Study J-1060 October 12, 1993

Memorandum 93-60

Trial Court Unification: Appellate Jurisdiction

BACKGROUND

Appellate jurisdiction within the judicial system is prescribed in Article 6, Section 11 of the Constitution.

> Sec. 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.
>
> Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.
>
> The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

Under this system, appeals from municipal and justice court judgments are to the superior court, and appeals from superior court judgments are to the district court of appeal. The obvious question under unification is, what happens to appeals from causes heard in the unified trial court?

The issues have been addressed extensively in commentary on SCA 3. The 1993 Judicial Council Report includes a good discussion at pages 34-39. We have also attached as an Exhibit to this memorandum a number of representative comments. See State Bar Committee on Appellate Courts (Exhibit pp. 1-6); Third District Court of Appeal (Exhibit pp. 8-20); Appellate Courts Committee of the California Judges Association (Exhibit pp. 21-33). Also of interest is the relevant discussion from the 1975 Cobey Committee report (Exhibit pp. 34-40). Reference is made to these materials in the discussion below.

SCOPE OF PROBLEM

The statistics are daunting. In 1991-92 the appellate departments of the superior courts disposed of 23,595 appeals from the municipal and justice courts.

During that same period the district courts of appeal disposed of 22,415 appeals from the superior courts.

We can assume that the number of appeals from judgments in a unified court would roughly equal the combined number of existing superior court, municipal court, and justice court appeals. This assumption may not be completely accurate, since other factors could come into play, including the possibility that litigants would feel they have received better justice in a unified court than in a municipal or justice court, or the expense of an appeal to the district court of appeal could be a disincentive. Nonetheless, appeals from judgments in a unified court would undoubtedly be substantial in comparison with the existing case load of the courts of appeal.

We may wish to differentiate among types of causes within the jurisdiction of the municipal and justice courts, for purposes of appeal rights. The Legislature controls their jurisdiction, since under Article 6, Section 10 the superior courts have original jurisdiction in all causes except those given by statute to other trial courts. Currently the jurisdiction of the municipal and justice courts is the same and concurrent, and includes, generally speaking:

(1) Causes where the amount at issue is less than $25,000 (except family and probate matters).
(2) Small claims cases.
(3) Misdemeanors and infractions (except juvenile matters).
(4) Felony arraignments, preliminary hearings, and guilty pleas.

The issues that have been identified concerning appellate jurisdiction under the existing scheme include:

(1) How should appeals from civil and criminal cases within the municipal and justice court jurisdiction be handled?

(2) Existing statutes provide a trial de novo in the superior court from small claims. What should be done with this arrangement?

(3) Existing criminal procedure statutes use a dual court system for review of lower court actions under Penal Code Sections 995 and 1538.5. What should be done with this arrangement?

A related but distinct matter is extraordinary writ jurisdiction, whereby the superior court issues a writ to a municipal or justice court. This matter is discussed in Memorandum 93-59 (original jurisdiction).

Appellate Division in District Court

SCA 3 addresses the issue of appeals from causes currently within the jurisdiction of the municipal and justice courts only indirectly. It provides for an appellate division in the unified court, but does not specify which causes would go to the appellate division and which would go to the court of appeal.

> Sec. 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when ~~superior~~ district courts have original jurisdiction and in other causes prescribed by statute.
>
> ~~Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.~~
>
> An appellate division shall be created within each district court. The appellate division has appellate jurisdiction in causes prescribed by statute that arise within that district court.
>
> The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

Several points about this provision are noteworthy. It appears to capture the effect of existing practice by providing for an appellate division within the lower court. However, it does not define the jurisdiction of the district court appellate division. Implementing legislation might, but is not required to, provide for lower court appeals for the same causes that are now within the jurisdiction of the municipal and justice courts.

One technical defect in this draft is noted by the Third District Court of Appeal—while it permits the Legislature to define the jurisdiction of the district court's appellate division, it does not withdraw jurisdiction in those matters from the district court of appeal, with the result that appellate jurisdiction would be concurrent. Any litigant might claim to a have a right of appeal to the district court of appeal notwithstanding apparent statutory jurisdiction of the district court appellate division. That issue is easily addressed by drafting, and should be if the SCA 3 draft is pursued.

The primary concern with creation of an appellate division within the district court is the problem of peer review and conflict of interest. The concern is that a judge should not be put in a position of having to reverse a judge of equal rank.

There may be a collegiality or deference on the court that will destroy the independent judgment necessary for a fair review.

The 1993 Judicial Council Report addresses this issue:

> However, appellate jurisdiction is not simply a matter of caseloads and case management. The guiding principle for over a century in California has been that appeals are heard by judges independent from those who heard the original cause. Moreover, more is at stake here than abstract principle. Public confidence in the judiciary requires such independence on the part of reviewing courts.
>
> Principle and public confidence can be preserved through adoption by the Judicial Council of rules that guarantee the independence of the appellate department and the quality and independence of judges serving in the appellate department. These rules should set forth relevant factors to be used by the Chief Justice in making appointments to the appellate department. The factors would include criteria such as length of service as a district judge, reputation within the district, and degree of separateness of the appellate department's workload from the judge's regular assignments (e.g., a district court judge who routinely handles large numbers of misdemeanors should ordinarily not serve in the appellate department). In addition, appointments to the appellate department should be for a minimum term of two or three years.

The staff thinks these comments are apt and should be preserved in the Commission's report on SCA 3 if the concept of internal district court review of some causes is recommended. There may be other ways that the peer review problem is ameliorated, including the fact that review may be by three judges en banc rather than a single judge. It is also worth noting that some who have studied this issue have concluded that the concern about peer review is overstated and should not be a major concern.

Appellate Jurisdiction in District Court (No Constitutional Appellate Division)

The 1993 Judicial Council Report also takes the approach of giving the district court appellate jurisdiction, but would not create an appellate division in the Constitution. They assume sufficient authority to create an appellate department in the district court by court rule, as is done now in the superior court.

Their proposal would replicate the existing higher and lower court situation by defining all causes as either Category One (equivalent to superior court

jurisdiction) or Category Two (equivalent to municipal and justice court jurisdiction). Appeals from Category One cases would go to the district court of appeal and appeals from category two cases would stay in the district court. The concept of creating two categories of causes within the district court is advocated by a number of others interested in this problem, including the Appellate Courts Committee of the California Judges Association.

The most significant difference between this proposal and SCA 3, however, is that authority to define appellate jurisdiction would be removed from the Legislature and vested in the Judicial Council, with approval of the Supreme Court. The report indicates that while the Legislature indirectly controls appellate jurisdiction now by defining the jurisdiction of the municipal and justice courts, this is really incidental. "As a practical matter, however, the Legislature exercises little control over appellate jurisdiction since the reassignment of a class of cases from the original jurisdiction of the superior court to the original jurisdiction of the municipal and justice courts has such significant implications entirely apart from which court has appellate jurisdiction." This situation is also noted in the materials from the Third District Court of Appeal and the California Judges Association Appellate Courts Committee.

The Judicial Council recommends that whether an appeal should be heard by the court of appeal or the appellate department of the district court is largely a matter of judicial policy and administration, and for that reason assigns the determination to the judicial branch. The report notes similar authority of the judicial branch in other major states such as New York and Illinois, and in the federal system.

This recommendation raises fundamental questions about separation of powers and the proper role of the judicial and legislative branches in structuring the system of justice. The staff is not prepared to comment on the philosophical issues at this point, other than to note that removing decisions concerning appellate jurisdiction from the legislative branch and vesting them in an administrative agency within the judicial branch would signal a major shift in constitutional policy. The staff has not seen in the materials it has reviewed to date any documentation or demonstration of a need for this change.

Upper and Lower Divisions Within District Court

A number of commentators on SCA 3, most notably the Third District Court of Appeal, argue for separate trial divisions within the district court. There would be an upper division and a lower division within the court, with jurisdictions the same as those of the superior court and municipal and justice courts. Thus the status quo could easily be preserved for the current appeals system, as well as other superior court/municipal court distinctions such as the Economic Litigation procedures.

The advocates of this proposal argue that under this scheme the court would in fact be unified. All judges would be equal, but might be assigned to either the upper division or lower division (and presumably could be rotated between them). And it would ensure that the existing constitutional scheme is preserved of appeals from the higher jurisdiction trial court to the district court of appeal.

The 1993 Judicial Council Report critiques this proposal at length:

> [A]fter thoughtful consideration and discussion, this proposal received little support. First, the whole purpose of trial court unification is to create *one* trial court, not to perpetuate an artificial division between trial level courts. Although creating constitutional divisions within a unified district court would not create the same degree of separation that now exists between superior and municipal/justice courts (in particular, there would be unified administrative control), requiring constitutionally separate divisions within a supposedly unified court creates an awkward and confused constitutional structure: The trial courts would be unified, but only to a degree.
>
> Second, the differentiation of procedures applicable to different types of cases is more directly and appropriately addressed as an issue of case management rather than of court jurisdiction. Certainly, effective case management requires that different types of cases be subject to different trial court procedures. But a variety of trial court procedural requirements can be maintained without creating separate jurisdictional divisions of the trial court.
>
> Third, the creation of divisions or departments within the district court is a matter more properly dealt with by the judiciary itself through state-wide or local rules of court or by the Legislature through statutes. (*See, e.g.*, C.C.P. §§ 116.110-116.950 (Small Claims Court); C.C.P. §§ 1730-1772 (Family Conciliation Court); Wel. & Inst. Code § 200 et seq. (Juvenile Court)). There appears to be no principled reason for creating [divisions] by constitutional

provision, but creating Small Claims Court, Family Conciliation Court and Juvenile Court by statutory provisions.

