Study J-1300 November 3, 1997

Memorandum 97-66

Trial Court Unification: Miscellaneous Issues

The comment period for the Law Revision Commission's four tentative recommendations on implementation of SCA 4 (Code of Civil Procedure, Government Code, Penal Code, and Miscellaneous Codes) ends on November 21, 1997. The following comments have already been submitted:

Some of the issues raised in these letters are likely to elicit further input and should be resolved only after the comment period closes (e.g., whether the appellate division may include judges from outside the county; whether there should be a municipal division of the unified superior court). This memorandum discusses the comments that can be productively considered in the interim, as well as miscellaneous points uncovered through staff research and analysis.

ISSUES RAISED IN COMMENTS

Precedential Value of Appellate Division Opinions

The State Bar Committee on Appellate Courts ("CAC") expresses concern that "the precedential value of the published opinions of the appellate departments of superior courts will be lost or eroded under SCA 4." (Exhibit p. 1.) Citing Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (1962), CAC explains that the doctrine of stare decisis requires tribunals exercising inferior jurisdiction to follow decisions of courts exercising superior jurisdiction. "Therefore, in our current system, the published opinions of appellate departments of superior courts are binding on all municipal courts." (Exhibit p. 2.) If, however, "all of the superior courts elected to unify, the opinions of appellate divisions would have no precedential effect, and there

would seem to be no sufficient reason to continue to publish them." (*Id.*) Thus, CAC "encourages the Commission to study and propose implementing legislation clarifying the precedential effect of published decisions of appellate departments and divisions of superior courts after SCA 4." (*Id.*)

CAC has identified an important set of issues. At present, the requirements for publication of a judicial decision are set forth in court rules, rather than codified. See Cal. Rules of Court 976-979. Similarly, the precedential value of judicial decisions is addressed in case law, not by statute. Although a decision of the appellate department seems to be binding on municipal courts as CAC asserts, that is not entirely beyond dispute. *Cf.* People v. Love, 111 Cal. App. 3d Supp. 1, 13, 168 Cal. Rptr. 591 (1980) ("This decision, as are all published and final opinions of this Appellate Department of the Los Angeles Superior Court, is binding on all municipal courts located within the County of Los Angeles.") *with* Worthington v. Unemployment Insurance Appeals Bd., 64 Cal. App. 3d 384, 389, 134 Cal. Rptr. 507 (1976) ("The department charged with administration of the Unemployment Insurance Code throughout the entire state was not obliged to follow the *Miller* decision of the superior court, even of its appellate department of a single county, but was free to accept the ruling of the Attorney General."); *see also* 9 B. Witkin, California Procedure *Appeal* § 939 (4th ed. 1997) ("The relatively few opinions ordered published by appellate department judges … are of debatable strength as precedents.") Instead of codifying whether a decision of the appellate division of a unified superior court is binding on judges of the court, it may be more appropriate to leave the matter to the development of case law and court rules.

Regardless of whether they have precedential effect, decisions of the appellate division of a unified superior court will have persuasive value. As Witkin comments, the persuasive value of appellate department decisions "has been constantly recognized," in part because "its opinions deal with some subjects that seldom reach the higher appellate courts." 9 B. Witkin, California Procedure *Appeal* § 939. "It is not surprising, therefore, to find these opinions freely cited by the Supreme Court and Courts of Appeal, as well as by appellate departments in other counties." *Id.* In light of this reliance, it seems unlikely that publication of appellate division decisions will cease following implementation of SCA 4, particularly because the standards for publication focus on a decision's potential for providing guidance, not on its precedential effect. See Cal. Rule of Court 976. Experience in the federal realm, where district court decisions are widely

published and cited despite a lack of precedential effect, provides further reassurance that appellate division decisions will remain broadly influential following trial court unification. Although legislation on the point seems unnecessary for now, it should be considered if a problem does develop.

Government Code Section 70210: Transitional Rules of Court

Proposed Government Code Section 70210 provides:

> 70210. The Judicial Council shall adopt rules of court not inconsistent with statute for:
>
> (a) The orderly conversion of proceedings pending in municipal courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after the date the municipal and superior courts in a county are unified.
>
> (b) Selection of persons to coordinate implementation activities for the unification of municipal courts with superior courts in a county, including:
>
> (1) Selection of a presiding judge for the unified superior court.
>
> (2) Selection of a court executive officer for the unified superior court.
>
> (3) Appointment of court committees or working groups to assist the presiding judge and court executive officer in implementing unification.
>
> (c) The authority of the presiding judge, in conjunction with the court executive officer and appropriate individuals or working groups of the unified superior court, to act on behalf of the court to implement unification.
>
> (d) Preparation and submission of a written personnel plan to the judges of a unified superior court for adoption.
>
> (e) Preparation of any necessary local court rules that shall, on the date the municipal and superior courts in a county are unified, be the rules of the unified superior court.
>
> (f) Other necessary activities to facilitate the transition to a unified superior court.
>
> **Comment.** Section 70210 mandates that the Judicial Council adopt rules of court to coordinate and guide the trial courts in effectively implementing trial court unification.
>
> ….
>
> Subdivision (e) provides for local rule adoption. As under current practice, the Judicial Council will determine which procedural issues shall be addressed by local rule and which by statewide rule.
>
> Examples of issues that may be addressed by rule of court under subdivision (f) include the development of informational

> programs for the public and the Bar about unification, and education and training programs for judicial officers and court staff to facilitate the effective transition to a unified court.

The Litigation Section of the State Bar recommends that the word "necessary" in subdivisions (e) and (f) "be deleted or defined." (Exhibit p. 6.) It asks: "If the Judicial Council adopts a rule regarding 'necessary' local rules or 'necessary' activities, is the validity of the rule adopted by the Judicial Council subject to challenge because it is not 'necessary?'" (Exhibit pp. 6-7.)

The word "necessary" was included in Section 70210(e) and (f) to make clear that the Judicial Council does not have carte blanche authority to undertake sweeping reforms, just authority to do what is needed to implement trial court unification. The following may be a clearer way of limiting the Judicial Council's authority to implementation of trial court unification:

> (e) Preparation of ~~any necessary~~ local court rules ~~that~~ to facilitate the orderly conversion of proceedings pending in municipal courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after the date the municipal and superior courts in a county are unified. These rules shall, on the date the municipal and superior courts in a county are unified, be the rules of the unified superior court.
>
> (f) Other ~~necessary~~ activities to facilitate the transition to a unified superior court.

The staff proposes to incorporate these revisions in the next draft of the implementing legislation.

The Litigation Section also recommends that "any rules or activities approved or adopted under proposed Section 70210(e) and (f) be required to be uniform." (Exhibit p. 7.) It explains:

> Inconsistent local transitional rules will be the bane of practitioners and parties. Consistent with Rule of Court 302, local rules should conform with state Rules of Court, and no extra requirements should be permitted. This should be the law anyway, but an explicit requirement will be necessary if the transitional provisions become law to minimize the risks of confusion and errors during implementation of the changes.

(Exhibit p. 7.)

Because there may be a need for flexibility in facilitating unification of courts in different counties facing differing circumstances, it may be impractical to codify a requirement that local rules and other activities facilitating unification be uniform. Even county-specific implementing legislation will be necessary in most if not all instances. See page 9, *infra*. It would, however, be appropriate to modify the Comment to Section 70210 to recognize uniformity as a goal:

> **Comment.** Section 70210 mandates that the Judicial Council adopt rules of court to coordinate and guide the trial courts in effectively implementing trial court unification. In taking such steps, the Judicial Council should strive for statewide uniformity.
>
> Subdivision (a) ….

Finally, the Litigation Section recommends revising the introductory clause of Section 70210 to state that the "Judicial Council shall adopt rules of court not inconsistent with statute or the Constitution …." (Exhibit p. 6.) "Although it would seem obvious that a rule of court should not conflict with the state Constitution, that should be explicit in the authorizing legislation." (*Id.*)

The current wording ("not inconsistent with statute") is standard drafting practice, based on the principle that the Constitution overrides other state sources of law and thus takes care of itself. While the Litigation Section correctly stresses the importance of the Constitution, the Judicial Council is aware of the constitutional limitations. It seems unnecessary to deviate from the standard practice in this instance. The Commission could, however, add the following sentence to the end of the first paragraph of the Comment: "Any actions taken pursuant to Section 70210 must be consistent with the Constitution."

