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Remarks of Jeff Bleich at the First Annual Conference on the California Supreme Court

Hon. Jeff Bleich[†]

I would like to thank UC Berkeley School of Law for inviting me here today. This is, of course, an opportunity that any person who has appeared before the California Supreme Court dreams about. It may be my only chance to address so many members of the Court without being stopped repeatedly, asked difficult questions, or losing. I can also say things like that without being concerned about contempt charges.

I'd like to talk about the current state of advocacy in the California Supreme Court, and offer two suggestions for improving the quality of briefing and oral argument.

The courts that confront our most difficult issues want, and deserve, the best arguments. Good, careful advocacy strengthens the decision-making process at every level. It ensures that the Justices get perspectives they might otherwise miss. It allows them to test the record, and to determine the limits of each side's position so that they craft a decision that can apply without unintended effects. This is why we have a hearing process in the first place: to

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reduce the chance that a court will make a mistake. Great advocacy, however, also increases the likelihood that a court will write a more persuasive opinion and speak with greater confidence, which in turn increases faith in the judicial system. The better the advocacy, the better the decision.

The U.S. Supreme Court has over time cultivated a group of exceptional advocates who appear frequently before it, and who have helped accomplish these goals of better and more precise decision making. I got to see some of them at work when I was a law clerk. Some of these advocates had earned the Court's trust by consistently offering solid advocacy over a sustained period. Although they were always deferential to the Justices, good advocates came to be viewed by the Justices as trusted colleagues that could be relied on to give wise and fair guidance. Their answers did not sound like they were hired guns trying to score points, but rather like the genuine, concerned advice of people who appreciated the Justices' job and wanted to give them answers from that perspective. On the other hand, even in that Court, there were advocates who weren't prepared, or who distorted the record, or were so nervous that they couldn't think clearly. My favorite of these was a lawyer from New York who kept calling Justice Scalia "that guy." In those cases, everyone loses. The Court generally stopped asking questions of the lawyer altogether; the lawyer and his client effectively forfeited all opportunities that oral argument presented to make their case; and the Court's decision was deprived the value of a nuanced and balanced presentation.

The California Supreme Court has a great deal in common with the U.S. Supreme Court both in terms of the importance of its cases and the influence its decisions have nationwide, and so one would expect comparable advocacy. The California Supreme Court is, by any objective standard, the leading state appellate court in the land. A study published in the U.C. Davis Law Review earlier this year concluded that the court is the most influential in the United States based on the number of times the decisions cited by other state supreme courts.¹ In the 65 years ending in 2005, California led all states with 160 decisions followed 3 or more times by out-of-state courts.² By contrast, New York only had 39 decisions followed 3 or more times but out-of-state courts during the same period.³

While the California Supreme Court stands at the pinnacle of state courts in terms of its docket, I'm not sure that the advocates who appear before it—the Supreme Court Bar members—share that honor. Although the California Supreme Court has been blessed with some great advocates, my impression is that this group is smaller than it could be and its members appear before the Court relatively infrequently. Sitting in on oral argument, or watching it on

1. Jake Dear & Edward W. Jessen, *Measuring the Comparative Influence of State Supreme Courts: Comments on Our "Followed Rates" Essay*, 41 U.C. DAVIS L. REV. 1665 (2008).

2. *Id.* at 1669.

3. *Id.*

California television, I've seen some extraordinary lawyers argue. But I've also seen some very ordinary argument.⁴

I believe there are two areas where reform would improve the quality of advocacy by the California Supreme Court Bar. First, California would benefit from developing a team of advocates within its Solicitor General's office to routinely represent the State before the California Supreme Court. Second, California law schools should consider developing a clinic dedicated to helping identify good cases for state supreme court review and ensuring those cases are well presented.

My first suggestion is merely to pattern the California Solicitor General's office after that of the U.S. Solicitor General, and the Solicitor Generals of several other states. Twenty-nine states have their own Solicitor General's office, which is nearly four times as many as there were two decades ago. There's a reason for this trend—it tends to produce better advocates for the state in high-stakes cases. Although California appointed its first Solicitor General a few years ago, it did not set up the office to function like the U.S. Solicitor General's office. In fact, California's office functions much like the system that most other states are abandoning. Currently, California's office has an appellate section chief who specializes in state and federal appeals, but mostly leaves to the assistant district attorney who handled the case below the privilege of arguing the case in the Supreme Court. As a result, California has not formed a small, trained corps of lawyers who are familiar with the Court's procedures and have developed a strong reputation with the Court as a reliable counselor on difficult issues.

Moving to a model similar to the U.S. Solicitor General's office would increase the professionalism and quality of the work. This is not to knock the trial lawyers in state government who currently handle appeals. However, the skills that make for a good trial lawyer do not necessarily translate to a good appellate advocate. A trial is a search for truth, while an appeal is a search for error. Each attracts different types of lawyers and benefit from different types

4. In fact, after watching a morning of argument I sent an email to the attorneys at my firm with my secret list of top ten tricks to outperform your adversary in oral argument before the California Supreme Court:

- (1) Show up on time.
- (2) Wait your turn. Don't speak or make annoying noises while the other side is still speaking.
- (3) Don't speak while a Justice is speaking.
- (4) Don't keep speaking after your time is up.
- (5) Don't respond to a question by telling the Court that you already answered that one, or not to worry because you're getting there, or my favorite: "Yes, but so what?"
- (6) Don't check your watch.
- (7) Don't start your argument by reading your brief aloud, or end by reading your brief aloud, or ever, ever, read your brief aloud. Ever.
- (8) Don't make stuff up.
- (9) Don't ignore stuff that matters.
- (10) Don't, during an actual oral argument, use the word "stuff."