Fourth, public policy and sound judicial administration demand that all judges at all levels of the judiciary be responsible for insuring that the justice system serves the needs of the public. Every judge should have a stake in the system and feel a responsibility for its operation, Yet a judicial system that divides itself into separate jurisdictional compartments is likely to divide itself into more narrowly focused interest groups. It is clear, for example, that many of the interests of the municipal court (where the greatest number of ordinary cases for the average Californian are handled) do not correspond exactly to the interests of the superior court. Unification of the superior, municipal and justice courts into a single trial level court will make all district court judges equally responsible for making the system work and reduce the potential conflicts between those three separate courts.

For the response of the Third District Court of Appeal to this critique, see Exhibit pp. 15-16.

Appeals Between District Courts

A concept that some have advocated is that appeals from matters formerly within the jurisdiction of the municipal and justice courts would not be made internally within the district court, but would be made to the district court in an adjoining county. The purpose of this proposal is to avoid the problem inherent in having peer review among colleagues of equal standing who share collegiality.

Criticisms of this suggestion are that it still involves a judge or panel of judges overruling the decision of a judge of equal rank. It also inconveniences the parties, since part of the concept of an appellate division within the district court is to provide easy accessibility of review to the people served by the court. And it undoubtedly would create management problems, particularly where the workload and staffing of adjoining districts differ substantially.

It should be noted that this option would not be available under SCA 3 as presently drafted. The current draft provides that the appellate division of the district court has jurisdiction in causes prescribed by statute "that arise within that district court".

All Appeals to the Courts of Appeal With Adjustment for Workload

Rather than creating an appellate division within the district court or in some other way dealing with appeals at the trial court level, all appeals could be made

to the district courts of appeal. In this event, measures would be necessary to deal with the expected increased workload on the courts of appeal. In addition, there is concern about making the availability of review too remote and formal; there is some thought that more local, immediate, and inexpensive review is necessary.

Suggestions that have been made in the past to handle the increased workload of the court of appeal under this proposal include:

(1) Increase the size of the court of appeal.

(2) Allow disposition of cases without a written opinion.

(3) Make acceptance of the appeal discretionary with the court of appeal.

(4) Limit appealability of small claims matters.

(5) Limit appealability of traffic matters.

(6) Eliminate Penal Code Section 995 and 1538.5 review.

Each of these suggestions is reviewed briefly below.

Increase the size of the court of appeal. Whether this makes any sense depends in part on the relative cost per unit of the court of appeal and of the appellate division of the trial court. The trial court appellate operation is more cost effective than the court of appeal operation. In 1992-92 only 19 superior court judge equivalent positions were required to handle a volume of appeals equal to that handled by 87.1 court of appeal judge equivalent positions. This is probably due in large part to the requirement of a written opinion in the court of appeal, as well as possibly to the complexity and importance of the court of appeal work load. We also do not know the extent to which any of the superior court appellate load may be handled by individual judges as opposed to a three-judge panel.

Allow disposition of cases without a written opinion. One way to ease the burden on the court of appeal and permit more expeditious processing of a greater volume of cases would be to eliminate the requirement of Article 6, Section 14 that decisions of the courts of appeal that determine causes "shall be in writing with the reasons stated". Under this proposal a written opinion could be issued if the court of appeals in its discretion determines it is appropriate. The 1975 Cobey Commission report advocates this, pointing out that written opinions are not now required in the superior court appellate divisions, that written opinions are required by the constitutions of only 12 states, and that several federal circuit court rules provide for affirmance without written opinion.

Make acceptance of the appeal discretionary with the court of appeal. This implies that some litigants would not be afforded an appeal remedy. Under the existing system an appeal is a matter of right. It could be argued that the right is only to have the matter screened by the appellate court, and should not extend to a full hearing on a frivolous issue. Discretionary review would require a substantial staffing increase for law clerks to assist in the court of appeal screening process. But this would arguably be far less expensive than maintaining a district court appellate division.

Limit appealability of small claims matters. It has been suggested that at least the trial de novo aspect of small claims should be eliminated, if not small claims appeals in their entirety. If the trial de novo were eliminated but an appeal right preserved, there would be an increased expense in small claims cases to create a record in the event of review. In 1991-92 the appeal rate from small claims judgments was 17,000 per 500,000 small claims filed.

Elimination of small claims appeals in their entirety has been advocated by a number of commentators. The 1975 Cobey Commission report noted that a small claims plaintiff has a choice of forums and could know in advance that by choosing small claims court the right to appeal is waived. The defendant would be protected by the right to remove the case to the general trial court jurisdiction; the defendant would be informed that an election not to remove the case would waive the right to appeal. An added protection for the parties in a small claims case would be the availability of writ review. (Under the Cobey Commission proposal writs would be issued from the court of appeal and not from the trial court. For further discussion see Memorandum 93-59 (original jurisdiction).)

Limit appealability of traffic matters. Elimination of traffic infraction appeals has been proposed. The staff does not know the magnitude of this, but we are seeking statistics. The 1975 Cobey Commission report argues that infractions do not involve a liberty interest or even a substantial fine, and conviction gives rise to no legal or moral disability or disadvantage—they are petty offenses. The report concludes that "early termination of proceedings and a finality of the trial court's judgment is desirable". In addition, writ review would be available. (See discussion immediately above.)

Eliminate Penal Code Section 995 and 1538.5 review. Several commentators on SCA 3 have suggested that the existing statutory duality of lower court preliminary action/higher court review in criminal cases is unnecessary and could be eliminated without loss—there would be an improvement in criminal

procedure as well as a substantial savings for all concerned. Others have expressed deep concern about this proposal—they indicate that the existing scheme is fundamental to protection of rights of the accused, and would strenuously oppose eliminating the review procedure.

A middle ground on this issue is proposed in the 1975 Cobey Commission report. The review procedure would be maintained, but it would go to another trial judge rather than an appellate judge. The report acknowledges that this would directly invoke peer review of one judge's decision by another, "but, on reflection, the Commission did not find this very different from the present review of these matters of the decision of another trial court, albeit a municipal or justice court, judge".

DISCUSSION

At the outset, it should be noted that the issue of appellate jurisdiction is largely a matter of statute and court rule. It has a constitutional dimension in that Article 6, Section 11 of the California Constitution vests jurisdiction over appeals from the superior court in the district court of appeal, and appeals from the municipal and justice courts in the superior court. But the Legislature indirectly controls court of appeal jurisdiction through its control of the original jurisdiction of the municipal and justice courts. Article 6, Section 10. And the Legislature directly controls superior court appellate jurisdiction under Article 6, Section 11 ("Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.")

It is clear that the appeal process must be addressed as a consequence of trial court unification. SCA 3 would create an appellate division within the trial court, although it is apparent that creation of an appellate division is not necessarily a constitutional matter. The superior court under existing law may establish an appellate department without an express constitutional provision.

Nonetheless, the staff believes SCA 3 is correct in its constitutional establishment of an appellate division within the district court. The existing superior court appellate department works because it is exercising review over lower court cases, not over other superior court cases. In other to ensure proper functioning of an appellate department staffed by judges of the same jurisdiction as the judges being reviewed, a constitutional hierarchy is desirable. This will avoid the dilemma of judges of equal rank claiming the constitutional right to reverse (and possibly re-reverse) each other.

While SCA 3 contemplates appeals within the trial court, it does not attempt to define the jurisdiction of the appellate division; that matter would be left to statute. The 1993 Judicial Council Report would structure the Constitution so that appellate jurisdiction is defined by the judicial branch rather than the legislative branch. This raises fundamental separation of powers issues that the staff is not prepared to address at this point.

A related matter is whether the Legislature may withdraw appellate jurisdiction in some cases.

> There is no constitutional right to an appeal or other review of a *judicial* decision, and the Legislature therefore has power to change the procedure, limit the right, or even abolish the right altogether.
>
> However, when appellate jurisdiction is conferred by the California Constitution, it cannot be destroyed or abridged by legislative action or inaction:
>
> (a) If the Legislature has failed to provide a procedure to govern the particular kind of appeal, the appellate court has inherent power to establish rules for such purpose.
>
> (b) The Legislature cannot indirectly destroy or limit the constitutional right by means of a change in procedure.
>
> (c) As a matter of statutory construction, where the right to appeal is in doubt, that doubt should be resolved in favor of the right. So where a new special proceeding was established without expressly denying the right of appeal, it was held that, despite its summary character, the general law governed, and appeal was possible.
>
> 9 B. Witkin, California Procedure, Appeal § 2 (3d ed. 1985) (citations omitted)

It is clear in any event that most of the practical problems in the appellate area are purely statutory. Trial de novo of a small claims action is a statutory decision. The criminal procedure checks and balances are a statutory creation. The entire jurisdiction of the superior court appellate department is directly the subject of statutory control.

The staff is attracted to the option of eliminating the appellate function of the trial courts and vesting all appellate issues in the courts of appeal, with appropriate workload adjustments such as increased staffing and limitations on appeals. However, this would raise major policy issues concerning the right to appeal and would signal a significant shift in the structure of the judicial branch that is arguably not necessitated by trial court unification.

