5/12/70

Memorandum 70-58

Subject: New Topic - Appellate Review in the Area of Discovery

You will recall that some time ago the Commission considered a suggestion that the existing appellate writ procedure be studied and revised. (See Exhibits III and IV attached.) The Commission determined not to request authority to study this matter, relying primarily upon Mr. Witkin's views as expressed in Exhibit IV.

Now comes another suggestion that this area of the law needs study. See Exhibit I (commenting on inadequacy of law governing appellate review in the area of discovery). I sought Mr. Witkin's comments on this new suggestion. His response is attached as Exhibit II.

It appears that a study of the existing appellate writ procedure would be worthwhile. However, the Commission already has enough studies to occupy all its time and resources for a number of years. Perhaps we should send this memorandum to the Judicial Council and request their views on the need for such a study and whether the Council would undertake such a study if one is needed.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 70-58 EXHIBIT I

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April 14, 1970

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Re: Appellate Review of Discovery

Dear John:

If my memory serves me, within the last few months someone addressed the Commission with a suggestion that the existing extraordinary appellate writ procedure be studied and revised by the Commission. This eminently sensible idea floated just long enough to be torpedoed by Bernie Witkin's witty letter which, while not defending the present body of law (perhaps non-law would be a better term), suggested that other matters of higher priority might more productively occupy the Commission's time.

Since that time a new decision has come down from the Supreme Court, which, if it really means what it says, should reopen the question of providing an alternative process of appellate review, at least in the area of discovery.

I invite your attention to Pacific Telephone, etc. v. Superior Court (March 13, 1970) No. LA 29,650 (not yet in the advance sheets). I enclose a copy of the pertinent language from that opinion as an attachment hereto. As you will observe, the Supreme Court takes great pains to reiterate that it really meant what it said in Oceanside Union School District v. Superior Court, 68 C 2d 180, 185-186, fn. 4. Namely, that extraordinary writs are not to be looked upon as the normal vehicle for reviewing trial court discovery orders, but should be reserved for the review of first impression.

Eight years have elapsed since Oceanside was decided, and in that time the Supreme Court has repeatedly urged this limitation upon review of discovery orders by prerogative writ (see cases cited in enclosed portion of the Pacific Telephone opinion). It seems therefore not unreasonable to anticipate that the Courts of Appeal will one of these days decide that the Supreme Court really means it, and will stop issuing alternative writs to review most discovery rulings.

The rule reiterated in Pacific Telephone, that extraordinary writ review is to be limited to novel cases, leads to an anomalous situation which has been repeatedly criticized by none other than Mr. Witkin in his instructive and entertaining lectures. I probably cannot say it as well as he, but the result of the Oceanside-Pacific Telephone writ-limiting rule is this:

Case A. A litigant becomes involved in discovery proceedings, in which the judge makes a plainly erroneous order, disregarding numerous precedents directly on point. As a result, the litigant finds his preparation and conduct of the case grossly and capriciously interfered with. However, the point on which the erroneous ruling was made is well-settled, and vacating the order of the trial court will result in nothing new or important in the development of discovery law. Under the Oceanside-Pacific Telephone rule - the litigant is now stuck. He must now prepare and conduct his case hampered by a patently erroneous ruling of the trial court. He is not entitled to get appellate review until after -- proceeding in this unfortunate posture -- he tries the case and obtains a judgment from which he can appeal. At best, if he waits several years, he may get an appellate decision holding that the trial court erred when it made the contested discovery order. Putting aside the cost and travails of prosecuting a full-fledged appeal from a judgment, and putting aside the usual presumptions and attitude of the reviewing courts which make the appellant's task something less than a sure bet, the harm inflicted may well be irreparable. For example, if the aggrieved litigant was entitled not to have something discovered, but the trial court ordered that it be discovered, and it was in fact discovered, an appellate adjudication two years later that the order was erroneous, becomes little more than an idle gesture. Unringing a bell, and all that.

Case B. A litigant becomes involved in a discovery controversy. Both his attorney and opposing attorney are gentlemen and scholars who do a commendable job of researching and presenting the law to the court. The trial court is not only

a gentleman and a scholar but possesses the judicial acumen of Solomon as well. But it so happens that the issue raised falls in a grey area on which there is no square precedent, and it can be fairly said that the trial judge unaided by pertinent decisional law can justifiably rule either way. Under the Oceanside-Pacific Telephone rule, the parties are now entitled to have the matter reviewed on a writ -- without waiting for a judgment -- because the issue is novel.

In other words, the more egregious the error of the trial court, the less right to get effective review at a time when review would be meaningful. Somehow, I don't think that is the intended result of the Supreme Court's exhortation to limit review of discovery orders by prerogative writ.

It therefore seems to me that since the Supreme Court appears to be determined to make the Oceanside-Pacific Telephone rule of limited review of discovery stick, some opportunity for interlocutory review of discovery orders should be provided. I respectfully urge that the Commission reconsider this matter and draft appropriate legislation providing for interlocutory appellate review of discovery orders.

Sincerely yours,

Gideon Kanner

GK/jk
enc.

cc: Bernard Witkin, Esq.

Initially, we must consider the availability of the prerogative writ sought by the defendants in this setting. We spoke directly to the question of the circumstances that would normally justify the invocation of an extraordinary writ in discovery cases in **Oceanside Union School District v. Superior Court** (1962), 58 Cal. 2d 180, 185-186 fn. 4: "The prerogative writs have been used frequently to review interim orders in discovery cases [citations]. But this does not mean that these discretionary writs will or should issue as of course in all cases where this court may be of the opinion that the interim order of the trial court was erroneous. In most such cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment. As inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases."