Government Code § 70211

Commenting on a now superseded version, the Litigation Section states that it "agree[s] with the concepts" in proposed Government Code Section 70211, which currently provides:

> 70211. When the municipal and superior courts in a county are unified:
>
> (a) The judgeships in each municipal court in that county are abolished and the previously selected municipal court judges become judges of the superior court in that county. Until revised by statute, the total number of judgeships in the unified superior court shall equal the previously authorized number of judgeships in the municipal court and superior court combined.

(b) The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court.

(c) The 10-year membership or service requirement of Section 15 of Article VI of the California Constitution does not apply to a previously selected municipal court judge.

Comment. Section 70211 restates the first three sentences of Constitution Article VI, Section 23(b), with the addition in subdivision (a) of a provision maintaining the total number of judgeships in the county. The Legislature prescribes the number of judges. Cal. Const. art. VI, §§ 4, 5.

The references in this section to a "previously selected" judge includes selection by election or by appointment to fill a vacancy. *Cf. Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 82 (1994) (Article VI, § 23(b) Comment).

The Litigation Section suggests that the phrase "previously selected" be "moved from the second paragraph of the Comment to the text of the statute, itself." (*Id.*) As the current version of Section 70211 reflects, that change has already been made.

The Litigation Section also recommends that the phrase "previously authorized" be defined in the statute. (*Id.*) That could be accomplished through a simple revision of subdivision (a):

70211. When the municipal and superior courts in a county are unified:

(a) The judgeships in each municipal court in that county are abolished and the previously selected municipal court judges become judges of the superior court in that county. Until revised by statute, the total number of judgeships in the unified superior court shall equal the ~~previously authorized~~ number of judgeships previously authorized by statute in the municipal court and superior court combined.

The staff recommends making this clarification.

References to the Small Claims Court

The Commission's tentative recommendations systematically change statutory references from the small claims "court" to the small claims "division." The Litigation Section "respectfully oppose[s] the decision to recommend that

references to the 'small claims court' be changed to 'small claims division' in the implementing legislation for SCA 4." (Exhibit p. 12.) It explains:

> Although we agree that the phrase "small claims court" is technically incorrect, the phrase is not merely colloquially acceptable. Many citizens resort to the small claims court to get their proverbial "day in court." If the small claims court is renamed a "division," the change may be semantically correct, but it will have a different impact on unsophisticated members of the public who utilize small claims proceedings.

(*Id.* at 12-13.)

Unquestionably, citizens should feel that they have their "day in court." If the name "small claims court" helps provide such assurance, that alone may be sufficient reason for retaining the name, despite its technical inaccuracy.

There are, however, additional reasons for not changing small claims "court" to small claims "division," which have become increasingly clear to the staff in working on this study. The number of statutory references to "small claims court" is substantial, as reflected in the tentative recommendations. (See in particular pages 74-89 of the tentative recommendation on the Code of Civil Procedure.) This adds considerably to the mass of statutes we have to deal with on an urgent basis. That volume would be even greater if, consistent with our current approach, we also converted references to the juvenile "court" and family conciliation "court."

Every increase in the volume of implementing legislation enhances the potential for technical (not to mention substantive) difficulties in the legislative process. For example, at least two references to the "small claims court" were overlooked in preparing the tentative recommendations. (See Exhibit p. 30.) Revisions such as these could easily be incorporated into the Commission's final recommendation, but such changes become much more complicated once a bill is introduced and must be formally amended. Given the potential for delay and the importance of having implementing legislation in place before the vote on SCA 4, the staff urges the Commission to streamline its recommendation by omitting the corrections of small claims "court." The matter could still be listed as a topic that may be appropriate for future study.

Trial Setting Preferences

The Litigation Section urges the Commission to consider the question of priority in trial setting. (Exhibit pp. 15-16.) The staff agrees that trial court unification poses new trial setting scenarios, which should be considered. The Judicial Council is in the process of providing input on this matter. Once that input arrives, the staff will prepare a supplement analyzing the issue of trial setting preferences.

Other Issues

In addition to the points discussed above, the letter from the Litigation Section includes some technical suggestions that were helpful to the staff in preparing the tentative recommendations. (Exhibit pp. 4-5 (appeals involving retrials), 6 (Gov't Code § 70210), 10 (appeals involving retrials; Code Civ. Proc. § 77(g)), 11 (Code Civ. Proc. § 86(a)(10)(A)), 13 (Code Civ. Proc. § 116.760).) Attorney Paul Crane's comments on a number of details were also useful in finalizing the tentative recommendations. (Exhibit pp. 18-19 (points ## 1, 2, 4, 5.) The Commission is fortunate to be receiving careful input from these sources.

Because of their importance and their potential for controversy, the following issues in the attached comments will not be analyzed and discussed until after the comment period ends:

• The comments of CAC (Exhibit p. 1) and the Litigation Section (Exhibit pp. 8-10) on the structure and functioning of the appellate division.

• Paul Crane's comments on divisions of the superior court. (Exhibit pp. 18-19 (points 3, 6).)

• The Litigation Section's comments on differentiating among civil causes and cataloguing causes like those now brought in municipal court. (Exhibit pp. 10-11.)

• The Litigation Section's comments on the procedure for stating the classification of a civil case and for challenging the classification of a civil case. (Exhibit pp. 14-15.)

The remaining points in the attached letters are either matters that were considered at the Commission's September meeting, comments that are obsolete

because there will be no stopgap measure, or expressions of support for positions incorporated into the tentative recommendations.

ISSUES IDENTIFIED THROUGH STAFF RESEARCH AND ANALYSIS

County-specific Statutes

There are many statutes, especially in the Government Code, that relate to the individual municipal courts or municipal court districts in a particular county. As a general rule, the tentative recommendations only revise statutes concerning the courts generally and do not deal with the special statutes for individual counties. Therefore, the Commission should add a caveat along the following lines to its recommendation:

> This recommendation proposes only revisions of the laws of the state relating to the courts generally. It does not propose revisions of the special statutes relating to the courts in a particular county. If the courts in a particular county elect to unify, the codes should be reviewed at that time to determine whether the special statutes relating to the courts in that county should be revised or repealed.

Such a caveat would alert interested persons to the potential need for county-specific implementing legislation.

The staff also recommends adding a provision along the following lines to the proposed legislation:

> **Gov't Code § 70215 (added). County-specific legislation**
>
> 70215. Upon unification of the municipal and superior courts in a county, any statutes specifically relating to that county that are inconsistent with unification of the municipal and superior courts are to that extent impliedly amended or repealed.
>
> **Comment.** Section 70215 is added to accommodate prompt unification of the municipal and superior courts in a county where approved by a majority of the judges of those courts. Cal. Const. art. VI, § 5(e). If the courts in a particular county elect to unify, the codes should be reviewed at that time to determine whether special statutes relating to the courts in that county should be revised or repealed. Section 70215 provides guidance pending enactment of such legislation.

This would facilitate prompt unification in counties where the judges intend to unify as soon as possible after the vote on SCA 4.

Judicial District

To aid in implementing SCA 4, the Commission has proposed a provision on the meaning of statutory references to judicial districts. That provision should be revised as follows:

> **Code Civ. Proc . § 38 (added). Judicial districts**
>
> 38. Unless the provision or context otherwise requires, a reference in a statute to a judicial district means:
>
> (a) As it relates to a court of appeal, the court of appeal district.
>
> (b) As it relates to a superior court, the county.
>
> (c) As it relates to a municipal court, the municipal court district.
>
> (d) As it relates to a county in which there is no municipal court, the county.
>
> **Comment.** Section 38 is intended for drafting convenience. Court of appeal districts and municipal court districts are constitutionally mandated. See Cal. Const. art. VI, §§ 3, 5. Superior court districts do not exist except in Los Angeles County. See Gov't Code §§ 69640-69650.
>
> By operation of this section, in a county in which the superior and municipal courts have unified, a statutory reference to a judicial district means the county rather than a former municipal court district. This general rule is subject to exceptions. See, e.g., Gov't Code § 71042.5 (preservation of judicial districts for purpose of publication).