The staff is not completely happy with the concept that some trial court appeals will be handled by an appellate division within the trial court itself. Nonetheless, it is workable and may be the only practical resolution of the problem. The appellate division of the district court would handle all appeals and review proceedings for causes where the current statutes rely upon a structure of superior court oversight of municipal and justice court actions. This would include appeals of matters within the municipal and justice court jurisdiction, small claims appeals, and criminal review proceedings. This could be accomplished without an overly extensive redrafting of existing statutes.

Article 6, Section 11 of the Constitution would be amended along the following lines to implement a scheme of appellate jurisdiction based on internal trial court review:

> Sec. 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction ~~when superior courts have original jurisdiction and in other causes~~ in all causes unless otherwise prescribed by statute.
>
> ~~Superior courts have~~ An appellate division shall be created within each district court. The appellate division has appellate jurisdiction in causes prescribed by statute that arise ~~in municipal and justice courts in their counties~~ within that district court.
>
> The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.
>
> **Comment.** Section 11 is amended to reflect unification of the superior courts, municipal courts, and justice courts in a single trial level court. See Section 4 (district court) and former Section 5 (municipal court and justice court).
>
> The first paragraph is amended to make clear that the jurisdiction of the courts of appeal may be limited by statute. It is the intent of this provision that the courts of appeal do not have appellate jurisdiction over causes assigned by statute for appellate review by the district court. Likewise, the courts of appeal do not have appellate jurisdiction over matters made nonappealable by statute. This preserves the effect of existing law. See, e.g., 9 B. Witkin, California Procedure, Appeal § 2 (3d ed. 1985). Nothing in this section limits the original writ jurisdiction of the courts of appeal. Section 10 (original jurisdiction).
>
> The first paragraph of Section 11 is also amended to delete the reference to jurisdiction of the courts of appeal over appeals from the superior court and in other causes prescribed by statute. The reference is obsolete, since the district court has original jurisdiction

in all causes, including all causes formerly within the statutory jurisdiction of the superior, municipal, and justice courts. See Section 10 (original jurisdiction).

The second paragraph of Section 11 preserves in the district court the appellate jurisdiction of the former superior courts and vests appellate jurisdiction in an appellate division. Nothing in this provision limits adoption of court rules that guarantee quality and independence of judges serving in the appellate division. Rules may set forth relevant factors to be used in making appointments to the appellate division. The factors may include criteria such as length of service as a judge, reputation within the district, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a district court judge who routinely handles large numbers of misdemeanors should ordinarily not serve in the appellate division). In addition, appointments to the appellate division might be made by the Chief Justice and might be for a minimum term of two or three years. Review may be by a panel rather than a single judge.

Appellate jurisdiction under this section is defined by Section 11.5 (transitional provision) pending statutory implementation of this section.

Note: This draft would preclude cross-appeals between district courts, since district court appellate jurisdiction is limited to matters arising within each court. This may be inappropriately limiting for small counties. See discussion in Memorandum 93-57 (district court).

There will be a concern that this general constitutional provision lacks specificity. There is a natural desire to pin down the exact consequences of unification so that they will be known at the time a vote on the measure is taken. The staff anticipates that most of the implementing legislation will be technical or conforming in nature. We do not contemplate that the implementing legislation would work any major changes in criminal procedure or any major shift in appellate or other review responsibilities between trial courts and courts of appeal.

Perhaps some of the concerns can be assuaged by a transitional provision that preserves the status quo pending legislative resolution of the appellate details. The transitional provision could be made part of the general constitutional transitional provisions, or could be in a companion statute that becomes operative only if the constitutional measure is enacted.

The staff suggests a constitutional provision along the following lines:

Sec. 11.5. On the operative date of this section, the appellate jurisdiction of courts of appeal is limited to causes within the original jurisdiction of the superior court immediately before the operative date, and the appellate jurisdiction of the appellate divisions of the district courts is limited to causes within the appellate jurisdiction of the superior court immediately before the operative date. This paragraph is subject to legislation that prescribes appellate jurisdiction of the courts operative on or after the operative date of this section.

This section is operative only until July 1, 1996, and as of that date is repealed.

Comment. Section 11.5 preserves the status quo of the appellate jurisdiction of the courts of appeal and trial courts pending legislation on the matter. The reference in this section to causes within the appellate jurisdiction of the superior court includes statutory review authority of the superior courts over municipal and justice court actions, whether or not technically an "appeal" (e.g., Penal Code §§ 995, 1538.5). For writ jurisdiction of the courts, see Section 10 (original jurisdiction).

The operative date of this section is July 1, 1995. Implementing legislation should be adopted before July 1, 1996.

We have drafted this provision with a limited duration of one year in order to force action on implementing legislation. The one year duration is also necessary in order to avoid complications as new causes of action are added to the statutes after the operative date of court unification without a clear appeal path. Note that we expect this provision will never have any effect, since we anticipate that legislation prescribing appellate jurisdiction, as well as other trial court unification issues, will be enacted and in place before the constitutional amendment becomes operative.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

THE STATE BAR OF CALIFORNIA

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February 19, 1993

The Honorable Bill Lockyer
Member of the Senate, 10th District
State Capitol, Room 2032
Sacramento, CA 95814

SCA 3 & SB 15: TECHNICAL AMENDMENTS
Committee on the Appellate Courts

Dear Senator Lockyer,

The Committee on the Appellate Courts of the State Bar of California, composed of experts in the areas of legal practice and procedure respectfully submits the attached proposed amendments to your SCA 3 and SB 15 for your consideration.

The Committee on the Appellate Courts takes no position on the measure, but believes the recommendations made in its report will result in better law if the bill is enacted. If you would like more information, please contact me or the author of the attached report.

THIS POSITION IS ONLY THAT OF THE COMMITTEE ON THE Appellate Courts OF THE STATE BAR. IT HAS NOT BEEN APPROVED BY THE STATE BAR'S BOARD OF GOVERNORS OR OVERALL MEMBERSHIP, AND IS NOT TO BE CONSTRUED AS REPRESENTING THE POSITION OF THE STATE BAR OF CALIFORNIA.

It is the policy of the State Bar to refer legislative proposals affecting specific legal questions or the practice of law to the appropriate State Bar Committee or Section for review and comment. If you wish to discuss this position further, please feel free to contact me.

Best Regards,

Larry Doyle
Chief Legislative Counsel

Enclosure

cc: Members and Staff, Senate Committee on Judiciary
David Kaye, Committee on the Appellate Courts
Phil Goar, Vice Chair, Committee on the Appellate Courts
Diane C. Yu, General Counsel, State Bar of California
Margaret Morrow, Committee BCAJ Liaison
David Long, Director of Research, State Bar of California
Heather Anderson, Committee Staff Liaison

THE COMMITTEE ON APPELLATE COURTS
THE STATE BAR OF CALIFORNIA

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TO: Larry Doyle, Director, Office of Governmental Affairs
FROM: Phil Goar, Vice Chairperson
DATE: FEBRUARY 10, 1993

RE: SCA 3 & SB 15 (as introduced by Senator Lockyer)

COMMITTEE POSITION:

_____ Support
_____ Support if Amended
_____ Oppose Unless Amended
_____ Oppose
__X__ No Position/Recommended amendments only

Date position recommended: February 5, 1993
Committee vote: Ayes: 15 Noes: 0 Abs.: 1

ANALYSIS:

(1) Brief description of the bill's provisions.

The trial court consolidation proposal introduced by Senator Lockyer is in the form of a constitutional amendment and implementing legislation. Essentially, the proposal would eliminate the superior, municipal and justice courts and instead provide for one district court in each county.

With respect to appellate jurisdiction, SCA 3 would add the following underlined language to Article VI, section 11 of the constitution:

> [C]ourts of appeal have appellate jurisdiction when superior [sic] district courts have original jurisdiction and in other causes prescribed by statute. [¶] An appellate division shall be created within each district court. [T]he appellate division has appellate jurisdiction in causes prescribed by statute that arise within that district court.

SCA 3 would eliminate the current provision of Article VI, section 11 providing: "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties." (SCA 3, p. 5:2-14.)

(2) Reasons for recommending the position noted above.

The Committee on Appellate Courts takes no position on trial court consolidation per se. The Committee is concerned about the effect of consolidation on appellate review, e.g. the effect on appellate jurisdiction and the caseloads of the district court appellate departments and courts of appeal. Because that effect cannot be determined from the language of the proposed legislation, the Committee neither supports nor opposes SCA 3 and SB 15. However, the Committee recommends at some point in the legislative process much more consideration should be given to the question of appellate jurisdiction.

The Committee cannot determine the effect the proposed legislation would have on appellate jurisdiction because, as explained below, the provisions addressing appeals need clarification and further development.

Assuming the phrase "superior district courts" (SCA 3, p. 5:5) is a typographical error, SCA 3 provides "courts of appeal have appellate jurisdiction when district courts have original jurisdiction." Because district courts would have jurisdiction over all cases, courts of appeal would have appellate jurisdiction over all cases including small claims, traffic infractions, and misdemeanors. However, SCA 3 goes on to say an appellate division shall be created within each district court and the appellate division has "appellate jurisdiction in causes prescribed by statute that arise within that district court." (Id. at lines 8-11.) Is it the legislature's intent any district court case be appealable of right to the courts of appeal but some cases, to be specified by the legislature, have to be appealed first to the district court's appellate department? Or is it the legislature's intent only cases not legislatively directed to the district court appellate department are appealable of right to the courts of appeal? If the latter is intended, when, if ever, may the courts of appeal review a district court appellate department decision?

