No. S106906

In the Supreme Court of the State of California

The People,

Plaintiff and Respondent,

vs.

Jose Guadalupe Reyes Pena,

Defendant and Appellant.

RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS BY AMICUS CURIAE THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS

On Review of a decision of the California Court of Appeal
Fourth Appellate District, Division Two, No. E029490

On Appeal from a Judgment of the Superior Court of California
San Bernardino County Superior Court No. FSB026870
The Honorable Patrick J. Morris and Brian S. McCarville

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I

PRELIMINARY STATEMENT

Amicus Curiae, The California Academy of Appellate Lawyers, submits this response to the Attorney General's recently filed Supplemental Brief.[1] This Supplemental brief highlights how, during the pendency of this appeal, the Court of Appeal, Fourth Appellate District, Division Two, slightly modified the oral argument notice at issue. According to the Attorney General, although this revised notice is "substantially similar to the prior version," its addition of a single sentence undermines the concerns expressed by the Academy in its Amicus Brief (filed April 25, 2003) regarding the chilling effect such notices have on the exercise of the right to oral argument.[2] Specifically, the Attorney General contends that the new, "more politic language," of the revised notice "destroys" any fear of sanctions and overall transforms the notice into one that no longer discourages oral argument. (Supp. Brief 2)

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[1] The Attorney General filed the Supplemental Brief on November 24, 2003—a mere eight days before this Court's scheduled oral argument on December 3, 2003 in San Jose—without notice to, or service on, the Academy. The Academy learned of its filing from the Court's on-line docket. By filing this response on Monday, December 1, the Academy hopes it will reach the Court in time for review before oral argument.

[2] The revised notice inserts this line: "Nevertheless, if counsel disagrees with the court's determination and does not consider the delay [caused by requesting oral argument] significant, counsel should request oral argument."

For the reasons set forth below, the Academy does not believe that the revised notice transforms the notice into one taking a neutral course. Rather, the revised notice still actively discourages oral argument.

II

ARGUMENT

In the Attorney General's view, the revised notice dispels all chilling effects on oral argument and clarifies that the court's "intent" never was to discourage argument. (Supp. Brief 2) Supposedly this has been accomplished by explicitly noting that litigants may "disagree" with the court's "determination" that oral argument "will not aid the decision-making process," and therefore may "[n]evertheless" insist on argument despite the Court's pronouncement. For a variety of reasons, this characterization does not withstand analysis.

First, the notice still begins with the following directive: "The court has determined that . . . oral argument *will not aid the decision-making process*, and [] the tentative opinion *should be* filed as the final opinion . . . ." (Emphasis added.)

Second, the notice still contains the admonishment that the given case "should" be resolved "without argument in the interests of a quicker resolution . . . and the conservation of scarce judicial resources."

Third, the notice still advises (in bold text) that scheduling oral argument "**delays filing of the opinion**" and still carries an unspecified threat that "**Sanctions may be imposed**" for unspecified violations of the notice.

Fourth, the Attorney General's focus on the revised notice overlooks the Academy's basic concerns regarding how the courts should approach oral argument relative to the intrinsic value of argument and the pivotal place of oral advocacy in the public and private perceptions of the appellate process. *See Lewis v. Superior Court*, 19 Cal. 4th 1232, 1265-66, 1273 (1999) (oral argument serves to "personalize and humanize the administration of justice"); *Moles v. Regents of Univ. of Cal.*, 32 Cal. 3d 867, 872 (1982) ("[o]ral argument provides the only opportunity for a dialogue between the litigant and the bench," and "'it promotes understanding in ways that cannot be matched by written communication.'").

Fifth, the revised notice still goes far beyond what is necessary or prudent. For example, it does not mirror the neutrality reflected in the notices used by other districts. Those notices demonstrate that courts can educate counsel and litigants about the right to oral argument—and the ability to waive argument—without suggesting that waiver is the only meaningful option. Further, nothing inherent in the tentative opinion process compels the use of an accompanying notice that comments on the efficacy of oral argument. Even if given cases do not appear to warrant oral

argument on their merits, this does not mean that the Constitutional right to oral argument correspondingly loses its value.

Sixth, a key theme of the Attorney General is that lawyers are not "timorous souls" who need protection from court procedures. (Supp. Brief 3) This position misses the point. Lawyers are especially careful about their interactions with the court and take seriously any strongly-worded message a court delivers. No amount of attorney bravado likewise can relieve appellate counsel of the awkward position he or she is placed in by the content of the notice. Counsel must explain the "don't bother to come" message to clients. Counsel similarly must try to explain away client apprehensions about potential repercussions from "disagreeing" with the court's intimation to waive argument.[3]

The revised notice, notwithstanding, this Court's opinion will be a guidepost for how oral argument is perceived statewide by the courts, counsel, litigants and the public. In *Lewis* and *Moles*, this Court has championed the value of oral argument to the fair and open administration of justice, in practice and perception. Even if oral argument notices stop short of actively encouraging a litigant's "day in court," they should not denigrate the

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[3] Nor is the context of the analysis here limited to "a sophisticated audience of officers of the court" (i.e., experienced appellate practitioners). (Supp. Brief 3) These waiver notices are sent to inexperienced attorneys as well as the increasing number of litigants choosing to represent themselves.

value of oral argument, expressly or by implication. The notice at issue here—in its original and revised form—crosses that line.

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Respectfully submitted,

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