Appellate Practice
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Now hear this!

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Lawmakers. To begin, appellate courts are often tasked with interpreting and applying statutes. Even assuming best efforts are taken, drafting legislation is hard to get right. Invariably there will be gaps, overlooked issues, and unexpected consequences that come to light in litigation. Thus, appellate courts often urge legislatures to refine statutes or otherwise fix the law. Decades ago, Witkin called out appellate opinions as proper vehicles to send a message to lawmakers generally: legislatures, agencies, Law Revision Commissions, and Judicial Councils. B.E. Witkin, Manual on Appellate Court Opinions, Section 88, pp. 160-162 (1977).

One case, citing Witkin, specifically asserted: "We use this opinion as a message to the Legislature. Simply changing the text of the amended statute will not be deemed a 'clear legislative direction' ... without a concomitant amendment .... We do not shrink from our duty to decide this dispute but an appellate court should not have to 'fill in the blanks' unless it has no other choice. ... We are ever hopeful that the Legislature will heed this respectful suggestion in the drafting of future statutes." *People v. Koontz*, 122 Cal. Rptr. 3d 705, 708 n.2 (Cal. App.), *rev. granted*, 251 P.3d 942 (Cal. 2011).

Sometimes a court not only identifies a problem, but also proposes a solution.
In *Meritplan Insurance v. Woollum*, 52 Cal. App. 3d 167, 176 (1975), the court reviewed an exclusion clause in an auto insurance policy, and explained: "Our duty does not end with disposition of the case at bench. We have an obligation to call to the attention of the Legislature the existence of any large block of cases reaching the courts which statutory change could avoid without change in substantive rights. ... Legislation specifying precise

exclusions from policies of automobile insurance as a matter of law, ... and requiring that the exclusions be written in statutorily designated language in large print upon the first page of the policy, will accomplish the desirable result."

A similar plea for legislative action appeared in *Gilbert v. Municipal Court*, 73 Cal. App. 3d 723, 732-33 (1977), where, in pointing out a legal "loophole," the court cleverly explained: "Either the Court of Appeal should be given discretion in the type of case before us or the ability to appeal such matters to the Court of Appeal should be foreclosed .... It appears to us that the matter is of sufficient import to be of interest to the Legislature. ... [E]veryone talks about court reform yet little is done about it."

Another sort of message is to assert that the law as written is wrong and should be changed, or for a dissenting justice to "appeal" to lawmakers in a dissenting opinion. *Dillon v. Legg*, 68 Cal. 2d 728, 752 (1968) (Burke, J., dissenting) ("in the light of today's majority opinion the matter at issue [limitations on contributory negligence] should be commended to the attention of the Legislature").

The most famous recent example of this is RBG's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), where she threw down the challenge, "Once again, the ball is in Congress' court." This dissent inspired the passage of the Lily Ledbetter Fair Pay Act. California courts have appealed to Congress to fix the law as well. *E.g.*, *In re C.B.*, 188 Cal. App. 4th 1024, 1027 (2010).

Lawyers. Appellate opinions are also a good way to send messages to the practicing bar -- after all, who else reads court opinions? These messages are often warnings about bad practices. *Finton Constr. Inc. v. Bidna & Keys*, 238 Cal. App. 4th 200, 205 (2015) (published "as an example to the legal community of the kind of behavior the bench and the bar together must continually strive to eradicate"); *Evans v. Centerstone Dev.*, 134 Cal. App. 4th 151, 154 (2005) (published as "a prime example of a frivolous appeal and of flagrant violations of the rules pertaining to appeals. We also publish this opinion to discourage parties to arbitration agreements from frivolously seeking judicial review of matters not cognizable in our courts."); *Sherman v. Kinetic Concepts, Inc.*, 67 Cal. App. 4th 1152, 1156 (1998) (published "because we wish to send a loud and clear message to litigants and counsel alike: We will not tolerate the disgraceful tactics which hallmark the defense in this action."); *Guthrey v. State of Cal.*, 63 Cal. App. 4th 1108, 1111 (1998) (published "to alert the bar of the serious consequences" to filing baseless discrimination cases).