In addition, this proposal's affect on appellate jurisdiction cannot be determined because SB 15, as currently drafted, does not prescribe the jurisdiction of the district court appellate departments. Their jurisdiction could be less than, the same as, or greater than the current jurisdiction of superior court appellate departments.

Finally, even if the provisions concerning appellate jurisdiction in SCA 3 and SB 15 were clarified, the actual effect of these provisions would be unclear because of the lack of any emperical information concerning the impact of these changes.

Although the Committee has not had sufficient opportunity to develop specific recommendations on the issue of appellate jurisdiction, the Committee believes trial court consolidation should not result in expanded appellate jurisdiction in the courts of appeal. The current distribution between superior court appellate departments and the courts of appeal should remain as is for the time being. The Committee also believes the two public policy issues discussed below, peer review and expanded jurisdiction of the district courts' appellate departments should be considered in determining the appropriate appellate jurisdiction over district court decisions.

(3) Proposed amendments.

The only specific amendment the Committee recommends at this time is to strike the word "superior" from SCA 3, page 5, line 5.

(4) Discussion

(a) Background information.

Court consolidation proposals are not new in California. Fifteen such proposals have been introduced since 1970. Most never made it through the legislature. However, in 1982 a proposal did pass the legislature and appeared on the ballot as Proposition 10. This proposal would have amended the constitution to permit a county to consolidate its superior, municipal and justice courts with the approval of county voters. The measure failed.

Proposition 10 was opposed by the State Bar on the ground its promised efficiencies could be accomplished through existing law without the increased cost of converting justice and municipal court judges into superior court judges. With respect to appeals, opponents of Proposition 10 noted court consolidation would eliminate the traditional appellate system in which a "higher" tribunal reviews the decisions of a "lower" one. The ballot argument stated, "A judge cannot and should not be expected to review the work of a colleague, knowing that perhaps next week their roles will be reversed." (Note: the State Bar did not sign onto this particular argument against Proposition 10.)

The Bar has changed its position on court consolidation and now recommends consolidation be the subject of pilot projects in a wide range of jurisdictions--urban, rural, large, small, densely populated and sparsely populated. The Bar believes these pilot projects would provide emperical information concerning the effects of trial court consolidation making it possible to determine whether consolidation would result in substantial cost savings.

As to appellate jurisdiction, the Bar recommends in trial court consolidation pilot projects the superior court's appellate jurisdiction remain unchanged. This proposal is consistent with previous consolidation proposals.

(b) Public policy considerations.

The Committee has identified two public policy issues it believes should be considered in determining appellate jurisdiction over district court decisions.

(1) Peer review. All judges are judges of the district court. Therefore, those sitting in the appellate department will be reviewing the decisions of their peers. Furthermore, unless the assignment to the appellate department is permanent, they must undertake this review knowing that soon roles will be reversed. Under such a system the appearance and substance of justice may be questioned and public confidence in the district courts may be eroded.

(2) Expanded jurisdiction of district court appellate departments. Because there would no longer be a jurisdictional distinction in the trial courts based on the amount in controversy there is no inherent reason why cases involving amounts over $25,000 have to be appealed to the courts of appeal. The court of appeal jurisdiction could be raised to $100,000 or $500,000 or more. Nor would there be any need for the distinction in appealability between sanction orders above or below $750.00. (Code Civ. Proc. § 904.1 (k).) All sanction orders could be made appealable to the district court appellate department. Similarly, in criminal cases court of appeal jurisdiction could be limited to "serious felonies" or convictions involving sentences of more than 25 years.

(c) Potential fiscal ramifications.

As far as the courts of appeal are concerned, the potential fiscal ramifications of trial court consolidation depend on where the legislature draws the line on appellate jurisdiction in the district courts. If, for example, appellate jurisdiction in the district courts and courts of appeal were to remain as it now exists between the superior courts and courts of appeal, SCA 3 would probably have no fiscal impact on the courts of appeal. On the other hand, the legislature could expand the appellate jurisdiction of the district court appellate departments beyond that presently enjoyed by the superior court appellate departments, thus alleviating some of the backlog caused by inadequate staffing of the courts of appeal. This could have a positive fiscal impact on the budget for the courts of appeal and the overall budget for the judiciary.

(d) Germaneness.

Trial court consolidation is clearly related to improvement of the quality and delivery of legal services. However, only its effect on appellate review of cases arising from the new consolidated courts is within the special knowledge, experience and technical expertise of the Committee on Appellate Courts. Thus the Committee's comments are limited to that aspect of the proposal.

cc: David Kay, Committee Chair
Margaret Morrow, BCCL Liaison
David Long, Director of Research
Heather Anderson, State Bar Staff Attorney
Office of the General Counsel

To: Hon. William Lockyer, Chairman, Senate Judiciary Committee, Hon. Philip Isenberg, Chairman, Assembly Judiciary Committee, and the members thereof.

From: Hon. Robert K. Puglia, Presiding Justice and Hon. Coleman A. Blease, Hon. Keith F. Sparks, Hon. Richard M. Sims III, Hon. Rodney Davis, Hon. Arthur G. Scotland, and Hon. George W. Nicholson, Associate Justices of the Court of Appeal, Third Appellate District

Date: October 8, 1993

Subject The Joint Hearing of Assembly and Senate Judiciary Committees regarding Trial Court Unification (SCA 3)

The following comments represent the views of above-named members of the Third District Court of Appeal regarding SCA 3 and SCA 3 as it is proposed to be amended in Trial Court Unification: Proposed Constitutional Amendments and Commentary of the Presiding Judges and Court Administrators Standing Advisory Committees, dated September 11, 1993, chaired by the Hon. Roger Warren. (Hereafter, Warren Committee Report.) The changes proposed by the Warren Committee Report that are of concern are attached as an Appendix A. A proposal to rectify the jurisdictional problems present in these proposals is attached as Appendix B.

There are two areas of immediate concern to us. On the one hand SCA 3 in its present form causes jurisdictional problems, e.g., it would send all of the appeals from matters within the jurisdiction of the municipal and justice courts to the courts of appeal. On the other hand the Warren Committee proposal would abolish provisions which safeguard the

constitutional jurisdiction of the courts of appeal and vest plenary powers over their internal administration in the Judicial Council.

More specifically, the Warren Committee proposal would *repeal* the *constitutional* jurisdiction of the courts of appeal over appeals from causes over which the superior courts presently have original jurisdiction (i.e., the most significant cases) and would abolish thereby the *constitutional* right of litigants to appeal such cases to the courts of appeal. It would vest the power to determine where an appeal should be taken in the Judicial Council, subject to approval by the Supreme Court. (Warren Committee Report, p. 34; revision of art. 6, § 11.)

The Warren Committee proposal would also repeal the Legislature's authority to provide for the officers and employees of the trial courts, and would vest it and the power regulate the employees of the Courts of Appeal in the Judicial Council and the Chief Justice. (Warren Committee Report; pp. 29-30; revision of art. 6, § 6.)

We are opposed to these proposals. We would support alternative amendments to SCA 3 to cure the jurisdictional problems (see below for the divisions proposal).

We begin by examining the amendments which SCA 3 and the Warren Committee proposal would make to the existing constitutional law. We then ask whether the radical changes in constitutional jurisdiction are justified by the goal of administrative efficiency.

I

The Constitutional Right of Appeal

A. The Existing Law

The Constitution presently divides causes of action into (essentially) two classes and assigns the more significant to the superior court and the less significant class to the municipal and justice courts. The *jurisdictional* separation of these courts into superior and inferior tribunals together with this assignment of causes has significant consequences. Article 6, section 11 of the Constitution vests "appellate jurisdiction" in the courts of appeal over all causes over which the superior court has original jurisdiction.[1] It creates thereby a constitutional right of appeal in such cases. (See e.g., *In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532.) This entails resolution of the appeal by a court of broad geographic jurisdiction by means of the traditional appellate review process, including written decisions with reasons stated. (Cal. Const. art. 6, §14.) Causes assigned to the municipal and justice courts are not appealable unless made so by statute and if so may be resolved without a written opinion by a local, county appellate department. (Art. 6, § 11.)[2]

B. SCA 3 As Presently Constituted

If the trial courts are unified, the present means of separating trial courts into superior and inferior tribunals will vanish and, unless replaced by a similar jurisdictional arrangement, so will the constitutional right of

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1 Section 11 currently provides that "[w]ith that exception [death penalty cases] courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute."

2 Section 11 currently provides that "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts ...."

appeal which is dependent upon that jurisdictional arrangement. If, as currently provided in SCA 3, a new district court is given jurisdiction over all causes, including those previously assigned to the municipal and justice courts, all causes, however trivial, would be accorded full appellate review in the courts of appeal, significantly raising their workload.[3] If a single trial court is created and vested with all of the powers presently given the multiple trial courts, including appellate powers, there will be no superior tribunal to hear appeals in causes formerly within the jurisdiction of the municipal and justice courts and no superior tribunal to issue writs concerning such causes to an inferior court tribunal. It is conceptually anomalous for a court to hear an appeal from itself or to direct a writ to itself.

If the problem is sought to be resolved by delegating the authority to determine whether and where an appeal should be taken, the appellate jurisdiction of the courts of appeal could be dramatically curtailed, e.g., by sending appeals to the appellate department of the new unified trial court without the costly necessity of written opinions. This presents the appellate jurisdiction problem of SCA 3.