So there is room for improvement.

of advocacy. A corps of appellate advocates ensures temperaments that are better suited to more scholarly analysis, and less of the skills that may be persuasive to a jury—such as dramatic flourishes—but fall flat with appellate jurists.

Finally, a group of skilled public-sector Supreme Court advocates will inevitably improve the quality of private sector advocacy. At the very least, some members of the Solicitor General's Office will leave state government at some point, and fan out into private practice. This will allow them to develop their own small groups of high-quality advocates who appear before the Court. Even those who remain in the Solicitor General's Office, however, will help set a higher standard of advocacy, because good lawyers tend to raise everybody's game.

The second innovation I've suggested is to create a clinic that comprehensively focuses on the Supreme Court, say at a place like the UC Berkeley School of Law. Many schools already have models that do this for the U.S. Supreme Court.⁵ These clinics search out cases that meet the Court's criteria for granting review. In California, for example, the cases most likely to be selected generally involve conflicting Courts of Appeal opinions, new laws or initiatives in which there is no consistent understanding of the law, or cases where California lower courts are out of step with other states. In such instances, the courts, litigants, and citizens need consistent guidance. A clinic can search for these situations, identify which cases best present that conflict or unsettled issue, and present that issue clearly to the Court in the petition for review. Currently, the Court is at the mercy of an ad hoc system of petitions. With over ten thousand petitions a year, the Court is unable to keep clear track of which issues are generating the most confusion or difficulties in the lower courts and which cases best present those issues.⁶ The Court has far too few resources to waste time on the "wrong" cases: indeed it currently denies ninety-six to ninety-seven percent of all petitions.⁷ Therefore, it needs help evaluating which of multiple cases present an ideal record for resolving the issue.

This is where I think Berkeley Law could come in. There are already examples of clinics that have been effective in finding good cases for review in the U.S. Supreme Court.⁸ These clinics typically work with students and faculty to review lower court cases, identify promising decisions, help the litigants prepare petitions for certiorari, and often help represent the parties if their

5. See, e.g., Georgetown Law's Appellate Litigation Clinic, <http://www.law.georgetown.edu/clinics/al/al.html> (last visited Jan. 10, 2010); Stanford Law School's Supreme Court Litigation Clinic, <http://www.law.stanford.edu/program/clinics/supremecourtlitigation> (last visited Jan. 10, 2010).

6. JUDICIAL COUNCIL OF CALIFORNIA, 2009 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 1989–99 THROUGH 2007–2008 IX, available at <http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf>.

7. *Id.* at 8.

8. See *supra* note 5.

petition is successful. The success of these programs is based on the ability of trained clinics, reviewing a wide range of decisions year after year, to recognize the issues that the court actually cares about. If a clinic does this well, the Court can start to rely on the clinic to find cases with a clean record. The Court also can trust that the briefs will be carefully reviewed and edited by professors and practitioners, and that the attorneys who argue the case will actually practice ahead of time.⁹

The best evidence that this process works comes from that other top ten law school in the Bay Area. In the October 2007 Term, Stanford's Supreme Court clinic instructors argued a whopping six cases before the U.S. Supreme Court between the January and April sittings alone—more than any private law firm.¹⁰ According to the clinic, Stanford clinic professors and lecturers argued seven Supreme Court cases in the 2008 term.¹¹ That, again, is more than any private law firm.

In conclusion, at the risk of losing out to better lawyers, I'd like to see us take up both of these challenges and work to make a California Supreme Court Bar that is as good as its Bench. I hope, that with the support of the California Attorney General's office and Berkeley Law, respectively, we could produce opportunities through the Solicitor General's office and a Berkeley Law clinic that would help accomplish this goal.

9. Some law schools currently offer a different model. For example, Golden Gate University offers Supreme Court advocates practice rounds, but—in order to avoid potential conflicts—they can only moot one side. One moot court with one panel generally is not enough to fundamentally improve the advocacy before a Court. Accordingly, I'd favor the more robust approach to selection and preparation of cases adopted by Stanford. This type of clinic would provide multiple rounds of practice with professors whose lives' work is to put the proper fear of God into the advocate. My rule is that if you aren't nervous about all the different ways the argument could go, then you are not prepared.

10. See Stanford Law School Supreme Court Litigation Clinic, Recent Filings and Developments, http://www.law.stanford.edu/program/clinics/supremecourtlitigation/#recent_filings_and_developments (last visited Jan. 10, 2010).

11. Jessica Dye, *Stanford Law Clinic Shakes Up Supreme Court Bar*, LAW360, Sept. 15, 2009.

