & Criminal appeals & Original proceedings \\
\hline
State total & 71 & 62 & 82 & 41 \\
\hline
District I & & & & \\
Division 1 & 70 & 65 & 81 & 40 \\
Division 2 & 70 & 69 & 67 & 40 \\
Division 3 & 70 & 68 & 89 & 41 \\
Division 4 & 70 & 70 & 89 & 53 \\
\hline
District II & 73 & 59 & 85 & 41 \\
Division 1 & 73 & 68 & 81 & 42 \\
Division 2 & 73 & 69 & 81 & 43 \\
Division 3 & 73 & 69 & 81 & 43 \\
Division 4 & 73 & 69 & 81 & 43 \\
Division 5 & 73 & 69 & 81 & 43 \\
\hline
District III & 73 & 59 & 85 & 41 \\
Division 1 & 73 & 68 & 81 & 42 \\
Division 2 & 73 & 69 & 81 & 43 \\
Division 3 & 73 & 69 & 81 & 43 \\
Division 4 & 73 & 69 & 81 & 43 \\
Division 5 & 73 & 69 & 81 & 43 \\
\hline
District IV & 73 & 59 & 85 & 41 \\
Division 1 & 73 & 68 & 81 & 42 \\
Division 2 & 73 & 69 & 81 & 43 \\
Division 3 & 73 & 69 & 81 & 43 \\
Division 4 & 73 & 69 & 81 & 43 \\
Division 5 & 73 & 69 & 81 & 43 \\
\hline
District V & 73 & 59 & 85 & 41 \\
Division 1 & 73 & 68 & 81 & 42 \\
Division 2 & 73 & 69 & 81 & 43 \\
Division 3 & 73 & 69 & 81 & 43 \\
Division 4 & 73 & 69 & 81 & 43 \\
Division 5 & 73 & 69 & 81 & 43 \\
\hline
\end{tabular}

41. \textit{Id.} at 75.

42. Unfortunately, the Judicial Council Report does not report the number of cases transacted by division, but by district. See \textit{Id.} at 91-3.

true: namely, that a judge may write an opinion which squarely meets one or more of the criteria, and yet will pressure his colleagues not to certify.  

Although the courts of appeal almost never discuss the applicability of an opinion to the standards of Rule 976, a rare exception is found in People v. Welborn. In that case, the court admitted that the appeal involved "no new or important issue of law and changes no established principle of law" but nevertheless deemed the opinion publishable under Rule 976 because the point raised on appeal illustrated "... an intelligent, painstaking and too infrequently invoked use by the trial judge of his power to make jury instructions more meaningful by fitting them to the specific facts." The court seems to have liberally exercised its discretionary power to publish, while inferring that the case may not squarely meet the criteria set forth in Rule 976(b).  

The problem seems to lie in the fact that the determination of publishability of a particular opinion is made by the same persons responsible for creating that opinion. It appears that subjective factors extrinsic to Rule 976 can creep into the exercise of judicial discretion as to certification for publication, resulting in a non-uniform practice of selective publication throughout California.

**The Precedent Value of Unpublished Opinions**

California has long recognized the precedent value of unreported opinions, provided they have not been superseded by subsequent reported opinions. The courts have cited such cases with approval, and have employed them as controlling...

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44. For example, although the opinion may squarely meet the criteria for publication, a judge may desire the anonymity inherent in non-publication because he fears reversal, is unwilling to extend his holding beyond the facts of the instant case, or fears that his reasoning may be unsound and subject to criticism.  


46. Id. at 671, 51 Cal. Rptr. at 646.  

47. Id.  

48. Admittedly, Rule 976 was more general in 1966 (when Welborn was decided) than it is as a result of the 1972 revision. See note 28, supra.  

49. See note 41, supra.  

50. Seligson and Warnlof 47-50.  

51. "The fact that [a] case was not ordered reported in the official reports cannot be taken to indicate ... that this court disapproved the doctrine announced therein." MacDonald v. MacDonald, 155 Cal. 665, 672, 102 P. 927, 930 (1909). See also Estate of Little, 23 Cal. App. 2d 40, 43, 72 P.2d 213, 215 (1937).  