C. The Warren Committee Proposal

The Warren Committee would create a single unified trial court with no *jurisdictional* divisions. It proposes to "solve" the "appellate jurisdiction problem" of SCA 3 by revising section 11 to provide that all

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[3] SCA 3, as amended in Assembly July 16, 1993, would amend section 10 of art. 6 to provide that "District courts have original jurisdiction in all causes." It would also amend section 11 to provide that, with the exception of death penalty cases, "courts of appeal have appellate jurisdiction when district courts have original jurisdiction ...." Read together, the courts of appeal would be given appellate jurisdiction over all causes including those presently within the jurisdiction of the municipal and justice courts.

causes shall be classified into two categories, categories One and Two, and that the courts of appeal shall have appellate jurisdiction over Category One causes and the district court appellate jurisdiction over Category Two causes.[4] No criteria are given for delineating these classes of causes. They do not mark the jurisdictional boundaries of the existing trial courts. So far as their constitutional status is concerned they are mere labels. Rather, the Warren Committee proposal would vest the authority to *define* the "classes of causes" within each category, and hence the authority to determine *where* an appeal may be taken or a writ issued, in the Judicial Council, which may act by rule with the approval of the Supreme Court. The Warren Committee Report argues that "[w]hether appeals should be heard by a court of appeal or the appellate department is largely a matter of judicial policy and administration." (Report, p. 38.) Thus, what had been a matter of constitutional right, to appeal to the court of appeal in the significant causes within the original jurisdiction of the superior court, is reduced to a matter of administrative efficiency. The claim is made that a constitutional right of appeal has been preserved because, unlike the present section 11,[5] appeal is

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[4] Section 11 would be amended as follows: "(a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal *and district courts* have appellate jurisdiction ~~when superior courts have original jurisdiction and in other causes prescribed by statute~~ as provided in this section. *(b) All causes in the district courts are within Category One or Category Two. Assignment of classes of causes to either of these categories shall be made pursuant to rules adopted by the judicial courncil which shall become effective when approved by a majority of the Supreme Court. Any causes not assigned to Category Two shall be deemed to be assigned to Category One. (c) Courts of appeal have appellate jurisdiction in Category One causes, cases in which one or more causes within Category One is joined in the same proceeding with one or more causes within Category Two, and in other causes prescribed by statute.* (d) "~~Superior~~ *District* courts have appellate jurisdiction in *Category Two* causes ~~prescribed by statute~~ that arise ~~in municipal and justice courts~~ within their ~~counties~~ *territorial jurisdicitons*."

[5] Section 11 of article 6 currently provides that "[s]uperior courts have appellate jurisdiction in causes *prescribed by statute* that arise in municipal and justice courts" thus reposing discretion in the Legislature to decide whether an appeal should be accorded in such a cause. (Emphasis added.) The Warren Committee would repeal the italized language, while substituting "district" for "superior" court, thus making "appeal" to the district a matter of constitutional right. We have elsewhere

made a matter of right in Category Two causes to the district court. But that blinks the reality of the distinction between appellate review in the courts of appeal and appellate review in the district court.

It must be emphasized that the present constitutional right of appeal is a function of the different *jurisdictions* of the existing tiers of trial courts. The Legislature has no power to preclude an appeal in a cause within the original jurisdiction of the superior courts. It has no power simply to determine where an appeal should be taken. This provides the *only constitutional safeguard* against the temptation to manipulate appellate jurisdiction as attempted in *In re Sutter-Butte By-Pass Assessment*. The proposed classification approach simply surrenders this safeguard.

The Warren Committee proposal for solving the appellate jurisdiction problem also carries with it a change in civil jury size. Section 16 of art. I is proposed to be amended to provide that "[i]n Category One civil causes the jury shall consist of 12 persons", unless otherwise agreed upon", but not so in Category Two cases. (Warren Committee Report p. 8; proposed revision of art. 1, § 16.) It is explained, that "As of the effective date of these amendments, all causes within the jurisdiction of the ... superior courts will be declared Category One causes", thus, "this amendment will result in no change to the constitutionally provided size of the civil jury." (Ibid.) However, that is misleading since, as a *constitutional* matter, under section 11 the Judicial Council and Supreme Court would decide the content of the categories. What is meant therefore is that it is proposed that those bodies make that determination as a matter of judicial policy. That, of course, is

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commented that it makes no sense to talk of appealing a case to oneself, as the Warren Committee would provide.

subject to the vagaries of time and circumstance. The only value of a constitutional safeguard is that it is *not* subject to administrative or statutory control.

For these reasons we oppose the Warren Committee proposal. It would abolish the constitutional jurisdiction of the courts of appeal and the ancillary right to appeal the significant causes now within the original jurisdiction of the superior courts. Regarding appeals that presently would be taken from causes within the jurisdiction of the municipal and justice courts and writs directed to such courts, it affords no relief for the conceptual headache of a court with jurisdiction over itself.

The Warren Committee Report also gives us independent causes for concern. Among other things, the Report proposes to vest plenary powers over court administration in the Judicial Council and Chief Justice.[6] This redistribution of powers presently confided in the appellate and trial courts is not required to achieve trial court unification. (Report pp. 29-30.) The Warren Committee also would repeal the existing constitutional provisions which state that the Legislature shall "provide for the officers and employees" of each trial court, leaving (under the amendments to section 6) the Judicial Council and the Chief Justice as the sole repositors of this authority. (Report, p. 25.) It is explained that the purpose of this deletion is that "good management principles require that *courts* have authority to provide for their own employees within the limits of resources provided to

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6 The proposal is as follows: "*The Judicial Council is the policy-making body for the courts.* To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, *adopt rules* for practice and procedure, not inconsisten with statute, and perform other functions prescribed by statute. *The Chief Justice shall be the chief executive officer for the courts and shall implement the rules promulgated by the Judicial Council.*"

the courts." (Emphasis added.) This confuses the "courts" with the Judicial Council and the Chief Justice. As a consequence the courts would be wholly dependent upon them for whatever administrative authority they would be permitted to exercise over their own affairs. We think that sound principles of court management are better served by the present decentralized system in which courts at each level have authority over their own personnel.

Currently, for example, both the appellate and trial courts are given authority by legislation over the selection of their staffs. (See e.g., Govt. Code sections 69141, 19825 [courts of appeal]; 69890 ff. [superior courts].) This authority would be shifted to the Judicial Council and Chief Justice, acting as the "chief executive officer for the courts", under the proposals sanctioned by the Report.

There are further changes that are not necessary to trial court unification. The proposal needlessly forces policy choices in procedural law under the gun of transition. It will make necessary the revision of all of the statutes which turn on the present jurisdictional differences of the trial courts. As related, it poses significant difficulties in extraordinary writ jurisdiction regarding causes presently assigned to the "inferior tribunals," municipal and justice courts.

For the reasons set out above we oppose SCA 3 in its current form and as it is proposed to be amended by the Warren Committee Report.

II

The Divisions Proposal

Our court has proposed the establishment of two divisions of the unified trial court, which would incorporate the bifurcated subject matter *jurisdictions* of the existing trial courts and their procedural regimes (the divisions proposal) in a single administrative unit, called the district court, thus preserving the present constitutional arrangements while permitting whatever efficiencies can be gained from a single class of judges and a single administration. This would preserve the existing constitutional right of appeal in the significant cases now within the jurisdiction of the superior court. It would simplify the transition to a unified court by enabling continued use of the present statutory scheme concerning procedural matters. The divisions proposal would similarly allow extraordinary writ statutes to continue in use by granting to the higher division writ jurisdiction over matters in the lower division as an "inferior tribunal." (See, e.g., Code Civ. Proc., §1085.) If this approach is not adopted a Pandora's box of policy choices is opened.

However the divisions proposal has not met with favor by the Warren Committee. (Report p. 24) It objects that it would result in a "somewhat awkward and confused structure." This seems, at best, to be an aesthetic objection entitled to no weight unless a satisfactory alternate solution is supplied. The Report also objects that the creation of departments is a matter that should be "dealt with" by statute or rules of court and that there is no "principled reason" for addressing this basis of division in the Constitution. Obviously, the principled reason for the distinction is to

continue the present *constitutional* arrangements concerning appellate jurisdiction while obtaining the benefits of administrative unification.

It has also been objected that the divisions proposal perpetuates a perceived stigma of "inferior" status judges. This concern about "inferiority" is unreasonable since the proposal contemplates actual equality of trial judges, with the same freedom and presumably rotation of assignments that would exist under any other version of the trial court unification proposal. In our view there are no "inferior" judges, there are only "inferior tribunals," a nonderogatory statutory usage that merely reflects the institutional arrangements necessary for appellate and writ review of questions of law.

It is deep conceptual confusion to think that this "damned spot" of "inferiority" can be washed out of any system that affords appellate and writ review. Such review requires a *separate* reviewing entity that is "superior" in the sense that it can, in limited circumstances, overturn or reverse the action of the inferior tribunal. If there is no separation of entities then the system of review is no more than a rehearing and cannot be considered appellate review. Indeed, as noted, without some constitutional recognition of jurisdictional separation, such as that afforded by the divisions proposal, one is left with the Warren Committee Report's proposed solecism of a "fully unified" trial and appellate and writ review court, i.e., an inferior/superior district court with appellate and writ jurisdiction over itself.