Proposed subdivision (d) is needed for statutory references to judicial districts where there is no direct link to a court. See, e.g., Penal Code § 597f(a) (owner of neglected animal in judicial district is guilty of misdemeanor). If Section 38 were revised as shown, the amendments of Penal Code Sections 597f and 599 could be deleted from the tentative recommendations. The "judicial district" revision in the amendment of Penal Code Section 4022 could also be eliminated, but the remainder of that amendment should be retained.

Judicial Arbitration

The Commission's proposed revisions of the judicial arbitration statute would change a reference to the small claims division and eliminate a reference to an obsolete pilot program. A more significant issue is whether mandatory arbitration should be extended to superior courts enlarged (in number of judges) by unification. Also, since unified superior courts will have jurisdiction over limited cases, it is necessary to resolve whether mandatory arbitration should apply to limited cases in those courts.

If we are to be consistent in our approach of trying to preserve parallel treatment of cases in unified and nonunified counties, we should adjust the mandatory arbitration provision along the following lines:

Code Civ. Proc. § 1141.11 (amended). Arbitration of at-issue civil actions

SEC. ____. Section 1141.11 of the Code of Civil Procedure is amended to read:

1141.1. (a) In each superior court with 10 or more judges, or 20 or more judges in a county in which there is no municipal court, all at-issue civil actions pending on or filed after the operative date of this chapter, other than a limited case, shall be submitted to arbitration, by the presiding judge or the judge designated, under this chapter if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff, which decision shall not be appealable.

(b) In each superior court with less than 10 judges, or fewer than 20 judges in a county in which there is no municipal court, the court may provide by local rule, when it determines that it is in the best interests of justice, that all at-issue civil actions pending on or filed after the operative date of this chapter, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff, which decision shall not be appealable.

(c) ~~In each municipal court district, the municipal court district~~ Each municipal court, or superior court in a county in which there is no municipal court, may provide by local rule, when it is determined to be in the best interests of justice, that all at-issue ~~civil actions~~ limited cases pending on or filed after the operative date of this chapter ~~in such judicial district~~, shall be submitted to arbitration by the presiding judge or the judge designated under this chapter. This section does not apply to any action in the small claims ~~court~~ division, or to any action maintained pursuant to Section 1781 of the Civil Code or Section 1161 of this code.

(d) In each ~~municipal~~ court which has adopted judicial arbitration pursuant to subdivision (c), all ~~civil actions~~ limited cases pending on or after July 1, 1990, which involve a claim for money damages against a single defendant as a result of a motor vehicle collision, except those heard in the small claims division, shall be submitted to arbitration within 120 days of the filing of the defendant's answer to the complaint (except as may be extended by the court for good cause) before an arbitrator selected by the court, subject to disqualification for cause as specified in Sections 170.1 and 170.6.

The court may provide by local rule for the voluntary or mandatory use of case questionnaires, established under Section 93, in any proceeding subject to these provisions. Where local rules provide for the use of case questionnaires, the questionnaires shall be exchanged by the parties upon the defendant's answer and completed and returned within 60 days.

For the purposes of this subdivision, the term "single defendant" means (1) an individual defendant, whether a person or an entity, (2) two or more persons covered by the same insurance policy applicable to the motor vehicle collision, or (3) two or more persons residing in the same household when no insurance policy exists that is applicable to the motor vehicle collision. The naming of one or more cross-defendants, not a plaintiff, shall constitute a multiple-defendant case not subject to the provisions of this subdivision.

~~(e) The provisions of this chapter shall not apply to those actions filed in a superior or municipal court which has been selected pursuant to Section 1823.1 and is participating in a pilot project pursuant to Title 1 (commencing with Section 1823) of Part 3.5; provided, however, that any superior or municipal court may provide by local rule that the provisions of this chapter shall apply to actions pending on or filed after July 1, 1979. Any action filed in such court after the conclusion of the pilot project shall be subject to the provisions of this chapter.~~

~~(f)~~ (e) No local rule of a superior court providing for judicial arbitration may dispense with the conference required pursuant to Section 1141.16.

Comment. Section 1141.11 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). *Cf.* Section 85 & Comment (limited cases).

Subdivision (c) is also amended to refer more precisely to the small claims division. See Section 116.210 & Comment. Former subdivision (e) is deleted as obsolete.

In determining precisely how to draft this amendment, it would be helpful to have input on whether a "superior court with 10 or more judges" is comparable to a court with "20 or more judges in a county in which there is no municipal court."

Court Reporters

Government Code Section 72195 limits court reporter fees in contested municipal court cases to $55 per day:

72195. Sections 69942 to 69955, inclusive, of this code and Section 273 of the Code of Civil Procedure are hereby made applicable to the qualifications, duties, official oath, certification of transcripts, fees, and notes of official reporters of municipal courts, except that the fee for reporting testimony and proceedings in contested cases, except for official reporters of municipal courts where a statute provides otherwise, is fifty-five dollars ($55) a day, or any fractional part thereof.

A $55 basic fee also applies in superior court, but it is subject to extensive exceptions:

Gov't Code § 69948. Superior court reporters

69948. (a) The fee for reporting testimony and proceedings in contested cases is fifty-five dollars ($55) a day, or any fractional part thereof.

(b) In San Joaquin County, the compensation for superior court reporters shall be that prescribed by Section 69993.

(c) In Madera County, the board of supervisors may, by ordinance or resolution, prescribe a higher rate of compensation for superior court reporters.

(d) In Kings County, the fee for reporting testimony and proceedings in contested cases is one hundred forty dollars ($140) a day, or any fractional part thereof.

(e) In Mariposa County, the board of supervisors may, by ordinance or resolution, prescribe the rate of compensation for superior court reporters.

(f) In Siskiyou County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(g) In Yuba County, the board of supervisors may, by ordinance or resolution, prescribe a higher rate of compensation for superior court reporters.

(h) In Butte County, pro tempore reporters shall receive a fee of seventy-five dollars ($75) a day, or any fractional part thereof, for reporting testimony and proceedings in contested cases.

(i) In Sutter County, except as may otherwise be provided in Sections 70045.11 and 74839, the fee for reporting testimony and proceedings in contested cases is one hundred ten dollars ($110) per day, or any fractional part thereof. However, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(j) In Napa County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(k) In Tehama County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(l) In Monterey County, the fee for reporting testimony and proceedings in contested cases in any court is seventy-five dollars ($75) a day or any fractional part thereof.

(m) In Nevada County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(n) In Calaveras County, the fee for reporting testimony and proceedings in contested cases is seventy-five dollars ($75) per day, or any fractional part thereof. However, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(o) In Placer County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(p) In Sierra County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(q) In Trinity County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(r) In Humboldt County, the fee for reporting testimony and proceedings in contested cases is seventy-five dollars ($75) per day, or any fractional part thereof.

(s) In Del Norte County, the fee for reporting testimony and proceedings in contested cases is seventy-five dollars ($75) per day, or any fractional part thereof.

(t) In Alpine County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(u) In Glenn County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(v) In Colusa County, the fee for reporting testimony and proceedings in contested cases is one hundred twenty-five dollars ($125) per day, or any fractional part thereof.

(w) In Shasta County, the board of supervisors may prescribe a higher rate of compensation for superior court reporters.

(x) In Solano County, the fee for reporting testimony and proceedings in contested cases is ninety dollars ($90) per day, or fifty-five dollars ($55) per half day or fractional part thereof. However, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(y) In Inyo County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

(z) In Mono County, the board of supervisors may, by ordinance, prescribe a higher rate of compensation for superior court reporters.

Thus, unification of the courts will result in an increase in court reporter fees for limited cases, unless revisions are made to preserve the existing rates.

A provision along the following lines would be one means of preserving the existing municipal court reporter fee schedule for limited cases in a unified court:

Gov't Code § 69948.1 (added). Superior court reporter fees in limited cases

69948.1. Notwithstanding Section 69948 or any other statute, the fee for reporting testimony and proceedings in a contested limited case in a superior court, except for official reporters of a superior court where a statute provides otherwise for a limited case, is fifty-five dollars ($55) a day, or any fractional part thereof.

Comment. Section 69948.1 is added to preserve the effect of Section 72195 as applied in a county in which there is no municipal court.

If a provision along these lines were adopted, the statutes relating to court officers and employees in a county that elects to unify would have to be reviewed and any increased fees for municipal court reporters provided in those counties should be preserved by statute.