Messages to the bar may also serve to highlight court policies. *Good v. Miller*, 214 Cal. App. 4th 472, 474 (2013) ("Although ... we have discretion to permit a premature appeal from a nonappealable order to be treated as timely filed after the ensuing judgment, there is a limit to our willingness to salvage appeals for parties who ignore the statutory limitations on appealable orders . ... We publish this case to illustrate that limit, and also to emphasize that it is imperative to appeal from an appealable order."). Or they may be

educational in nature. *Williams v. Ward*, 15 Cal. App. 3d 381, 388 (1971) ("Rarely do we take a tutorial position in opinions of this court, but we think it appropriate to call attention to lawyers and trust officers who have to do with the drafting and revision of wills and trusts, the possible impact of the adult adoption law on gifts to a class."). Recently, one court proclaimed: "We publish to remind practitioners whose clients settled a dispute involving payments over time how to incentivize prompt payment properly, and what may happen if done incorrectly." *Red & White Distrib. v. Osteriod Enters.* (Aug. 9, 2019, B291188).

The Public. An appellate opinion may also send a message to the public at large or to those engaged in certain activities. *Janisse v. Winston Inv. Co.*, 154 Cal. App. 2d 580, 586 (1957) (condemning "thinly veiled" "crude and illegal" business scheme; such schemes should be "fully exposed" to warn future victims). In *Kennedy v. Bremerton School District*, 869 F.3d 813, 831 (9th Cir. 2017) (M. Smith, J., conc.), one judge wrote a lengthy "specially concurring" opinion, essentially addressed to "interested readers," expressly intended "to share a few thoughts about the role of the Establishment Clause in protecting the rights of all Americans to worship (or not worship) as they see fit."

Lower Courts. Appellate opinions can also be used to send a message to trial courts. In *Zasueta v. Zasueta*, 102 Cal. App. 4th 1242, 1243 (2002), the court took the opportunity to "remind" trial court judges handling "emotionally difficult cases" of "the need to set aside personal feelings and experiences when making [hard family law] rulings" that may present "the temptation ... to allow the heart to rule over the letter of the law." *See also People v. Superior Court*, 70 Cal. 2d 123, 130 (1969) ("for the guidance of the trial court we make the following observations"); *Assoc. Home Builders v. City of Livermore*, 18 Cal. 3d 582, 601 (1976) (same).

Higher Courts. An opinion may also urge a higher court to review the case and change the law. *Kimberly M. v. LAUSD*, 215 Cal. App. 3d 545, 550-51 (1989) (Johnson, J., conc.) ("I urge the California Supreme Court to use this case as a vehicle to reconsider [existing precedent]."); *People v. Torres*, 213 Cal. App. 3d 1248, 1260, 1261 (1989) (describing current precedent as "unrealistic and unworkable," and asserting "continued adherence to [existing precedent] is legally unsupportable and poses a serious threat to the fair and effective administration of our system of justice. ... Accordingly, in the interest of justice, we urge the California Supreme Court to reassess these holdings."); *In re Micah S.*, 198 Cal. App. 3d 557, 568 (1988) (Brauer, J., conc.) ("I write separately ... to draw the attention of higher authority, legislative and judicial, to serious problems [with the law]. ... The reform I suggest is admittedly extreme; namely, that our Supreme Court in its role of supervising the conduct of lawyers promulgate a canon ...."). In *Lich v. Carlin*, 184 Cal. App. 2d 128, 139, 140 (1960), the court of appeal lamented its lack of power to change Supreme Court precedent, and urged a change in the law either by the Supreme Court or the Legislature -- and the Legislature changed the law. *See Estate of Pack*, 233 Cal. App. 2d 74, 77 (1965) (noting the change and citing *Lich* and other cases criticizing the old law).

Appeals Within Appeals. "Sending an important message" is not an enumerated factor in rule 8.1105(c)'s listing of publication standards, but it arguably is reasonably encompassed by factor (c)(6) for cases involving "a legal issue of continuing public interest." Whether an appellate opinion contains a message is up to the court, not counsel, of course. But where appropriate, practitioners should feel to suggest that courts make an appeal (to a higher power) within an appeal.