III

The Goal of Administrative Efficiency
Is Unification More Efficient Than Coordination?

Since the Warren Committee proposal would make radical changes in the constitutional jurisdiction of the courts of appeal and affect the internal administration of the courts it is proper to inquire whether such changes are justified by the claimed fiscal advantage of administrative efficiency which is the announced goal to be achieved by trial court unification.

We are not told why a constitutional amendment is necessary to achieve administrative efficiency. The courts are presently implementing the trial court coordination plan, authored by Assemblyman Isenberg, which has the same purpose. (Government Code section 68112.) Indeed, the Warren Committee Report offers the experience of the Sacramento courts under the statutory coordination plan as support for the claim that savings would be made by the constitutional amendment.[7] (p. 22.) The merits of the statutory plan are currently under study by the Judicial Council. (See 1993 Annual Report, Judicial Council of California, pp. 18-19.)

It is not self evident that a constitutional amendment is necessary to achieve the administrative savings advanced as the reason for SCA 3.

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[7] The Report states: "Based on the experience of those counties which have coordinated the provision of judicial services most fully, these particular increases [in salaries and benefits occasioned by unification 9 (see fn. 2)] will be offset by the costs avoided through reducing the need for additional judgeships. Counties that have already consolidated their superior and municipal court benches report significantly more efficient use of available judicial resources which directly translates into a reduced need to create more judgeships. (Warren Committee Report, p. 22.)

The appropriate question to be answered is whether SCA 3 could save money over and above that saved by the statutory trial court coordination plan.[8]

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[8] The question is especially pertinent in view the facts that SCA 3 would increase the salaries and benefits of all municipal court judges by $10,000 per year, would transmute justice court judges from part time to full time judges at an effective increase of some 18 judicial positions, and would likely increase the retirement benefits of all retired municipal and justice court judges because the terms of the existing municipal and justice court judges, which are used to measured the benefits of retired judges, would continue into their terms as district court judges. (Warren Committee Report, p. 7.)

Appendix B.

The Divisions Proposal

California Constitution

Article I

Declaration of Rights

Section 16, paragraph 2. In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in ~~municipal or justice court~~ *division two of the district court* the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.

Article VI

Judicial

Section 1. The judicial power of this State is vested in the Supreme Court, courts of appeal, ~~superior, municipal courts, and justice courts and district courts.~~ All courts are courts of record.

Section 4. ~~In each county there is a superior court of one or more judges. The Legislature shall prescribe the number of judges and provide for the officers and employees of each superior court. If the governing body of each affected county concurs, the Legislature may provide that one or more judges serve more than one superior court. The county clerk is the ex officio clerk of the superior court in the county~~.

The Legislature shall divide the State into district courts, each consisting of one or more entire counties. The Legislature shall provide for the organization, territorial jurisdiction, number and compensation of judges, and the number, qualifications, and compensation of the officers and employees of the district courts. The district courts shall have two divisions.

Section 5, concerning the municipal and justice courts, is repealed.

Section 10. The Supreme Court, courts of appeal, *their judges*, and ~~superior~~ *division one of the district* courts ~~and their judges~~ have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. *The jurisdiction of division one of the district courts shall extend to matters arising in division two of the district courts.*

~~Superior~~ *Division one of the district* courts ~~have~~ *has* original jurisdiction in all causes except those given by statute to ~~other trial courts~~ *division two of the district courts. On the effective date of this amendment all causes within the original jurisdiction of the superior courts are within the original jurisdiction of division one of the district courts and all causes within the jurisdiction of the municipal and justice courts are within the jurisdiction of division two of the district courts.*

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when ~~superior courts have~~ *division one of the district courts has* original jurisdiction ~~and in other causes prescribed by~~ statute.

~~Superior courts have~~ *Division one of the district courts has* appellate jurisdiction in causes prescribed by statute that arise in ~~municipal and justice courts~~ *division two of the district courts* ~~in their counties.~~

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or is not a matter of right.

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

NORMAN L. EPSTEIN
ASSOCIATE JUSTICE

TELEPHONE
(213) 897-5066

August 4, 1993

Judge Patrick J. Morris
Judge of the Superior Court
San Bernardino County
Central District
351 N. Arrowhead Avenue
San Bernardino, California 92415-0240

Re: Appellate Jurisdiction and Senate Constitutional Amendment 3

Dear Judge Morris:

By this letter, I am pleased to submit the report of the Appellate Courts Committee on this proposed constitutional amendment, to you and to the CJA Board. We have two principal recommendations:

First: that the Legislature be asked to refer the subject of the proposed amendment to the California Law Revision Commission for identification and analysis of the constitutional and statutory changes necessary to accomplish unification of the trial courts; and that the Commission be asked to submit its report no later than six months from the date of referral.

Second: that, if our first recommendation is not accepted, that Sections 10 and 11 of the Constitution be revised to read as set out in the draft attached to this report.

Background. SCA 3 is the legislative vehicle for the accomplishment of trial court unification. One of the many difficult issues presented by this project is the treatment of appellate jurisdiction with respect to decisions of the unified court. Under the present divided system, appeals from decisions of special jurisdiction courts (justice and municipal courts) are handled by appellate departments of the superior courts; except for death penalty judgments, decisions of general jurisdiction courts (superior courts) are subject to review by the courts of appeal.

Unless all appeals and writs are to go to the courts of appeal, a result no one has advanced and all have disclaimed, there must be some provision to differentiate cases that are to be determined on appeal by appellate departments of the combined trial court, from cases subject to review by the courts of appeal. A thoughtful memorandum by Justice Coleman Blease of the Third District points out that SCA 3, in its present form, would not resolve this problem, because it does not modify the provision in Section 11 of Article VI vesting all appellate jurisdiction over decisions of general jurisdiction courts in the courts of appeal.

A short time ago, the Executive Director of the Association, Ms. Constance E. Dove, passed on a request that our committee examine the issue. We have done so, and we have had the benefit of memoranda by Justice Blease and Profession Clark Kelso, Reporter for the combined Presiding Judges and Court Administrators committees. As chair of the committee, I have had extensive discussions of the issues with Justice Blease, Professor Kelso, and others, and I have shared those discussions with the committee.

The committee met at the Westin Hotel in Millbrae on July 30, 1993 to consider the issues presented. All members of the committee[1/] were present, except Justices Robert Timlin and Clinton Peterson. Justice Timlin had planned to come to the meeting, but was prevented from doing so at the last minute. I spoke to him before and after the meeting. (Justice Peterson was out of state, and could not be reached.) The meeting was also attended by Justices Baxter and Croskey, Ms. Dove, and by you. We had an opportunity, during the meeting, to hear Justice Blease on the issues presented; his discussion was by speaker telephone.

We deliberately did not attempt to evaluate the overall wisdom of court unification. That question, and a number of related policy issues, are matters that the CJA Board will consider for the Association. They also are being reviewed by several committees of the Judicial Council and will be considered by the Council itself. We confined our discussion to the effect of the revision on the appellate function and, since it is

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1/ The members of the committee are Justices George, King, Lillie, Merrill, Nares, Timlin, N. F. Woods, and myself. (Justice Peterson meets with the committee as CJA Board liaison.)

inextricably related, to the need for a full review of the affected laws.

I am pleased to inform you that, with a single exception relating to the role of the Judicial Council with respect to cause categorization, our recommendations reflect the unanimous view of all the members of the committee.

The balance of this memorandum discusses our recommendations in detail.

1. Referral to Law Revision Commission. Our principal recommendation is that the California Law Revision Commission be asked to prepare a report, analyzing the constitutional and statutory changes that are necessary to accomplish effective trial court unification. In many instances, these changes will go beyond altering the name of a court in a constitutional or statutory provision; policy choices will have to be made as to how matters are handled. The Commission should identify these areas and discuss the principal policy alternatives.

We are convinced that it is not in the public interest to present so sweeping and systemic a change in the law as trial court unification without a thorough review of the substantive changes in law that it would effect, together with identification of policy options where appropriate. If this is not done, the result is likely to be confusion of law and procedures, clean-up bill after clean-up bill, and litigation over unresolved issues that is likely to extend over a decade or more. Further constitutional revisions may be required to cure oversights in the present measure.

We know that there are serious, unresolved issues inherent in the proposed amendment. They range from retirement to coordination, from handling the Economic Litigation Program to Voting Rights Act issues. They are great and small, and no one can say with any confidence what or how many they are. To proceed without a proper survey of the laws affected, the changes required and policy options presented, and a considered resolution of those issues, would not only be hazardous, it would be bad government.

The California Law Revisions Commission is ideally suited to conduct the review, identify the issues, and propose

alternative solutions where appropriate. It is a statutory body (see Gov. Code, § 8280, et seq.) of long standing. Its reports are highly respected by the Legislature, the courts, and the Bar. The product of its work may be found in such major legislation as the Evidence Code of 1965, the government tort liability statutes, the recently enacted Probate Code, and the recently enacted Family Code. We know of no comparable entity whose work is so consistently excellent and well respected. A study and report by the Commission, as we recommend, is likely to engender the public confidence that a law of this scope should command. The report of the Commission will also provide valuable history which will be of valuable assistance in interpreting the constitutional and statutory provisions.