52. See, e.g., Schwartz v. Knight, 74 Cal. 432, 16 P. 235 (1887); Santa Ana
with respect to the legal issues decided therein.\textsuperscript{58}

However, the silence of Rule 976 as to the precedent value of unreported cases has caused distress to at least one commentator who sees the situation as “\[o\]ne of the unsettled questions in the operation of the selective publication system.”\textsuperscript{54} The California Supreme Court, in denying petitions for rehearings, has recently directed the Reporter of Decisions not to publish appellate opinions which cite unpublished opinions.\textsuperscript{55} The apparent reason for this practice is that while the court approved the result in the case, it “disagreed with or had reservations about the reasoning for the decision and chose this course of action to remove the opinion as precedent.”\textsuperscript{56}

The courts of appeal have actually indicated in at least two cases\textsuperscript{57} that “it is improper to cite as precedent an opinion of the court of appeal which has been certified for non-publication pursuant to Rule 976.”\textsuperscript{58}

Although fewer case decisions are now published under selective publication, some commentators\textsuperscript{59} advocate further measures to decrease the volume of published cases by removing the incentive to publish uncertified cases. They argue that if courts no longer accept unpublished opinions as precedent, unofficial reporters will be eliminated,\textsuperscript{60} and the value of unreported cases will be severely undermined.\textsuperscript{61} Such cases, except to the extent

\begin{itemize}
  \item v. Harlin, 99 Cal. 538, 34 P. 224 (1893); Gray v. La Societe Francaise, 131 Cal. 566, 63 P. 848 (1901).
  \item 53. See, e.g., Puterbagh v. Wadham, 162 Cal. 611, 123 P. 804 (1912); Foley v. Martin, 142 Cal. 256, 71 P. 165 (1904); Smith v. Martin, 135 Cal. 247, 67 P. 779 (1901).
  \item 54. 6 B. Witkin, CALIFORNIA PROCEDURE (2d ed.), Appeal § 509, at 4460 (1971).
  \item 55. People v. Bowling, 2d Crim. No. 21296 (Sup. Ct., filed May 3, 1972), in The Recorder, May 8, 1972, at 6, 7, accord, People v. Gomez, 26 Cal. App. 3d 928, 930-31, 103 Cal. Rptr. 453, 454 (1972), where the court, referring to an unpublished opinion cited by respondent, noted that the “Supreme Court, however, while denying hearing in [that case], has directed that it not be published in the official appellate reports . . . . [The case] is thus not of precedential value here.”
  \item 56. Seligson and Warnlof 48-9.
  \item 58. People v. Cobb, 15 Cal. App. 3d 1, 3 n.1, 93 Cal. Rptr. 152, 154 n.1 (1971). (Certification for non-publication was the rule prior to the 1972 revision. See text accompanying note 34, supra.)
  \item 59. See Prince, supra note 15, at 37; Seligson and Warnlof 51-4.
  \item 60. In essence, this has already been achieved in California, since only those opinions “deemed appropriate” or certified for publication by the Supreme Court “shall be available for publication by any person.” CAL. CONST. art. VI, § 14; CAL. R. CT. 976.
\end{itemize}
they affect the parties involved, would thus be relegated to immediate and deserved obscurity. Factors such as judicial economy, fairness, reliability and efficiency are cited to support the proposition that unreported cases should be stripped of their value as precedent.62


FORM AND PUBLICATION OF DISPOSITION OF CASES

(a) Opinions, Memoranda, Orders; Publication. A written reasoned disposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER.

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written dispositions which have been printed as slip opinions, or copies of which have been prepared by any other means. Publication as a matter of course shall apply only to opinions.