An alternative, and perhaps cleaner approach would be to amend existing Section 72195 and all express statutes that set municipal court reporter fees, so that they refer instead to fees in limited cases. For example, Section 72195 could be amended to read:

Gov't Code § 72195 (amended). Court reporter fees in limited cases

72195. Sections 69942 to 69955, inclusive, of this code and Section 273 of the Code of Civil Procedure are hereby made applicable to the qualifications, duties, official oath, certification of transcripts, fees, and notes of official reporters ~~of municipal courts~~ in limited cases, except that the fee for reporting testimony and proceedings in contested cases, except ~~for official reporters of municipal courts~~ where a statute provides otherwise for an official reporter in a limited case, is fifty-five dollars ($55) a day, or any fractional part thereof.

> **Comment.** Section 72195 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). For statutes providing different fees for an official reporter in a limited case, see Sections [to be provided].
>
> ☞ **Staff Note**. If this approach is taken, Section 69948 must be prefaced by the words, "Except as provided in Section 72195".

Statutes such as this would then be applicable regardless of whether the courts in a county unify. There are some organizational issues, because the statutes are currently located in portions of the Government Code relating to municipal courts. But presumably the statutes relating to a municipal court in any particular county would be dealt with appropriately at the time the courts in that county elect to unify.

Transitional Issues

Suppose a statute provides for remand of a case to, or other action by, a court that originally had jurisdiction of a case, but that court no longer exists due to unification. For example, consider Penal Code Section 851.8(c):

> In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, **the defendant may, at any time after dismissal of the action, petition the court which dismissed the action** for a finding that the defendant is factually innocent of the charges for which the arrest was made. A copy of such petition shall be served on the district attorney of the county in which the accusatory pleading was filed at least 10 days prior to the hearing on the petitioner's factual innocence. The district attorney may present evidence to the court at such hearing. Such hearing shall be conducted as provided in subdivision (b). If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b).

Our general transitional provisions for unification do not quite deal with this situation, although they come close. See, e.g., proposed Gov't Code §§ 70210(a) (rules of court for conversion of municipal court proceedings pending at the time of unification), 70212(d) (procedures applicable to pending municipal court proceedings). There is a catch-all safety net in proposed Government Code Section 70213(b):

> The Judicial Council may adopt rules resolving any problem that may arise in the conversion of statutory references from the

municipal court to the superior court in a county in which the municipal and superior courts become unified.

The staff recommends, however, that the Commission address known transitional problems directly rather than relying on this safety net.

The problem of remand to a superseded court was addressed in similar circumstances under the Municipal and Justice Court Act of 1949, which the Commission is proposing to amend:

> **Gov't Code § 71003 (amended). Powers of municipal court judge**
>
> SEC. ____. Section 71003 of the Government Code is amended to read:
>
> 71003. The municipal court ~~and the justice court~~ and each judge of the court has all the powers and shall perform all of the acts which were by law conferred upon or required of any court superseded by such municipal ~~or justice~~ court and any judge ~~or justice~~ of such superseded court, and all such laws not inconsistent with the Municipal and Justice Court Act of 1949, or the provisions of law succeeding that act, apply to any such municipal ~~and justice~~ court and to each judge of such court.
>
> **Comment.** Section 71003 is amended to reflect elimination of the justice court. Cal. Const. art. VI, §§ 1, 5(b).

Such a provision could easily be adapted for unification of the municipal and superior courts in a county:

> **Gov't Code § ____ (amended). Powers of municipal court judge**
>
> ____. In a county in which the municipal and superior courts become unified, the superior court and each judge of the superior court has all the powers and shall perform all of the acts that were by law conferred on or required of any court superseded by the superior court and any judge of the superseded court, and all the laws not inconsistent with the statutes governing unification of the municipal and superior courts, apply to the superior court and to each judge of the court.
>
> **Comment.** Section ____ is drawn from Section 71003 (powers of municipal court judge). Under this provision, if a statute provides for remand to or other proceedings in, or before a judge of, a municipal court that no longer exists as a result of the unification of the municipal and superior courts in a county, the proceedings are in the superior court in the county.

If the Commission approves this approach, the staff will explore precisely where to place the proposed provision.

Criminal Appeals

Penal Code Section 1466(b) currently is located among the statutes dealing with appeals from the municipal court. It provides that appeals from the municipal court in a felony case are to the court of appeal, rather than to the appellate department of the superior court. Since the Commission is reorganizing the Penal Code statutes to deal with appeals by type of case (felony or misdemeanor) rather than by type of court (superior or municipal), Section 1466(b) should be relocated among the statues dealing with felonies. Thus it would be deleted from Section 1466 and inserted in Section 1235:

Penal Code § 1466 (amended). Appeals

1466. ~~(a)~~ An appeal may be taken from a judgment or order ~~of an inferior court~~ in an infraction or misdemeanor case to the appellate division of the superior court of the county in which the ~~inferior~~ court from which the appeal is taken is located, in the following cases:

(1) By the people:

(A) From an order recusing the district attorney or city attorney pursuant to Section 1424.

(B) From an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(C) From a judgment for the defendant upon the sustaining of a demurrer.

(D) From an order granting a new trial.

(E) From an order arresting judgment.

(F) From any order made after judgment affecting the substantial rights of the people.

(2) By the defendant:

(A) From a final judgment of conviction. A sentence, an order granting probation, a conviction in a case in which before final judgment the defendant is committed for insanity or is given an indeterminate commitment as a mentally disordered sex offender, or the conviction of a defendant committed for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment or an order granting probation the court may review any order denying a motion for a new trial.

(B) From any order made after judgment affecting his or her substantial rights.

~~(b) An appeal from the judgment or appealable order of an inferior court in a felony case is to the court of appeal for the district in which the court is located.~~

Comment. Section 1466 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). *Cf.* Section 691 & Comment. Appeals in misdemeanor and infraction cases lie to the appellate division of the superior court. Appeals in felony cases lie to the court of appeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. See Section 1235 & Comment. *Cf.* Cal. Const. art. VI, § 11(a) (court of appeal has appellate jurisdiction when superior courts have original jurisdiction and in other causes provided by statute).

Criminal cases of which the juvenile court is given jurisdiction are governed by the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code. See Welf. & Inst. Code §§ 203 (juvenile court proceedings non-criminal), 245 (superior court jurisdiction), 602 (criminal law violation by minor subject to juvenile court jurisdiction), 603 (juvenile crimes not governed by general criminal law).

Penal Code § 1235 (amended). Appeal on questions of law

1235. (a) Either party to a ~~criminal action within the original trial jurisdiction of a superior court~~ felony case may appeal ~~from that court~~ on questions of law alone, as prescribed in this title and in rules adopted by the Judicial Council. The provisions of this title apply only to such appeals.

(b) An appeal from the judgment or an appealable order in a felony case is to the court of appeal for the district in which the court from which the appeal is taken is located.

Comment. Section 1235 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See also Section 691(f) ("felony case" defined).

Appeals in felony cases lie to the court of appeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) (court of appeal has appellate jurisdiction when superior courts have original jurisdiction and in other causes provided by statute).

Additional Revisions to Implement SCA 4

Staff research has also uncovered some other provisions that require amendment to implement SCA 4 but have not been incorporated into the tentative recommendations. These self-explanatory revisions are set forth at Exhibit pages 20-26.

Additional Justice Court Conforming Revisions

The tentative recommendations include numerous conforming revisions to account for the elimination of the justice courts. A few additional justice court conforming revisions are necessary. (See Exhibit pp. 27-29.)

Technical Corrections

There are a number of technical errors in the tentative recommendations, which will be corrected in the next draft. (See Exhibit p. 31.) If you are aware of any additional omissions or typographical or technical errors, please bring them to the staff's attention.

ISSUES FOR FUTURE STUDY

The tentative recommendations list a number of issues that may be appropriate for future study. Possible additions to the list include:

(1) *Concurrent jurisdiction.* Scattered throughout the various codes are provisions appearing to confer concurrent jurisdiction on municipal and superior courts. The interpretation and constitutionality of these provisions deserves further study. In addition to the provisions identified in the tentative recommendations, the following statutes should be referenced if this topic is listed in the Commission's report: Bus. & Prof. Code §§ 6405, 22391, 22443.1, 22455; Civ. Code §§ 1789.24, 1812.66, 1812.105, 1812.503, 1812.510, 1812.515, 1812.525, 1812.600; Veh. Code §§ 11102.1, 11203.