We recognize that some studies already have been made. Professor Kelso has surveyed laws affected by SCA 3, and the Judicial Council commissioned a study over a decade ago, when court unification was last on the ballot. There are other studies and reports as well, such as that of the Cobey Commission. These works will serve as a baseline and a check for the study we recommend, but nothing done years before, or by a single individual, however talented, is likely to be as thorough and fully considered as a review and report by the Commission.

A recommendation of referral to the Commission was made by the Judicial Council's standing Committee on Civil Law and Small Claims several months ago. The recommendation was brought to the attention of committees reviewing SCA 3. There was some comment at the time that Commission studies often take long periods of time to complete. We are confident, however, that if the Legislature requests the Commission to conduct the study and render its report (see Gov. Code, § 8293), and to treat this matter as one of the highest priority, the Commission is fully capable of completing the task within a reasonable time. We therefore recommend that the Commission be asked to submit its report no later than six months from the date the matter is referred to it by the Legislature.

If the referral is made soon, it may be possible to complete all levels of review in time to place the matter on the ballot for the November 1994 General Election; we recognize that it will not be possible to complete the process in time for the June 1994 Primary Election.

We believe this delay is a small price to pay for good government.

Referral to the Commission is our primary, and unanimous recommendation. We urge its acceptance. Our second recommendation, which we discuss next, is addressed to the contingency that this recommendation is not accepted.

2. Constitutional Provisions on the Appellate Function. At the time we began our review, two approaches had been suggested for allocation of appellate authority. Both recognized the undesirability of assigning all appellate work to the courts of appeal. Implicit in that decision is that the present system of appellate departments to review decisions of the justice and municipal courts will continue. The basic problem is how to determine what each court is to review.

It is possible to provide a detailed specification in the Constitution of exactly which causes are assigned to each level of trial court, or to each category of cause. That, in fact, was the system employed before the constitutional revision of 1966. No one so far has endorsed it, and we do not.

One of the two approaches under review is to delegate decision-making power to the Judicial Council, to the Legislature, or to the former subject to some form of acceptance or rejection by the latter. A principal problem with this approach is that it would allow the delegated entity to directly allocate appellate jurisdiction from one court to another.

It is true that the Legislature can accomplish much the same thing now by indirection, through enlarging the jurisdiction of municipal and justice courts. (As their jurisdiction is expanded, so is the scope of the superior court appellate departments, with a corresponding reduction in court of appeal jurisdiction.) But it is one thing to affect appellate jurisdiction in an ancillary way, as an incident to changes in trial court jurisdiction, and quite another to delegate the power to allocate and reallocate appellate jurisdiction as such. The power to make such allocation would, for example, allow the delegated entity to allot all unlawful detainer appeals to the courts of appeal, or to the appellate departments regardless of the amount in controversy; or to do the same with appeals from any category of tort litigation. It would constitute a fundamental change in the appellate rationale of the State.

The other suggested approach is to create two divisions in each district court, one to hear and decide cases now within the jurisdiction of the municipal and justice courts, and the other to hear and decide everything else. Although each district judge would be empowered to hear any case within the jurisdiction of the court, i.e., any case, the proposal has been criticized because it bears too close a resemblance to the present two-tier system that SCA 3 would abolish.

The attached draft suggests a variation that, hopefully, will meet these objections. It would categorize cases, rather than the court or its judges. There would be two categories; anything not assigned to the second (corresponding generally to cases now within the authority of the special jurisdiction courts) would fall within the first (corresponding to the authority of the general jurisdiction courts). Assignment to a category would be made by the Legislature and the Judicial Council. Which cases are assigned to a particular judge would be a function of the assignment system of the trial court, as it is now. But every judge would be empowered to hear any matter.

These general observations having been made, I pass to specific commentary about particular provisions, beginning with Section 10.

a. Section 10.

This section must be revised to accommodate the problem of prerogative writ review; otherwise, the district courts would be unable to issue writs directed to the handling of what are now justice and municipal court matters.

The first paragraph of the proposed amendment of this section would give the Supreme Court and courts of appeal the same writ jurisdiction they now have, but allow the district courts (presumably through appellate departments) to issue prerogative writs in Category Two matters. (It is a departure to have one department of a court issue a writ to another department of the same court; traditionally, any writs directed to a court issues from a court of higher authority. But aside from the traditional nature of these writs, no reason appears why the Constitution cannot authorize the Legislature to empower appellate departments of the district courts to issue writs commanding or prohibiting action by a judge hearing a Category Two case.) Writs of mandate (C.C.P., § 1085) and

administrative ("certiorarified") mandamus (C.C.P., § 1094.5) would be handled as at present, presumably as Category One causes.

The second paragraph updates the present second paragraph of Section 10, and refers to Section 11 for assignment of cases into categories.

The final paragraph is taken from the present provision without change.

b. Section 11.

-Subsection (a). The first sentence is taken from the present provision without change. The second sentence specifies that all non-death penalty appellate jurisdiction is governed by the provisions of the Section.

-Subsection (b). The first sentence provides for the division of causes into categories.

The second sentence provides for allocation and reallocation of classes of causes into categories. (The term "cause" follows the present nomenclature of the section. "Classes of causes" is used to make it clear that assignment of a particular case to a category is not permitted.)

The second sentence reflects the fact that the Legislature is presently authorized to assign classes of causes to the municipal and justice courts, and that it has done so. We anticipate that one of the implementing statutes to be enacted in a form double-joined to the proposed constitutional provision would categorize matters now within the jurisdiction of the justice and municipal courts to Category Two, and providing that the procedures applicable to those causes under present law will continue to apply. (For example, the limited discovery and motion provisions of the Economic Litigation Program, C.C.P., § 90, would continue to apply.) Nevertheless, the practical restrictions that inhibit changes in the jurisdictional boundary between the special and general jurisdiction courts are likely to be reduced in the context of a single-level unified court. Since those changes have a substantial effect on the volume and nature of appellate review and the allocation of resources to service that review, we recommend that assignments be made by the Legislature (acting through statute) and the Judicial Council. Some concern was expressed about inclusion of the Judicial Council in this

process, but it was considered that concurrence of the Council and the Legislature is appropriate in this instance.[2/]

The third sentence of the subsection recognizes the "special jurisdiction" origin of Category Two causes. It provides that causes are deemed to be in Category One until and unless assigned to Category Two.

Our original draft had included a final sentence in the subsection, specifying that until other provision is made, all classes of causes within the jurisdiction of the municipal and justice courts on January 1, 1994 shall be deemed to be assigned to Category Two, and all others to Category One. This transitional provision was deleted as inappropriate for the Constitution. Instead, we propose that the substance of the provision be accomplished by statute, the effectiveness of which would be dependent upon approval of the constitutional amendment. (S.B. 15 is such a provision.)

-Subsection (c). This provision and Subsection (d) allocate appellate jurisdiction. Appellate review of Category One causes would be in the courts of appeal, exactly as such review of superior court cases is vested now. Special provision must be made for cases in which causes within each category are joined in the same lawsuit, much as a misdemeanor and a felony may now be charged in the same proceeding, or a contract cause of action in which the amount in controversy is below the jurisdiction of the superior court is joined with an open-ended tort cause of action, or with a cross-complaint that is outside the limits of special court jurisdiction. In such cases, the appeal is heard by the court of appeal, and we resolve the issue in the same way. The final clause, giving courts of appeal jurisdiction over other causes as prescribed by statute, follows the present provision.

-Subsection (d). This provision allocates appellate jurisdiction to district courts. It is expected that the present appellate department system will be continued by statute as it is now. (See C.C.P., § 77.) The text reflects present law which provides a constitutional right of appeal from the superior court, and from municipal and justice courts

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[2/] Justice Timlin disagrees with this recommendation. He would leave the authority to assign classes of causes to categories to the Legislature alone.

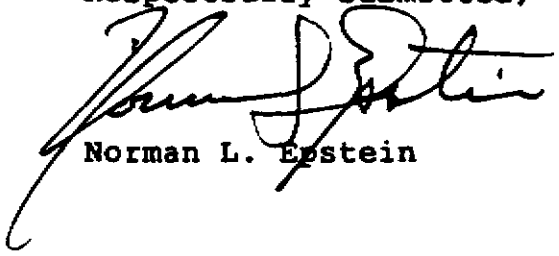
(Category Two causes) by statute.

-Subsection (e). This subsection repeats the present provision without change.

(I have attached three annexes to this report. The first is of Sections 10 and 11 as proposed by the committee; the second is of these sections as they are at present; and the third shows the changes by strikeout and underscore.)

Finally, I would like to express my personal gratitude to the members of the Committee, to you, and to the many others who have assisted us in the undertaking of our task. We are dealing with matters of great significance to our justice system, and it is important that all of us act with due deliberation and the benefit of full advice. We hope that the end result will be one that is worthy of our legislative process and of the people of California.

Respectfully submitted,



Norman L. Epstein

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Attachments

PROPOSED PROVISIONS

Section 10. The Supreme Court, courts of appeal, district courts, and their judges have original jurisdiction in habeas corpus proceedings. The Supreme Court, courts of appeal, and their judges also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The district courts and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari and prohibition, except review of court proceedings in Category One causes.

District courts have original jurisdiction in all causes. All causes shall be assigned to Category One or Category Two, as provided in Section 11.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 11. (a). The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal and district courts have appellate jurisdiction as provided in this section.

(b). All causes in the district courts are within Category One or Category Two. Assignment of classes of causes to either of these categories shall be approved by both the Legislature and the Judicial Council. Any cause not assigned to Category Two shall be deemed to be assigned to Category One.