(b) When Disposition to be by Opinion. Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule or law, or
(2) Calls attention to a rule of law which appears to have been generally overlooked, or
(3) Criticizes existing law, or
(4) Involves a legal or factual issue of unique interest or substantial public importance, or
(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or
(6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

(c) Dispositions as Precedent. A disposition which is not for publication will not be regarded as precedent in this Court and shall not be cited to this Court in briefs or oral argument; Provided, any disposition of this Court may be referred to on the question of whether such disposition establishes the defense of res judicata or collateral estoppel or establishes the law of the case.

(d) Designation for Publication. A disposition other than an opinion may be specially designated by a majority of the judges acting for publication and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the clerk by the addition of the words "For Publication" on a separate line.

(e) Preliminary Determination to Publish. The preliminary determination whether the disposition should be published should be made at the first conference following oral argument, or if the disposition is made without oral argument, before it is filed with the clerk.

Note that this rule differs from the California Rule 976 in one important aspect: the 9th Circuit allows any decision which is accompanied by a dissent or concurring opinion to be published. While such an addition would certainly liberalize California's Rule 976, it would still not solve the problem posed by a decision such as Ball v. Tobeler, which was a unanimous decision.

Additionally, the 9th Circuit allows decisions of "legal or factual issues of unique interest or substantial public importance" to be published. This is indeed more liberal than California's Rule 976, which limits publishable decisions to those which involve only legal issues of continuing public interest, and distinguishes "public interest" from mere public curiosity. See note 30 and accompanying text, supra.
Such a proposal seems well suited to the typical case which does not meet the criteria of Rule 976(b) and is therefore not published. The problem, however, is that meritorious opinions which should be published under Rule 976(b) are repeatedly deemed unpublishable either through judicial indiscretion or non-uniform application of the rule. As a result, an opinion which should be accorded the precedent value that publication in the official reports requires is nevertheless cast aside as worthless.

This situation is seemingly intolerable in a legal system based on stare decisis. While the most immediate function of a judicial opinion is to explain the disposition of a case to the parties and their counsel, a more generalized function is to achieve predictability in law "so that expectations based on knowledge of the law may be justified and justified expectations be realized." Precedents are not the ultimate sources of the law, for back of them are basic juridical concepts as well as habits of life and societal institutions. "None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins."

Exiling valuable "points of departure" into oblivion by means of the non-uniform and indiscreet operation of selective publication can only hinder the work of both judge and counsel.

**Denial of Public Access to Judicial Opinions**

To a trial attorney, the most serious criticism of California's

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63. Witkin points out that although the precedent value of unreported opinions is questionable, "if the criteria for publication are strictly followed, [unpublished opinions] are unlikely to be useful as precedents." 6 B. Witkin, CALIFORNIA PROCEDURE (2d ed.), Appeal § 663, at 4578 (1971) (emphasis added).

This statement, in a nutshell, sets forth the basic policy behind Rule 976, i.e. to restrict the publication of decisions which are not likely to be useful as future precedent. Under this rule, however, it is obvious that meritorious cases may not be certified for publication either because the judges apply the criteria for publishability inconsistently, or because the very criteria themselves are overly restrictive. The latter aspect of the problem at hand may be remedied by broadening the criteria, or repealing Rule 976 entirely and reinstating the policy of publishing all opinions. In the long run, there is no doubt that the latter course would be the most fair, reliable and efficient (albeit the most expensive) as well as most consistent with traditional notions of stare decisis. See note 74, infra.

Given, however, the expressed desire of the legal profession to preserve by publication for future reference only those opinions which by some criteria are arguably worth preserving, we proceed on the assumption that a policy of selective publication as exemplified by Rule 976 can be a workable concept. But it can only be so if it operates in such a manner as to bring about the result suggested by Witkin, supra. Otherwise, perhaps we are sacrificing stare decisis for the sake of mere economic considerations.


selective publication rule is that members of the legal profession as well as the public at large are being denied free access to the opinions of courts.