(2) *Small claims advisory committee (Code of Civil Procedure Section 116.950).* Code of Civil Procedure Section 116.950(d) specifies the composition of the small claims advisory committee. To accommodate trial court unification, the Commission has proposed the following amendment:

> (d) The advisory committee shall be composed as follows:
>
> ….
>
> (6) Six judges of the municipal court ~~or justice court~~, or of the superior court in a county in which there is no municipal court, who have had extensive experience as judges of small claims ~~court~~ division, appointed by the Judicial Council.

An alternative approach would be to delete the phrase "of the municipal court or justice court" in Section 116.950(c)(6), so that any judge with extensive experience as a small claims judge (including a retired judge, an appellate court justice, or a judge of a non-unified superior court) could serve on the advisory committee. That change in policy may warrant consideration after the vote on SCA 4.

(3) *Terms and conditions for payment of money judgments.* Code of Civil Procedure Section 85 presently gives municipal courts broad discretion to set the terms and conditions for payment of money judgments. As far as the staff has deduced from limited research, the superior courts have less discretion in this regard than the municipal courts. For example, Code of Civil Procedure Section 667.7 authorizes superior courts to enter judgments for periodic payments under certain circumstances in actions for injury or damages against health care providers. In contrast, Section 85 grants municipal and justice courts authority to provide for installment payments "regardless of the nature of the underlying debt and regardless whether the moving party appeared before entry of such judgment or order." Further research would be necessary to confirm whether the superior courts actually have less discretion than the municipal and justice courts, understand whatever differences do exist, and determine whether such differentiation should continue.

(4) *Catalogue of cases within the appellate jurisdiction of the courts of appeal on June 30, 1995.* If SCA 4 is enacted, Article VI, Section 11 of the Constitution will provide in part:

> The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute.

In the draft attached to Memorandum 97-38 (p. 6), the staff raised the possibility of compiling a statutory list of "causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995." The Litigation Section writes that "[s]uch a catalogue will be essential to avoid confusion and malpractice by attorneys in the future." (Exhibit p. 11.) They "consider this to be an important project which will protect the public from inadvertent mistakes by attorneys or

the judiciary." (*Id.*) In light of those comments, the staff recommends adding the project to the Commission's list of potential study topics. The merits of constructing the proposed catalogue can be more thoroughly explored when the Commission has resources available for the project.

(4) *Jury commissioners.* Consolidation of jury commissioner functions for the courts in each county is a potential topic of considerable importance.

A more technical issue involving jury commissioners relates to the last sentence of Code of Civil Procedure Section 195(a), which states: "In any court jurisdiction where any person other than a court administrator or clerk-administrator is serving as jury commissioner on the effective date of this section, that person shall continue to so serve at the pleasure of a majority or [sic] the judges of the superior court." That sentence, enacted in 1988, may now be unnecessary and obsolete. The Commission could undertake to confirm as much and amend the provision accordingly.

(5) *Judges' Retirement*. Some provisions of the Judges' Retirement Law are keyed to salaries currently being paid to judges of the same rank. For example, Government Code Section 75076 provides that a retired judge governed by its provisions is to receive a retirement allowance equal to 65 percent of "the salary payable, at the time payment of the allowance falls due, to the judge holding the judicial office to which he or she was last elected or appointed." Applying this provision will be difficult at best if there is no judge holding the relevant judicial office and thus no salary against which to gauge the retirement allowance.

As a practical matter, this issue does not need to be addressed immediately, because it is unlikely that all courts will unify immediately. There will be municipal court judgeships to serve as a basis for retirement allowances for some time to come. The issue should, however, be resolved at some point. The staff recommends listing the matter for further study, and also referring it to the Judicial Council for consideration.

(6) *Appealability of orders of recusal (Penal Code §§ 1238, 1424, 1466).* Penal Code Section 1466(a)(1)(A) states that in a misdemeanor or infraction case an appeal may be taken from "an order recusing the district attorney or city attorney pursuant to Section 1424." In contrast, the comparable provision for felony cases (Penal Code Section 1238) does not expressly authorize an appeal from an order

recusing the district attorney or city attorney. This may be an oversight that should be corrected.

(7) *Magistrate as judicial officer of state or judicial officer of a particular court.* The Penal Code does not make clear whether a magistrate is a judicial officer of the state, as opposed to a judicial officer of a particular court. This point may warrant clarification when time permits.

OVERALL STATUS

The staff's work on trial court unification is ongoing and we are constantly learning of new issues and problems, many of which are not discussed in this memorandum. Time is of the essence in this study and input from knowledgeable sources is critical in ensuring that the proposed legislation satisfactorily addresses the multitude of issues presented by trial court unification. Help from the Commissioners, the Judicial Council, the State Bar, and other interested persons to identify and analyze these issues is crucial in achieving that goal.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

THE COMMITTEE ON APPELLATE COURTS
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

September 30, 1997

Allan L. Fink, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study J-1300 -- Trial Court Unification by County
Memorandum 97-47

Dear Mr. Fink:

I am writing on behalf of the Committee on Appellate Courts ("CAC") of the State Bar of California to communicate some of CAC's concerns regarding SCA 4.

Although CAC took no position on trial court unification per se, it is concerned about the effect of unification on appellate review, including appellate jurisdiction, the processing of appeals in appellate divisions of unified superior courts, and the caseloads of appellate divisions of unified superior courts and the courts of appeal. Since the effect of trial court unification on appellate review will be largely determined by implementing legislation, CAC is interested in the ongoing work and recommendations of the Commission.

One of CAC's strong concerns is that judges of appellate divisions of unified superior courts, who will exercise appellate jurisdiction over the judgments and orders of their peers, have as much judicial independence as can reasonably be devised in such a system. CAC supports the concept of appointment of appellate division judges by the Chief Justice, rather than by presiding judges of superior courts. CAC also favors fixed and reasonably lengthy terms for appellate division judges. Apart from promoting judicial independence, fixed and lengthy terms would permit appellate division judges to develop and apply expertise in the principles of appellate review. CAC also favors the concept of appellate division judges "riding circuit," exercising jurisdiction over the judgments and orders of superior courts other than the ones on which they are currently sitting, if such a concept can be lawfully implemented under SCA 4.

Another of CAC's concerns is that the precedential value of the published opinions of the appellate departments of superior courts will be lost or eroded under SCA 4. Reviewing courts perform two basic functions. They correct error, and they publish opinions which, under the doctrine of *stare decisis*, affect the outcome of future cases. The first function benefits only the litigants. However, the second function benefits all of the citizens of the state as well by providing binding precedents which clarify the law.

"Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, in our current system, the published opinions of appellate departments of superior courts are binding on all municipal courts.

However, tribunals exercising equal jurisdiction are not required to follow each others' decisions. Just as the published opinions of United States District Court judges are not binding on other federal judges exercising the same jurisdiction, the published opinions of state superior court judges would apparently not be binding on other superior court judges. If the judges of some counties elect to unify and the judges of other counties do not, inferior trial courts may continue to exist. Presumably, a published opinion issued by an appellate division of a unified superior court would be binding on a municipal court in a different county. However, if all of the superior courts elected to unify, the opinions of appellate divisions would have no precedential effect, and there would seem to be no sufficient reason to continue to publish them. Thus, a jurisprudential benefit of operating the appellate departments of superior courts would apparently be lost or eroded under SCA 4. CAC encourages the Commission to study and propose implementing legislation clarifying the precedential effect of published decisions of appellate departments and divisions of superior courts after SCA 4.

We hope these comments are helpful and applaud the very important work of the Commission in recommending legislation to implement SCA 4.

Very truly yours,

Richard H. Benes

Richard H. Benes,
Vice-Chair

LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8846
Fax: (415) 561-8868

August 22, 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: J-1300 -- Trial Court Unification

Ladies and Gentlemen:

By this letter, the Litigation Section of the State Bar of California comments on the staff draft of the Tentative Recommendation on Trial Court Unification: Revision of Code of Civil Procedure, No. J-1300. In preparing these comments, we have considered your memoranda 97-37, 97-38, 97-40, and 97-52; and the Tentative Recommendation dated July 14, 1997.