(c). Courts of appeal have appellate jurisdiction in Category One causes, cases in which one or more causes within Category One is joined in the same proceeding with one or more causes within Category Two, and in other causes prescribed by statute.

(d). District courts have appellate jurisdiction in Category Two causes prescribed by statute that arise within their territorial jurisdiction.

(e). The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

PRESENT PROVISIONS

Section 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Superior Courts have original jurisdiction in all causes except those given by statute to other trial courts.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

PROPOSED AND PRESENT PROVISIONS COMPARED

(New language shown by underscore, deleted language by strikeout.)

Section 10. The Supreme Court, courts of appeal, ~~superior~~ district courts, and their judges have original jurisdiction in habeas corpus proceedings. ~~Those courts~~ The Supreme Court, courts of appeal, and their judges also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The district courts and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari and prohibition, except review of court proceedings in Category One causes.

~~Superior~~ District courts have original jurisdiction in all causes ~~except those given by statute to other courts~~. All causes shall be assigned to Category One or Category Two as provided in Section 11.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 11. (a). The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal and district courts have appellate jurisdiction ~~when superior courts have original jurisdiction and in other causes prescribed by~~ as provided in this section.

(b). All causes in the district courts are within Category One or Category Two. Assignment of classes of causes to either of these categories shall be approved by both the Legislature and the Judicial Council. Any cause not assigned to Category Two shall be deemed to be assigned to Category One.

(c). Courts of appeal have appellate jurisdiction in Category One causes, cases in which one or more causes within Category One is joined in the same proceeding with one or more causes within Category Two, and in other causes prescribed by statute.

(d). ~~Superior~~ District courts have appellate jurisdiction in Category Two causes prescribed by statute that arise in

municipal and justice courts in within their counties territorial jurisdictions.

(e). The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

E. APPELLATE PROCEDURES

One of the more controversial questions involved in trial court unification is that of appeals from cases which formerly arose in the lower courts and which, after unification, would be brought in the unified superior court.

(a) The Commission recommends that there be no appellate department in the unified superior court.

Appellate departments exist in many of California's courts today to hear appeals emanating from the justice and municipal courts. But the general philosophy of appeals, that appeals are taken vertically to an "upper" court, appears to raise strong objections to the creation of an appellate department in the unified superior court to "horizontally" review matters previously determined by other superior court judges.

(b) The Commission recommends that appeals from misdemeanors and all civil appeals, regardless of the amount in controversy, be taken to the courts of appeal.

The most logical alternative to maintaining superior court appellate departments is to take all allowable appeals from the unified superior court to the courts of appeal. In a unified trial court system, there is no justification whatever to maintain a jurisdictional distinction, for purposes of appeal, in civil cases based on the amount in controversy. Such a figure, wherever placed, is arbitrary and the issues involved

are not usually dependent upon the amount prayed for by the plaintiff. Thus, all civil cases should be appealable to the courts of appeal.

Misdemeanors, too, should be appealable to the courts of appeal, again on the basis that appeals should be taken to an "upper" court.

The exact number of extra cases this would send to the courts of appeal is not known at this time, but it would be substantial. In order, therefore, for the added caseload to be handled without the necessity of adding new justices to the courts of appeal, the requirement that all appellate decisions of the courts of appeal be in writing should be discontinued.

(c) The Commission recommends that decisions of the courts of appeal not be required to be in writing, but that written opinions be discretionary with the court.

Article VI, §14, of the California Constitution presently requires the courts of appeal to issue written opinions in all cases. This would place a serious burden on the courts of appeal if all appeals were taken there and should therefore be eliminated. The Commission's recommendation in this regard is neither original nor revolutionary. The English criminal appeal system, for example, does not require written opinions, with marked success.[42] Similarly, local rules for the federal circuit

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[42]See Karlen, Appellate Courts in the United States and England, N.Y.U. Press (1963), pp. 152-154.

courts in the District of Columbia,[43] First,[44] Fifth,[45] Eighth,[46] and Tenth[47] Circuits also now provide for affirmances without opinion. Additionally, only 12 states have a constitutional requirement for written appellate opinions.[48] It should be remembered that written opinions are not required today for appeals at the superior court level and, as there, although opinions in many appeals would be unnecessary, a written opinion could still be issued by the court, at its discretion. Therefore, the recommendation makes no change with respect to appeals of matters which presently originate in the lower courts.[49]

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[43] D.C. Cir. R. 13(c). The only guidance given in the rule regarding the appropriateness of a decision without opinion is that there is "no need" for an opinion.

[44] 1st. Cir. R. 14. If no new points of law are believed to be involved.

[45] 5th Cir. R. 21.

[46] 8th Cir. R. 21.

[47] 10th Cir. R. 17.

[48] Arizona, California, Louisiana, Michigan, Missouri, Ohio, Oregon, South Carolina, Utah, Virginia, Washington and West Virginia.

[49] The Commission recognized that, notwithstanding the experience of the several federal circuits in this regard, the recommendation might be strongly opposed and politically difficult to accomplish. As an alternative, but expressly stated by the Commission to be the less desirable of the two, the Commission would recommend that the written opinion requirement be eliminated in misdemeanor cases only, which should not generate a great deal of controversy as appeals of such cases today do not necessarily involve written opinions.

(d) The Commission recommends that decisions of the unified trial court in cases solely involving traffic infractions should not be appealable.

On the same rationale by which the California Legislature established the category of infractions for minor traffic offenses (and eliminated the rights to a jury trial and appointed counsel in such cases), decisions of the trial court in cases relating solely to this category should not be appealable. The controversies here in question cannot result in loss of life or liberty, nor even in a fine of more than $250 (and that only on a third or subsequent conviction within a 12-month period), nor give rise to any disability or legal disadvantage based on conviction of a criminal offense. Nor does any moral obloquy attach to such offenses, which are by their nature mala prohibita and not mala in se. The fact that these are truly "petty offenses" leads to a conclusion that early termination of proceedings and a finality of the trial court's judgment is desirable.

Replacing appeals in these cases, however, would be the writ procedures presently available to review other unappealable orders. The granting of a writ, of course, is discretionary with the reviewing court, but this procedure should actually provide, in a unified trial court system, greater protection to a defendant from improper actions of the trial court, if any, as

the proceedings of the unified court are of record and, with the transcript before it, the court of appeal should be better able to ascertain error than can the superior courts today, which review such cases on appeal from the lower courts without a transcript. The contemplated procedure should be more than sufficient to protect the defendant in such cases.

(e) The Commission recommends that decisions of the Small Claims Court should not be appealable.

Under the existing system, only the defendant in a small claims action has the right to appeal an adverse judgment. This procedure was established to preserve the rights granted under the California Constitution to a trial by jury and to be represented by counsel. The plaintiff, by choosing the forum, waives these rights and the judgment is conclusive as against the plaintiff. An appeal by the defendant results in a trial de novo in the superior court, and the matter ends there--no further appeal is available.[50]

The Commission has recommended that, upon the filing of a small claims action by the plaintiff, the defendant be allowed to remove the matter to the regular calendar of the court by exercising one of the constitutional rights not available under small claims procedure, the preservation of which is the only reason for allowing an appeal by trial de novo under the current system. If the defendant fails to remove the matter

[50]See Section 117j and Chapter 1 (commencing with Section 901) of Title 13 of Part 2 of the California Code of Civil Procedure.

from the Small Claims Court then, like for the plaintiff, there has been a waiver of the rights to jury trial and counsel and the matter can (and would) be conclusive on both parties. The appropriate form for such removal, to insure good faith on the part of the defendant, would be to file a request for counsel, accompanied by the appearance of counsel, or for a jury trial, accompanied by a deposit of one day's jury fees, since either form of request involves an attempted exercise of the otherwise unavailable right.

The comments made in the preceding discussion on traffic infractions about the availability of writ proceedings for review in cases which really require review are equally applicable here, including the greater ability on review to make a proper determination due to the availability of a transcript. Today no determination of error is made; rather, as indicated, a trial do novo is had which results in two trials of these relatively minor matters and hence an extremely inefficient use of the court's time.

(5) The Commission recommends that all prerogative writs to a court or judge should emanate from the Supreme Court or the courts of appeal.

These courts already have original jurisdiction in these matters, concurrent with that of the superior courts. Stated most simply, writs directing or prohibiting an action, directed to a court or judge, should come from a higher level.

(g) The Commission recommends that no change be made in the manner by which and times for which motions pursuant to Sections 995 and 1538.5 of the Penal Code may be made.

Certain decisions in criminal proceedings may now be reviewed on motion made pursuant to Sections 995 or 1538.5 of the California Penal Code. Although these technically are not appeals (except with respect to misdemeanors, where an appeal may be taken under subdivision (j) of Section 1538.5), they should be mentioned here as they do involve a review of other judicial decisions and several commentators arguing against unification seem to assume that, in a unified system, these remedies must be repealed.

The Commission recommends not only that these remedies be retained but also that no change be made with respect to the motions which may be made under either of these sections. Such motions, as at present, would be heard before any judge of the superior court. This does amount to a "horizontal" review of the decision of another superior court judge but, on reflection, the Commission did not find this very different from the present review in these matters of the decision of another trial court, albeit a municipal or justice court, judge. The appeal procedure in Section 1538.5(j) for misdemeanors should be repealed, as such matters could be pursued by motion in the identical fashion as in felony cases.