The right of access to judicial opinions is by no means a new concept, having been first enunciated by the highest court of Massachusetts in Nash v. Lathrop.\(^{66}\) It has been confirmed by the United States Supreme Court\(^{67}\) and several state courts as well.\(^{68}\) The right is clearly delineated by the Nash court, which found that

> [t]he decisions and opinions of the justices are the authorized exposition and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices.\(^{69}\)

The Nash court reasoned that since state judicial opinions are on essentially the same footing as statutes,\(^{70}\) and since the legislature could hardly pass laws without making them public, neither, therefore, could the courts of the state.\(^{71}\)

It seems reasonable that if the general public has the same right of access to judicial opinions as it has to state laws, then attorneys must have an even greater right by virtue of their profession. Indeed, support for such a view has been expressed in at least one federal case:\(^{72}\)

> In a system of law based on stare decisis it is not enough that opinions of the court be available only to litigants and their counsel. It is essential that such opinions be readily accessible to the legal profession generally and to the courts for purposes of research, citation and general development of

\(^{66}\) 142 Mass. 29, 6 N.E. 559 (1886).

\(^{67}\) Banks v. Manchester, 128 U.S. 244 (1888).


\(^{69}\) Nash v. Lathrop, 142 Mass. at 31, 6 N.E. at 560 (1886).

\(^{70}\) The U.S. Supreme Court accepted this proposition in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

\(^{71}\) Nash v. Lathrop, 142 Mass. at 31, 6 N.E. at 560 (1886).

the law, as well as to others who may wish to refer to
them.78

Under a system of selective publication applied as non-uniformly as California's, whenever a case which contributes significantly to the development of the law is denied publication, an attorney may be precluded from effectively assisting a client simply because that element of the law is unavailable for reference. Such a process denies attorneys the benefits of stare decisis,74 which would have been readily available had publication been permitted.

The California selective publication system further provides that if the state does not publish an opinion in the official reports, neither, it appears, may it be published privately.76 This view is not only in direct conflict with Nash and its subsequent line of cases,76 but also with the decision of the United States Supreme Court in Banks v. Manchester,77 which concluded that "[t]he whole work done by judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all."78 Additionally, it has long been held in the United States that judicial opinions are not the property of the state merely because it pays the salaries of the judges. Instead, they belong to the people in the same way that state laws belong to the citizens of the states.79 Therefore, although the state reporter of decisions has the exclusive right to edit and publish the official reports,80 he has no right to suppress the opinions of the justices before they appear in the official reports.81 He does, however, possess the right as well as the duty to control by rea-

73. Id. at 143.
74. In a leading case, the California Supreme Court has held that
under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Auto Equity Sales v. Superior Court, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962).
75. See note 60, supra.
76. "The policy of the state always has been that the opinion of the justices, after they are delivered, belong to the public." Nash v. Lathrop, 142 Mass. at 32, 6 N.E. at 561. See also Ex parte Brown, 166 Ind. at 599, 78 N.E. 553 at 559 (1906).
77. 128 U.S. 244 (1888).
78. Id. at 253 (citing Nash).
80. CAL. R. CT. 976(e) (West 1973).
sonable rules the inspection and handling of public records.\textsuperscript{82}

Summarizing briefly, it may be noted that under the scheme of selective publication, an opinion which meets the criteria of Rule 976 may nonetheless remain unpublished; that non-publication puts in doubt an opinion's value as legal precedent; and that non-publication may involve a denial of the right of public access to such cases in general, and a denial of access by the legal profession in particular. Assuming for the present that an unreported case like \textit{Ball v. Tobeler}\textsuperscript{83} reflects the shortcomings inherent in selective publication, the availability of remedies to compel publication is the next consideration.

\textbf{Writ of Mandate To Compel Publication}

One possible remedy to compel publication of unreported cases in the official reports is the writ of mandate.\textsuperscript{84} For example, if a party or an attorney in an unreported case such as \textit{Ball} could make a showing that the court had abused its discretion in applying Rule 976 to the opinion, that no other adequate remedy is possible, and that a question of public interest is presented, a writ of mandate should issue to compel the Reporter of Decisions and the court of appeal to publish the opinion.