As a preliminary matter, we emphasize that any comments and recommendations about the proposals in this letter should not be construed as criticism of the Commission or its staff. To the contrary, the Commission and staff have made an excellent start in preparing recommendations to the Legislature. These matters must have taken very substantial effort and time because of the details, complexity, and sophistication of the issues presented by the changes which will be required if SCA 4 is passed by the electorate. The Commission and its staff are to be complimented for their excellent work.

1. Proposed Amendment to Code of Civil Procedure Section 46.

We find the wording of proposed Code of Civil Procedure section 46(a) contained in the July 14 draft preferable to the alternatives stated at pages 3 and 4 of the Minutes of the Commission from May, 1997.

Although the substance of the language of the proposed revision to Code of Civil Procedure section 46, as adopted at the meeting

of the Commission on June 12, 1997, would be acceptable, we suggest consideration of an alternative. Since the current draft uses the phrase "Chapter 5.1 civil actions," an alternative to the existing proposal for Section 46(a) might read:

> Courts of appeal have appellate jurisdiction in general civil matters within the original jurisdiction of superior courts.

This would use the generic phrases which are followed in other parts of the recommendation, would make the language slightly less cumbersome, and would eliminate the necessity for the two subparagraphs in Section 46(a).

We agree with the proposed wording of Section 46(b). It is a reasonable attempt to deal with the unfortunate wording of SCA 4.

2. Proposed Code of Civil Procedure Section 76.

We agree with the wording of proposed Code of Civil Procedure section 76(a). Using a blanket definition in a reference to the "appellate department" would avoid the risk that particular code sections might be overlooked in the amendment process.

We have several comments regarding proposed Section 76(b). First, the Commission might consider using the new phrasing "Chapter 5.1 civil matters." Thus, for example, the appellate division of the superior court could be given jurisdiction on appeal from decisions in Chapter 5.1 civil matters. This would eliminate some of the awkward wording of the existing proposal.

We are concerned that there is an ambiguity at the end of the introductory paragraph of proposed Section 76(b). Specifically, the phrase ". . . except appeals that require a retrial in superior court . . ." may create unintended problems. If trial courts are consolidated in a given county, all retrials will be held in the superior court. For example, if an appeal is taken from a municipal court judgment and, while that appeal is pending, the courts in that county elect to consolidate, and if the result of the appeal is reversal and remand for a new trial, the retrial will be in the new unified superior court. There will be no municipal court. Thus, an effect of the proposed statute, if it includes this exception, would be to require all appeals from municipal court decisions to be heard in the court

of appeal in the counties in which unification is elected. We suspect this was not an intended result.

3. Proposed Amendment to Code of Civil Procedure Section 911.

We support the rewording of Code of Civil Procedure section 911 reflected in the minutes of the Commission dated June 12, 1997. The approach is a reasonable attempt to deal with the re-designation of the appellate division of the superior court.

4. Unification Voting Procedure.

We support in principle the approaches taken in proposed Government Code sections 70200-70203, as reflected in the July 14, 1997, draft. We also make the following observations:

a. We are pleased to see the current wording of proposed Section 70200(a). As originally drafted, unification would have occurred on certification of results requiring a majority of all votes "actually cast." As currently worded, the proposed section properly requires unification on the majority of the superior court judges and the majority vote of municipal court judges in the county. This is consistent with SCA 4, and the prior wording would have been inconsistent with SCA 4.

b. In proposed Section 70200(c), the phrase "changes within the voting period" appears. The meaning of this phrase is unclear. Changes in what? Does this refer to changes in the votes? To changes in the identity of the voters? Or to changes in the rules to be adopted by the Judicial Council? If this phrase refers to changes in the votes by judges within the county, we recommend that this concept be deleted. Once a judge casts a ballot for or against unification, the judge should not be permitted to change his or her vote during that balloting process. Otherwise, the lobbying and pressure exerted during the voting period may tend to be corrupting.

c. We suggest that statements be added to proposed Section 70201 which would require that all ballots be submitted to a designated representative of the Judicial Council or to the registrar of voters and that the ballots are not amendable once cast. We suggest that the section provide that the ballots will be collected either by persons appointed by the Judicial Council from outside the county in which the election is being held or by the registrar of voters.

d. Proposed Section 70202(c), dealing with certification of results, provides that, after certification, a vote to unify the municipal and superior courts in a county may not be "rescinded." To us, this is unclear. Does this mean, for example, that an individual vote may not be rescinded? Or that the results of the election may not be rescinded. Proposed Section 70202 does not state the consequences if there are irregularities in the conduct of the election. If irregularities have occurred in the election process, should the vote not be rescindable? Conversely, if a majority of judges vote against unification, the current wording suggests that they could not rescind that vote by a subsequent election in which the majority of judges vote for unification.

We perceive a risk to the reputation of the judiciary if constant electioneering on the issue of unification could continue in perpetuity. One possible revision of Section 70202(c) would read:

> After the results of the vote have been certified by the Judicial Council, the judges in a county may not vote again on the issue of whether to unify or not to unify the municipal and superior courts.

Another alternative would be to permit successive elections but to limit the frequency with which they may occur and to include a sunset provision by which, after a certain date, future elections would not be held.

5. Transitional Provisions for Unification.

We agree with the approach taken in proposed Government Code section 70210. We prefer the mandatory "shall" to the permissive "may" which appeared in an earlier draft of the introductory clause. We offer the following suggestions.

First, we recommend that the last part of the prefatory clause at lines 3 and 4, page 15, of the July 14, 1997, draft, be changed to read ". . . not inconsistent with statute or the Constitution . . . ." Although it would seem obvious that a rule of court should not conflict with the state Constitution, that should be explicit in the authorizing legislation.

Second, we recommend that the word "necessary" be deleted or defined. What is a "necessary" rule in the context of paragraphs (e) and (f)? If the Judicial Council adopts a rule

regarding "necessary" local rules or "necessary" activities, is the validity of the rule adopted by the Judicial Council subject to challenge because it is not "necessary?"

Third, we recommend that any rules or activities approved or adopted under proposed Section 70210(e) and (f) be required to be uniform. Inconsistent local transitional rules will be the bane of practitioners and parties. Consistent with Rule of Court 302, local rules should conform with state Rules of Court, and no extra requirements should be permitted. This should be the law anyway, but an explicit requirement will be necessary if the transitional provisions become law to minimize the risks of confusion and errors during implementation of the changes.

Fourth, we agree with the concepts contained in proposed Government Code section 70211. However, we suggest that the phrase "previously selected" be moved from the second paragraph of the Comment to the text of the statute, itself. We also suggest that the phrase "previously authorized" be defined in the statute.

Fifth, we recommend that the proposed Government Code section 70213(b) be reworded to read:

> Chapter 5.1 civil matters heard in the superior court shall proceed under the laws and rules that would be applicable if the matter were held in the municipal courts.

We recommend that Government Code section 70213(c) and (d) be reworded to conform with the style of the recommended rewording for paragraph (b), supra.

In addition, we are concerned about the wording of proposed Section 70213(c). We suspect that the Commission does not intend that this paragraph be interpreted to mean that filing fees cannot be raised in the future. However, that is one possible interpretation of the current draft.

Sixth, we suggest that proposed Section 70213(h) is overbroad. It permits the Judicial Council to adopt rules ". . . resolving any other problem . . ." that might arise in the conversion of statutory references from the municipal court to the superior court. However, paragraph (h) is worded so broadly that it might permit substantive changes in the law if characterized as a rule

of court adopted by the Judicial Council. More narrow wording would be appropriate.

We agree with the approach taken in proposed Government Code section 702124.

6. Proposed Amendments to Code of Civil Procedure Section 77.

Under the proposed revision of Code of Civil Procedure section 77(a), the Chief Justice would be required to assign judges to the appellate division of the superior court for specified terms pursuant to rules adopted by the Judicial Council.

We are concerned about the implications of this section. Applications for appointment to the appellate division of a superior court may become politicized. If judges lobby and campaign to serve in the appellate division, this process may erode the respect in which the public should hold members of the superior court. Putting judges through a "beauty contest" may discourage qualified judges from applying for appointment to the appellate division of the unified superior courts.