Despite this express declaration of the necessary limitations on the availability of the prerogative writs, and our reaffirmance of this standard in subsequent cases (see, e.g., **Associated Brewers Distributing Co. v. Superior Court** (1967), 65 Cal. 2d 583, 585; **Waters v. Superior Court** (1962) 58 Cal. 2d 885, 890), at least some appellate courts have apparently continued to consider prerogative writs as the normal instruments for reviewing discovery orders. (E.g., **Peck's Liquor Inc. v. Superior Court** (1963), 221 Cal. App. 2d 772, 775 ("When, in discovery proceedings, the trial court issues its order requiring answers to questions propounded, a petition for writ of prohibition is a proper remedy by which a petitioner may seek review of the propriety of that order."); **Poeschl v. Superior Court** (1964), 229 Cal. App. 2d 383; **O'Brien v. Superior Court** (1965), 233 Cal. App. 2d 388, 390.) We realize, of course, that this practice rests primarily on a legitimate concern with the inadequacies of a review of discovery orders after trial,[10] and that even under the approach adopted in **Oceanside** such inadequacy will inevitably influence a court's evaluation of the "general importance" of the question presented.

Nevertheless, appellate courts must keep in mind that too lax a view of the "extraordinary" nature of prerogative writs, rendering substantial pretrial appellate delay a usual hazard of the use of discovery, is likely to result in more harm to the judicial process than the denial of immediate relief from less significant errors. In our judgment, the lack of general import of the petitioner's objections in the instant case might well in itself have presented a persuasive ground for an immediate denial of the writ sought.[11] Since the Court of Appeal has already issued an order to show cause, however, and since the plaintiff did not raise this point either before the Court of Appeal or this court, and since the case has been fully briefed on the merits, we proceed to evaluate the main contention raised by the petition. (See **Rossmont v. Superior Court** (1964), 60 Cal. 2d 709, 712.)

Memorandum 70-58

EXHIBIT II

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April 26, 1970

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Dear John:

Your letter of April 16, regarding Kanner's suggestion of a study of appellate review in the area of discovery, rested comfortably with other unanswered mail while I battled with the printer. I apologize for the delay.

There is little that I can add to my original observations. The prevailing view is that any group with a sufficiently strong motive and head of steam can enact a special review statute - the current favorite is mandamus. The need for such prompt review is often obvious; so is the danger of delay in the trial. The desirable solution, I think, is a discretionary appeal, which will allow prompt review where it will serve proper objectives of trial procedure, and will reject it when it will not. The present view of Oceanside and Pac. Telephone, that review will be granted to allow appellate courts to issue some kind of advisory opinion on the law, and will be denied to a litigant whose right is clear, is to me indefensible, and I have said so on several occasions. But it is a practical, if illogical solution, in an appellate system without a consistent pattern for review, and in a judicial system which refuses to provide for legitimate advisory opinions and continually seeks means to bootleg them.

Now for what answer I can offer, off the cuff, to your specific question: If the motion to suppress illegally obtained evidence deserves appellate review, so do discovery proceedings. (I could give half a dozen other analogies.) But I still think that the only study worth while is of appellate review of intermediate orders generally, rather than of each one individually.

Cordially

B. E. Witkin

Memorandum 70-58 EXHIBIT III

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3 November 1969

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Re: Interlocutory Appeals

Gentlemen:

At a recent CEB lecture on civil writs one of the speakers remarked that the reason why California makes such extensive use of extraordinary writs is that California procedure is far more restrictive of interlocutory appeals than that of other jurisdictions. The speaker further explained that the number of extraordinary writs has increased in enormously greater proportion to the number of appeals, and since extraordinary writs must be handled immediately, a greater strain was being imposed on courts of appeal than would be necessary if there were a system of expeditious interlocutory appeal. The speaker suggested that Bar Associations consider the matter and draft a resolution for presentation to the Annual Conference of Delegates.

After four years of attendance at the Conference of Delegates and submission of several resolutions, it occurs to me that this matter is far too complex for drafting by a local Bar group and handling by the Conference of Delegates. I believe that this problem should be considered by the Law Revision Commission and I trust that you will let me know whether the Commission plans to study this question.

Very truly yours,

Andrew Landay

AL:bh

Memorandum 70-58

EXHIBIT IV

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Nov. 15, 1969

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Dear John:

My usual season's apologies (up to my neck in page proofs) for this delay in answering your letter of November 6.

The question you raise calls for a vast response, but this letter is not the time for it. I will summarize my views.

First, the idea that an unworkable volume of writ proceedings has resulted from an outmoded appeal statute was first expressed by me in 1940-1943 in working on the rules on appeal, restated in my talk to the Conference of Judges about 12 years ago ("The Extraordinary Writ - Friend or Enemy"), printed in the State Bar Journal at about that time, and reiterated in several panels of the Conference of Judges, Appellate section, in recent years. I am still of the same opinion.

Second, the correct solution is a reexamination and revision of the appeal statutes, to reflect the modern need for and desire for expeditious review of many orders which are not final judgments. This solution, proposed in 1943 and thereafter, never aroused any interest. Instead, the State Bar regularly sponsored legislation to increase the scope of writ review (venue, process, motion to suppress, etc.). With the bar committed to the writ solution, and the appellate courts geared to handling it, who wants an intelligent system?

My conclusion: The Commission, at great expense, could produce a much better review system than the one we have. To adopt it would be to undo all the painful work in the wrong direction that the courts and bar have done in the past 15 years. I can think of more useful projects for the moment.

With best regards, I am

Cordially yours,

B. E. Witkin