First Supplement to Memorandum 93-60

Trial Court Unification: Appellate Jurisdiction (Kelso Proposal)

Attached to this memorandum is a proposal by Professor Clark Kelso for handling the problem of appellate jurisdiction in a unified trial court.

Under Professor Kelso's proposal, the trial court would not have an appellate division or any appellate jurisdiction. However, by court rule a three-judge panel could be convened within the trial court to rehear specified causes. "A rehearing could take the form either of a true rehearing including presentation of evidence (perhaps, for example, in small claims cases) or a rehearing on the basis of the record only (which would be much closer to an appeal)."

The advantage Professor Kelso sees in this concept is that it would avoid the concern of the trial court exercising appellate jurisdiction over itself. Review of decisions within the court would not be by appeal but only by a "rehearing" before a limited en banc panel.

Rehearing jurisdiction under this proposal would be determined by court rule. Professor Kelso suggests that this would not deprive the Legislature of its ultimate authority to determine what types of cases should be reviewed in the trial court and what the allocation of responsibility should be between the trial court and court of appeal. Under the Constitution court rules remain subject to statute.

As a final aspect of the Kelso proposal, matters subject to rehearing in the trial court would be removed from the court of appeal caseload, except that the courts of appeal would retain writ jurisdiction (certiorari) over those matters.

The staff believes this proposal addresses the main concerns that have been expressed about appellate jurisdiction in a unified court system. The staff is not sure that it really solves the peer review problem within the trial court—review and reversal among colleagues would occur whether in the form of an appeal or a rehearing.

As a technical matter, if we wish to provide that the Legislature retains ultimate authority over rehearing jurisdiction, we would need to do that directly. A specific provision that district court rehearing jurisdiction may be established by court rule under Section 11 would likely be construed to override the general

authority of the Judicial Council under Section 6 to provide rules of practice and procedure not inconsistent with statute.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Mr. Sterling:

I propose the following language regarding appellate jurisdiction:

> **Section 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction in all causes except that courts of appeal have jurisdiction to review by writ of certiorari causes in which the district court is authorized by rules of court to convene a three-judge panel to rehear the cause.**

This language addresses a number of problems inherent in the Judicial Council's proposal, in SCA 3 as presently drafted, and in most other proposals I have seen. First, many judges have properly expressed discomfort in having the district court exercise appellate jurisdiction over itself (even in the form of the appellate department). The proposal above more accurately describes the process as involving a rehearing by a limited en banc panel. A rehearing could take the form either of a true rehearing including presentation of evidence (perhaps, for example, in small claims cases) or a rehearing on the basis of the record only (which would be much closer to an appeal).

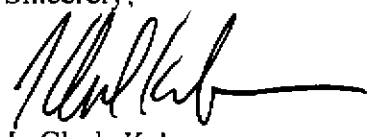
Second, expressly authorizing the courts of appeal to review three-judge panel decisions by writ of certiorari would clarify the jurisdictional relationship between the courts of appeal and the appellate department. It is particularly important in my view that the courts of appeal have the power--though not the mandatory obligation--to review decisions by the appellate department. Depriving courts of appeal of that power in effect creates a bifurcated intermediate appellate structure which is unnecessarily complex and introduces the risk of competition between those two appellate tribunals.

Third, because the decision whether to permit a three-judge panel for rehearing will be made by rules of court, the Judicial Council will have initial control over the choice between the courts of appeal and the appellate department, but since rules of court must be "not inconsistent with statute," the Legislature would have power to override the Council's rule. Thus, under this

proposal, both the Judiciary and the Legislature will be involved in allocating jurisdiction between the courts of appeal and appellate department.

I do not know what effect, if any, this proposal should have upon § 10 writ jurisdiction. Would a writ of mandate go to the three-judge panel or to the court of appeal? It seems to me that writ jurisdiction is a slightly different question than appellate jurisdiction, and I can well imagine a system in which writs of mandate against district judges would always be handled by the courts of appeal. After all, having one district judge issue a writ of mandate against a fellow judge does present some conceptual and practical difficulties.

Sincerely,



J. Clark Kelso
Professor of Law