Having expressed these concerns, we agree that if SCA 4 passes, the sentence in proposed Section 77(a) at lines 16-19, at page 19 of the July, 1997, draft would be appropriate.

We are still of the opinion that the reorganization of the appellate division in the unified courts reflects a major flaw in the unification proposal contained in SCA 4. If appellate review is to be by another judge in the same court, rather than by a judge in a "higher" court, the protections of appellate review under the existing system will be impaired. Judges in the same court work together, eat together, socialize together, and dictate each other's administrative burdens. There is no feasible segregation of appellate divisions from the trial judges of the same court. The appearance and substance of independent appellate review will not be present if SCA 4 passes.

We disagree with the sentence which begins at line 19 and ends at line 22, at page 19 of the July, 1997, draft. This sentence would permit assignment to the appellate division of a superior court of judges from other counties or of retired judges. This is a serious change in the law. Now, judges may be assigned to the appellate department of the superior court only if they are

already members of the superior court in the county in which that department sits, unless the county has three or fewer judges in the superior court. If the judges in a county elect to unify, it is unlikely that the county will have three or fewer judges, so the exceptional circumstance which exist under current law for appointment of a retired judge or a judge from another county will not likely occur. However, this sentence of proposed amended Section 77(a) would permit the routine assignment of judges from outside the county or the routine assignment of retired judges to the appellate division of the unified superior court, rather than making such assignments unusual. We oppose this approach.

There is much valid criticism about the election of judges. However, our state's Constitution contemplates that trial court judges shall be accountable to the citizens of the counties in which they sit. Accountability is imposed by way of the electoral process. If judges, as a matter of routine, can be assigned to hear cases in the appellate division of the superior court in counties in which they are not accountable to the electorate, the appellate division judges of that superior court will be the only judges of that court who are not so accountable. Even court of appeal judges are required to live in the districts in which they sit and to face confirmation elections by vote of the citizens within their districts. Appointment of judges from outside the county to the appellate division of the superior court would promote the independence of the appellate division, but this approach is inconsistent with the Constitutional concepts which now exist and which would continue to exist after adoption of SCA 4.

Competitions among superior court judges for appointments to out-of-county appellate divisions will be distasteful. Will the appointment of such judges be determined by whether or not their decisions have been "politically correct?" Or will such judges be appointed to attempt to control a local judiciary whose decisions are considered politically incorrect? Since, normally, there is no right to appeal from the decision of the appellate division, local accountability of the judges who sit in that division will still be important. Conversely, appointment of judges to the appellate division in another county as a reward to be bestowed by the Judicial Council or by the Chief Justice will erode the public image of the judiciary. For example, if judges in Los Angeles can compete for appointments to the appellate division in Monterey County so they can live in Carmel at the

taxpayers' expense, the public impression of the judiciary will be tarnished.

Instead of the approach contained in the sentence which appears at lines 19 to line 22, page 19, of the July 14, 1997, draft, we suggest consideration of the requirement that the appellate division consist of at least three judges from the unified superior court, unless the number of judges in that court is too few to have three such judges, or unless the judge whose decision is appealed is one of the three. Judges from outside the county or retired judges should only be assigned to the appellate division in most instances if the number of judges in the county is so few that the judge whose decision is being reviewed is sitting in the appellate division, or in the event of illness or other absence, such as vacations.

The last phrase of proposed Section 77(e), appearing at lines 19 and 20, page 20, of the July 14, 1997, draft, should be clarified. If unification is elected, all appeals will require retrial in the superior court because there will be no municipal court in that county. Thus, the inclusion of the phrase ". . . except appeals that require retrial in the superior court . . ." will make Section 77(e) an oxymoron.

We support the principle reflected in the proposed amendment to Code of Civil Procedure section 77(g) that rules should be adopted to promote the independence of, and to govern the practice in, procedures in, and disposition of the business of, the appellate division if the trial courts are unified. However, we suggest that the word "shall" be substituted for the word "may" at page 20, line 26, of the July 14, 1997, draft.

We agree with the "stop-gap" approach taken in proposed Section 77(h).

7. Chapter 5.1 Civil Matters.

We prefer the approach contained in proposed new Chapter 5.1 of the Code of Civil Procedure to the approaches contained in earlier drafts. The use of the phrases "Chapter 5.1 civil matter" and "general civil matter" will avoid the pejorative effects of the characterizations in the prior drafts of what are now municipal court cases.

Municipal courts and the judges who sit in them have substantial experience and expertise in handling certain types of cases which are now brought regularly in those courts. Unlawful detainers are but one of many examples. These cases are of great import to the parties. The municipal court is not a "lesser" court because it handles such cases. Instead, municipal court judges have substantial experience and expertise in handling certain types of civil and criminal cases which superior court judges do not normally handle. The converse is also true. In a unified court, the judges may be significantly less familiar with the cases assigned to them for hearing or for trial. Merely reclassifying the cases will not avoid this problem, unless the intention of the Legislature and the Judicial Council is to have some judges and some administrative personnel handle what are now municipal court cases, and others handle only what are now superior court cases. This would mean that unification would create a difference in name without an improvement over the consolidation steps now being taken in many counties.

We agree with the approach of proposed Code of Civil Procedure section 85(a), namely cataloging the types of actions that will be "Chapter 5.1 civil matters."

We recommend that staff be authorized to construct the catalogue of cases which were in the appellate jurisdiction of the courts of appeal on June 30, 1995, as suggested in an earlier draft. Such a catalogue will be essential to avoid confusion and malpractice by attorneys in the future. We consider this to be an important project which will protect the public from inadvertent mistakes by attorneys or the judiciary.

We suggest rewording of paragraph (A) at page 25 of the July 14, 1997, draft, beginning at line 30. We suggest, instead of its current version, that line 35 read:

> . . . under paragraphs (1) through (9) of paragraph (a) of this section, where the petition is filed after the arbitration . . . .

Similarly, we suggest that line 38 at page 25 be amended to read:

> . . . paragraphs (1) through (9) of paragraph (a) of this section . . . .

8. Code of Civil Procedure Sections 1068, 1085, and 1103.

We support the proposed approach for the revision of Code of Civil Procedure sections 1068, 1085 and 1103. Use of the shorthand phrase "Chapter 5.1 civil matter" makes the current version of those proposed amendments preferable to the versions contained in prior drafts.

9. Deletion of Code of Civil Procedure Section 81.

In a prior version of the tentative recommendations, there was a proposal to repeal present Code of Civil Procedure section 81, which codifies the principle that headings and articles in the chapter do not govern or limit the scope or meaning of the text. We do not see that proposal reflected in the tentative recommendation dated July 14, 1997. We hope that this reflects reconsideration of the proposal. The substance of existing Section 81 should be retained. Headings in the Code of Civil Procedure should not have substantive effect, and they are sometimes ambiguous.

10. Proposed Repeal of Code of Civil Procedure Sections 83, 85, 87, 88, 89, 91(d), 221, and 1012.5.

The proposed repeal of Code of Civil Procedure sections 82 through 85, 87 through 89, 91(d), 221, 422.40 and 1012.5 would be laudable.

Section 87 has already been held unconstitutional, and it should be deleted from the Code.

Sections 91(d), 221, and 1012.5 are obsolete due to the passage of time.

The other sections deal with the distinctions between municipal and justice courts or would have no relevance after trial court unification. We consider the repeal of these Code sections to be technical clean-up of the Code of Civil Procedure.

11. Revision of Small Claims Court Chapter.

We respectfully oppose the decision to recommend that references to the "small claims court" be changed to "small claims division" in the implementing legislation for SCA 4. Although we agree that the phrase "small claims court" is technically incorrect,

the phrase is not merely colloquially acceptable. Many citizens resort to the small claims court to get their proverbial "day in court." If the small claims court is renamed a "division," the change may be semantically correct, but it will have a different impact on unsophisticated members of the public who utilize small claims proceedings.

Similarly, we oppose the change from a "small claims appeal" to "seeking a new hearing." While we support the proposed amendments to Code of Civil Procedure 116.710, we do not recommend the global replacement of the phrase "small claims appeal" with "small claims retrial." Defendants in small claims court often are not sophisticated. If they find out that they cannot appeal, they may become irate. We are concerned about the impact on such people of deleting references to the "small claims appeal."