\textit{Jurisdiction}

An action for mandate to compel an appellate court to publish an opinion would properly lie in the California Supreme Court, since it has both the jurisdiction\textsuperscript{85} and the power\textsuperscript{86} to so order the lower court and the Reporter.\textsuperscript{87}

\begin{itemize}
  \item \textsuperscript{82} \textit{Ex parte Brown}, 166 Ind. at 599, 78 N.E. at 559 (1906).
  \item \textsuperscript{83} See note 2, supra.
  \item \textsuperscript{84} \textsc{Cal. Civ. Pro. Code} § 1085 (West 1967): "[Mandate] may be issued by any court, \ldots to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal. \ldots"
  \item The writ of mandate was the remedy sought by Pennsylvania Supreme Court Justice Joseph Musmanno in his attempt to compel that state's reporter of decisions to include a dissenting opinion in the official reports. The state supreme court eventually denied the writ, not because it was an improper remedy, but on the ground that Justice Musmanno had failed to comply with court rules and practice. \textit{Musmanno v. Eldredge}, 382 Pa. 167, 114 A.2d 511 (1955), \textit{noted}, 24 \textsc{Fordham L. Rev.} 450 (1955).
  \item \textsuperscript{85} \textsc{Cal. Const.} art. VI, § 10 (West Supp. 1972): "The Supreme Court, courts of appeal \ldots and their judges have original jurisdiction \ldots in proceedings for extraordinary relief in the nature of mandamus \ldots"\textsuperscript{86}
  \item \textsuperscript{86} \textsc{Cal. R. Ct.} 976(c) (West 1973): "An opinion [not certified for publication] shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect."
  \item \textsuperscript{87} See generally Fowler, \textit{Mandamus as an Original Proceeding in the California Appellate Courts}, 15 \textsc{Hast. L.J.} 177 (1963).
\end{itemize}
No Other Adequate Remedy

Once the court of appeal has decided, pursuant to Rule 976,88 that the opinion will not be published, a request for publication by the proponent should be made by motion, since, in order for a writ of mandate to issue later, it must appear that a request for relief has been made, unless such a request would have been futile.89

The existence of a remedy other than mandate will be a question of fact for the supreme court,89 since this is an original proceeding. However, even if another remedy would normally be adequate, which is doubtful here, the overriding factor of public interest may influence the court to grant relief in the form of the writ of mandate.90

Abuse of Discretion

Mandate is normally employed to correct the actions of courts or officers in the performance of their ministerial duties. While the discretion of a court will not ordinarily be directed by mandate, "it is not universally true that the writ will not issue to control such discretion or to require a judicial tribunal to act in a particular way."91 Where it is found that the discretion of a court could be legally exercised in only one way, mandate will lie to compel the court to so exercise it.92 Mandate thus can be employed to prevent an abuse of discretion, or to correct arbitrary action which does not amount to a proper exercise of discretion.93

When the substance of the holding of Ball v. Tobeler94 is compared to the criteria for publication of Rule 976(b),95 it appears that there is a prima facie abuse of discretion.

88. Rule 976(c) provides that certification for publication must be made prior to the decision becoming final in that court.
91. See, e.g., Jensen v. McCullough, 94 Cal. App. 382, 392, 271 P. 568, 573 (1928), where the issue was construction of a statute of statewide concern.
93. Id.
94. Id. See also State Farm Mutual Ins. Co. v. Superior Court, 47 Cal. 2d 428, 432, 304 P.2d 13, 15 (1956); Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956); Cook v. Superior Court, 240 Cal. App. 2d 880, 884, 50 Cal. Rptr. 81, 83 (1966).
95. See notes 3-5 and accompanying text, supra.
96. See notes 28-32 and accompanying text, supra.
The first criteria of Rule 976(b) provides that an opinion may not be published unless it "establishes a new rule of law or alters or modifies an existing rule."\textsuperscript{97} Since this includes a "new construction of a statute," Ball's cause of action for injunctive relief on the basis of unfair competition arguably applies; for the court ruled, in a case of first impression, that rental housing was indeed a business within the meaning of the unfair competition statute in question.\textsuperscript{98} The court did not merely apply an existing legal rule to a new factual situation, but rather "broadened the scope of legal protection against wrongful business practices generally" to include the "entire consuming public," in accordance with the will of the legislature.\textsuperscript{99}

