Policy Regarding Public Positions to be taken by the American Academy of Appellate Lawyers

(Adopted January 31, 1998)

Both the Articles of Incorporation and the Bylaws of the Academy contain extremely broad mandates regarding what activities the organization may undertake. However, the power to act does not mean that the Academy should act or dictate how it should go about deciding what it should do. This statement is designed as a beginning of a policy that will develop over time concerning the subjects on which the Academy ought to take public positions and how it ought to go about deciding whether to take a position, what that position should be, and the form that any such statement should take.

The Board has chosen not to establish a detailed set of procedures, and it recognizes that it has left many questions open regarding the types of issues on which public positions will be taken. The Board further recognizes that the Academy is a membership organization and that it needs to be sensitive to the different views of all its members, consistent with its overall mission to improve the administration of appellate justice in the United States. The Board therefore decided to leave to this Board and, most importantly, to future Boards, the decisions that will ultimately give meaning to this policy, recognizing that future Boards and the full Academy are free to change this policy at any time if they so choose.

1. Appropriate Subject Areas

Article II of the Articles of Incorporation provides, among other things, that the Academy has the power to "consider and deal with common problems facing attorneys engaged in appellate practice; to reform abuses and inculcate principles of justice and equity in the practice; to promote activities aimed at enabling members to conduct themselves with the greatest efficiency and economy; to.... give proper consideration to and expression of opinion upon questions affecting the practice;... and to do all such lawful acts of things necessary or proper to promote the general welfare of appellate practice in federal and state courts...." Similarly, Article 2.1 of the Bylaws states that the Academy is "dedicated to the improvement and enhancement of the standards of appellate practice, the administration of justice, and the ethics of the profession as it relates to appellate practice." While those purposes do not explicitly provide for the issuance of public statements on matters relating to appellate practice, it is difficult to imagine that the goals of the Academy could be furthered without making some public statements on some occasions.

There are, however, some limits to the subjects that are appropriate for taking public positions. Since this is an organization of appellate lawyers, it should limit its public statements to issues relating to appellate courts, which include those aspects of trial court practice that bear on the appellate process. In addition, our mission does not give us license to comment on all matters relating to the administration of justice in the United States just because they happen to affect appellate courts in some respect. Thus, even if we all agreed that there should be reasonable salaries for federal judges (including those on the courts of appeals), the appropriate level and whether judicial salaries should be de-

coupled from Congressional salaries are not issues on which we should take public positions.

Some matters will clearly be within our purview and are not controversial in the ordinary sense of the word. Foremost among these are the Rules of Appellate Procedure, the statutes dealing with appellate jurisdiction, and practices adopted by courts to improve fairness and efficiency, such as internal operating procedures. Not only are such matters rarely political in the sense that they are resolved based on one's views of competing values in a society, but they are also issues on which our expertise is of greatest assistance to decision makers.

On the other extreme, if, after appropriate study, Congress decided to divide the Ninth Circuit, it is unlikely that the Academy would comment on the particular division chosen because the decision is essentially a political one and one on which we have no special expertise, particularly since the Academy has members throughout the country. But if a more general restructuring plan were proposed for all the federal appeals courts, it is more likely that this would be an appropriate subject on which the Academy would express its views.

2. Procedures

There are no formal procedures that must be satisfied before the Academy may issue public statements in matters of interest to it. In most cases, the Board will put the matter to a vote of the membership at the Annual or Mid-Year Meeting, with reasonable advance notice of the substance of the Academy's proposed position. It will also endeavor to disseminate a draft of the position to be taken and the manner in which the position will be conveyed (see item 3 below). Where there is an Academy committee that works on an issue, the Board will obtain the views of the committee, to the maximum extent practicable.

In some instances, however, the Board may conclude that committee input, a vote of the Academy membership, and/or advance notice of a proposed position may not be feasible because of a particular need for Academy input within a restricted time frame. In such cases, the Board will endeavor to provide the maximum input for the Fellows of the Academy consistent with the circumstances. This may require that the Board alone vote on a statement of position, or that the proposed position be circulated for a mail vote by the membership. On the question of the procedures to be followed in a particular situation, the Board retains the discretion to deal with exceptional circumstances as they arise. In every instance in which the Academy takes a public position, the Fellows will be promptly informed and, if the ordinary procedures are not followed, an explanation of the circumstances leading to the need for the truncated procedures will be provided to the membership.

3. Manner of Taking Position

As with the procedures to be followed, the manner in which the Academy will make its positions known is left to the discretion of the Board. In many cases it will be done by submitting formal comments as part of a rulemaking process. When legislation is involved, the Academy may choose to submit written testimony and, perhaps, have a representative

appear as a witness, an option that might also be used where a rulemaking procedure includes a hearing. In other situations, a letter to the appropriate person(s) may be all that is needed. And, when an issue of appellate practice is involved in litigation, the Academy might decide to file an amicus brief, but would do so only after the most careful consideration, and only in a case in which there are no political overtones and in which our expertise would be particularly useful.[1]

4. Membership Input on This Policy

The Academy is still a new organization, and the current Board is reluctant to tie the hands of its successors who may wish the Academy to speak out on issues of importance in appellate practice in the future. The policy contained in this statement is a first step in what will no doubt be the evolution of a set of practices governing public statements by the Academy. The Board encourages the Fellows of the Academy to express their views to the Board on how this policy is working in practice, and the Board will review this policy statement periodically to assure that it continues to meet the needs of the Academy and its Fellows.

[1] The California Supreme Court is now considering whether a statute affording a right to oral argument applies not only to direct appeals, but also to original writ proceedings in the appellate courts. If the Academy believed that it had something useful to add in a case like that, there would be no reason why it should not express its views as an amicus.