An even stronger argument for publishability is presented with regard to the second criterion of 976(b):\textsuperscript{100} namely, a "legal issue of continuing public interest." In upholding the cause of action for declaratory relief, the court noted that "[t]he plight of the low-income tenant in urban centers has been the subject of recent law review discussion [citations omitted]."\textsuperscript{101} Furthermore, the court cited section 33250 of the Health and Safety Code,\textsuperscript{102} in which the legislature found that inadequate and un-sanitary housing is "contrary to the public interest and threatens the health, safety, welfare, comfort and security of the people of this state."\textsuperscript{103} In light of these considerations, it is difficult to imagine an issue of continuing public interest which could better satisfy Rule 976(b). At the very least, the legal issue in Ball is of "continuing interest" to such "substantial groups of the public" as tenants, landlords, and even legislators.\textsuperscript{104}

Finally, to the extent that Ball applied the newly enunciated concept of implied warranty of habitability,\textsuperscript{105} the opinion certainly "clarifies a controlling rule of law that is not well established,"\textsuperscript{106} and thereby implicitly widens the gap in the existing common law. By doing so, the court may even be inviting the

\textsuperscript{97}See note 29, supra.
\textsuperscript{98}"The conclusion that the renting of housing accommodations of the magnitude alleged in the complaint is a business cannot reasonably be avoided." Ball v. Tobeler at 18.
\textsuperscript{99}Id. at 20.
\textsuperscript{100}See note 30 and accompanying text, supra.
\textsuperscript{101}Ball v. Tobeler at 14.
\textsuperscript{102}\textsc{Cal. Health & Safety Code} \$ 33250 (West 1972).
\textsuperscript{103}Ball v. Tobeler at 14.
\textsuperscript{104}Cf., \textsc{People v. Yellow Cab Co.}, 31 Cal. App. 3d 43, 106 Cal. Rptr. 875 (1973), where the court directed publication since its opinion may be of interest to "other taxpayers."
\textsuperscript{106}See note 31 and accompanying text, supra.
legislature to codify this new concept,\textsuperscript{107} although it does not expressly address this point.

Since \textit{Ball v. Tobeler} apparently meets at least two of the standards for publication, when only one is required for publication, it may logically be concluded that the court of appeal abused its discretion by failing to certify the opinion for publication.\textsuperscript{108}

\textbf{Standing}

Under ordinary circumstances, the petitioner in a mandate proceeding must show that he has a legal or special interest in the result, or an exclusive right or interest to be protected.\textsuperscript{109} However, the “conditions of petitioner’s right and respondent’s duty may be greatly relaxed, if not virtually abandoned, where the question is one of public interest.”\textsuperscript{110} This is the rule of \textit{Hollman v. Warren},\textsuperscript{111} which held that

\textit{[w]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.}\textsuperscript{112}

Petitioners for a writ of mandate may therefore be granted standing in their general capacities as citizens and taxpayers,\textsuperscript{118} in addition to standing based upon a personal interest in the outcome.

In the present example, therefore, even though an attorney seeking to force the publication of an opinion may not be able to demonstrate an exclusive personal right, he may allege that he is acting both as a citizen and an attorney to ensure compliance with Rule 976. In both capacities, he is representing the public interest in promoting the right of access to judicial opinions.\textsuperscript{114}

\textsuperscript{107} See note 32 and accompanying text, supra.
\textsuperscript{108} It should be noted at this point that the California Supreme Court denied the petition for a hearing in \textit{Ball v. Tobeler} on November 9, 1972. Therefore, Rule 976(d) (which provides that “no opinion superseded by the granting of a hearing, rehearing, or other judicial action shall be published in the Official Reports”) does not bar the publication of this opinion.
\textsuperscript{109} See generally 52 AM. JUR. 2d Mandamus § 390 (1970).
\textsuperscript{111} 32 Cal. 2d 351, 196 P.2d 562 (1948).
\textsuperscript{112} Id. at 357, 196 P.2d at 566. See also Kappadahl v. Alcan Pac. Co., 222 Cal. App. 2d 626, 643, 35 Cal. Rptr. 354, 365 (1963).
\textsuperscript{114} Nash v. Lathrop, 142 Mass. 31, 6 N.E. 559. See also note 69 and accompanying text, supra.
and in seeking a more uniform application\textsuperscript{115} of Rule 976 to the certification process.

The maxim that mandate will not issue to enforce an abstract right of no practical benefit to the petitioner is no bar here. In \textit{Diaz v. Quitoriano},\textsuperscript{116} the petitioner sought a writ of mandate to compel welfare workers to advise all persons requesting aid of the right to make a written application and of the right to appeal a denial of an application. Petitioner obviously knew of these rights himself, and therefore mandate would be of no practical value to him personally. Yet, "where the problem presented and the principle involved are of great public interest, the courts have deemed it appropriate to entertain the proceedings rather than to dismiss the same as being moot."\textsuperscript{117} In other words, as a matter of public interest, the question was not moot, and the petitioner prevailed as a citizen interested in procuring the enforcement of a public duty.

Similarly, even though an attorney may personally have access to an unpublished opinion, he should be able to obtain a writ of mandate, because: 1) as an attorney and a citizen, he may assert the right of public access to judicial opinions, which is a matter of public interest; 2) he has an interest in both capacities in the uniform administration of Rule 976; 3) there has been an abuse of judicial discretion in applying the standards of Rule 976; and 4) he is not asserting a mere "abstract right of no practical benefit," since the precedent value of the case will undoubtedly be enhanced if it is officially published—a fact of special importance to an attorney who argues the case on appeal, or who may have occasion to cite it in subsequent litigation.

\textbf{Conclusion}

Although the writ of mandate may be a sufficient remedy to compel the publication of an occasionally worthy opinion which the judges fail to certify, as a practical matter it cannot solve the overall problem of the non-uniformity of judicial application of Rule 976. If mandate were regularly sought for that purpose, it would only serve to clog the already overburdened judiciary, and alienate many judges. Additionally, it would place the burden of compelling publication on a few attorneys in each case. If they were unwilling to assume that burden or did not


\textsuperscript{117} Ballard v. Anderson, 4 Cal. 3d 873, 877, 484 P.2d 1345, 1347, 95 Cal. Rptr. 1, 3 (1971).
recognize the value of the decision to other practitioners, the problem would remain.

One solution is to remove from the judges the discretion to decide which opinions should be published. This would relieve the courts of one more essentially non-judicial function, and allow them to devote more time to the actual resolution of cases.

After court decisions become final, the written opinions could be submitted to an independent statewide or district-wide panel composed of members of the Bar, legal scholars, or perhaps retired jurists. This panel would screen the written opinions, independent of the biases of their authors, and decide which merit publication under Rule 976. Alternatively, such a panel could review the determination of the judges concerning an opinion's publishability, operating in a manner analogous to the supreme court clerks who screen petitions before recommending to the justices whether or not a hearing should be granted. Such a system would maintain the goals of selective publication, and eliminate the present disparity of publication standards between the appellate districts, thus ensuring that significant cases are published, while those of no consequence are not.

Selective publication of written judicial opinions is a desirable means of limiting the volume of cases officially published for the use of the legal profession. However, if such a system is applied in an improper manner, otherwise worthy cases may not be published, thereby depriving the legal profession and the general public of the right to access to the law. At the same time, the precedent value of such cases is rendered questionable at best. The writ of mandate may be employed in individual cases to compel the publication of opinions which meet the standards. However, this is a rather piecemeal remedy. A better overall solution may lie in the creation of an independent panel or office which could exercise the discretion now vested in the courts themselves.

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