We note that the heading of even the proposed amended Code of Civil Procedure section 116.710 reads "Right to appeal." This is the very section in which the phrase "seeking a new hearing" is being inserted in the text of the section. Similarly, the proposed amendment to Code of Civil Procedure 117.760(d) in the June, 1997, draft would add the word "appeal," so that word appears twice in the same sentence.

We also suggest that there is a semantic flaw in that sentence. One does not file a document "in the appeal." A document is filed with the clerk of the court or in the clerk's file. If the word "appeal" is going to be added at the end of the sentence, we suggest that the amendment to Code of Civil Procedure 116.760(b) be changed to read:

> A party who does not appeal shall not be charged any fee for filing any document concerning the appeal.

In the staff note which appears at page 29 of the June, 1997, draft, there was a suggestion that there should be some restriction on who conducts the retrial. We recommend that there be no restriction other than that the judge who heard the original small claims trial should not hear the retrial. Presently, a retrial in the superior court of a small claims action is a retrial by a court of higher jurisdiction. The risk that a retrial could simply become a second opportunity to try the case before a judge of the same court is flaw which is

inherent in SCA 4. If SCA 4 is passed by the electorate, the trial de novo should take place before a co-equal judge.

12. Proposed Amendment to Code of Civil Procedure Sections 425.10 and 430.10.

In proposed new paragraph (c) of Code of Civil Procedure section 425.10, a complaint or cross-complaint would be required to include a "declaration" stating whether the matter is a Chapter 5.1 civil matter or a general matter. We oppose this amendment.

A declaration does not belong in a pleading. If a statement under oath is required, the pleading should be verified. However, this is unnecessary. A declaration is a different document from a pleading.

Instead of confusing the concept of a pleading with the concept of a declaration, if a case is to be anything other than a general civil matter, a document separate from the pleading should be filed concurrently with the filing of the complaint or cross-complaint. For example, a simple addition to the civil cover sheets now required by most courts could include a choice between a general civil matter and a Chapter 5.1 civil matter. Boxes could be added which would be checked to indicate whether the plaintiff or cross-complainant contends that the matter is a Chapter 5.1 civil matter or a general civil matter.

If the Commission insists that such a document be in the form of a declaration, then a statute [perhaps a new Code of Civil Procedure section 425.111] could be adopted requiring, in substance, that the declaration be filed concurrently with the filing of the complaint or cross-complaint. If no such declaration is filed and served, the case will be deemed a general civil matter.

Similarly, the proposed amendment to Code of Civil Procedure section 430.10 is unnecessary and inappropriate. Whether the case is a Chapter 5.1 civil matter or a general matter is not properly a ground for demurrer. A demurrer should be used to attack the sufficiency of the complaint or cross-complaint, not to dictate what procedures will apply to the litigation as a whole. Whether the matter should have been within traditional municipal court jurisdiction may not appear on the face of the complaint or cross-complaint, so a demurrer would not lie. The

magnitude of the potential recovery will usually be extraneous to the pleadings.

If an opponent disagrees with the designation in a civil cover sheet or declaration filed concurrently with the complaint or cross-complaint, then the proper remedy would be a motion to strike the cover sheet or declaration, accompanied by a declaration showing why the document claiming Chapter 5.1 civil matter status was inaccurate. This, for example, is the method by which a memorandum that civil case is at-issue has traditionally been attacked.

13. Recommendation for Further Study: Trial-Setting Preferences.

The July 14, 1997, draft tentative recommendations and its predecessors do not consider the question of priority in trial setting. We urge the Commission to study this subject before submitting its recommendations to the Legislature.

Without trial court unification, litigants have two points of access for getting their cases to trial. A case may be set on the municipal court trial calendar or on the superior court trial calendar. If unification is passed by the electorate and elected by the judiciary, there will be only one point of access to trial departments, namely the superior court trial calendar. Cutting the routes to trial in half will adversely impact the time for cases to get to trial.

Many cases are entitled to priority in trial setting. Others may be granted priority in the discretion of the trial court. If the correct grounds are shown, at the trial-setting conference these cases now are given priority in scheduling for trial. Rule of Court 217(a).

There are many grounds for obtaining preference in trial setting. These include, for example, cases in which preliminary injunctions have been granted and are in effect [Code Civ. Proc. § 527(e)]; cases in which the parties are aged, ill, or minor [Code Civ. Proc. § 36]; declaratory relief cases, where no other relief is sought [Code Civ. Proc. § 106.23(a)]; unlawful detainer cases [Code Civ. Proc. § 1179(a)]; and numerous other proceedings. See, e.g., Weil & Brown, Civil Procedure Before Trial, ¶¶ 12:240, et seq.

In addition, all criminal cases must be ". . . given precedence over, and set for trial and heard without regard to pendency of, any civil matters or proceedings." Penal Code section 1050(a) [emphasis added]. Therefore, if unification occurs under SCA 4, all misdemeanor criminal cases must be set for trial, and heard, in preference to all civil cases. For example, if there is a civil disturbance resulting in mass arrests, and 250 misdemeanor cases are awaiting trial, they will have to be tried before any civil cases, even if the civil cases have statutory priority in setting. In addition, if there are 25 unlawful detainer actions also waiting to be tried, they too will have statutory priority and will go to the front of the line of those civil cases waiting to be set.

Therefore, one result of unification under SCA 4 will be that all civil cases presently tried in the superior court will have to wait in line behind misdemeanor cases currently tried in the municipal court. Cases currently tried in the superior court which are not entitled to priority in setting will also have to wait for setting behind all unlawful detainer and other cases now entitled to priority in what is now the superior court. They will also have to wait behind all cases with preference in setting which would have been tried in what is now the municipal court. The municipal court civil cases that are not entitled to statutory preference will have no priority in setting. They will wait in line behind all criminal cases, and behind all cases which are now superior court cases that have priority in setting, and behind what are now municipal court civil cases which have priority in setting. Thus, there is a risk that what are now municipal court civil cases without preference may never be set for trial in some counties.

The "traffic jams" which may be created in non-priority civil cases in some counties as a result of trial court unification will be particularly acute because of the preferences to which municipal court criminal cases and municipal court unlawful detainer cases will be entitled. As new criminal cases are commenced, the non-preference civil cases will repeatedly be bumped until they reach the five year statute.

Legislation proposed to implement SCA 4 should address this problem to avoid the risk that municipal court civil cases and superior court civil cases that are not entitled to a preference in setting may never get to trial.

Thank you for this opportunity to comment.

Very truly yours,

LITIGATION SECTION

By: _____
Jerome Sapiro, Jr.

JS:cpc
(9930.03:129)

PAUL N. CRANE ATTORNEY AT LAW

SUITE 900 • TWO CENTURY PLAZA • 2049 CENTURY PARK EAST • LOS ANGELES, CALIFORNIA 90067-3111
TELEPHONE (310) 282-8118 • TELEFAX (310) 282-8077

FILE NO. 934.68

September 5, 1997

Mr. Nathaniel Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303

Re: Commission Memorandum 97-47
Trial Court Unification by County

Dear Mr. Sterling:

I have reviewed the staff's draft tentative recommendation dated July 14, 1997 of the captioned study and note some matters which the Commission might wish to consider.

1. Code of Civil Procedure § 911

The first sentence of § 911 would read better as "A court of appeal may order any case on appeal ~~within~~ to a superior court..."

2. References to Appeals

In several instances, the reference to the appellate function becomes prolix because of an attempt to follow the language of the current statute as much as possible while at the same time making the changes necessary for the transition. For example, proposed CCP § 76(b) would be easier to understand if references to "appeals that require a retrial in the superior court" were simply referred to as "appeals from the small claims division" and by changing the reference in the last portion of subparagraph (b) to speak of appeals in "a Chapter 5.1 Civil Matter" [or whatever nomenclature is used to describe the form municipal court].

3. Small Claims Actions Filed by Government Agency

CCP § 116.213 provides that where a government agency files a small claims action and the defendant appears by an attorney, the matter is to be transferred to the municipal court. Proposed new subsection (e) defines the transfer as being "to the appropriate

division of the transferee court." There is, however, no provision in this legislation for the new superior court to have any divisions, other than a small claims division and an appellate division, which is not what is intended. Subsection (e) should say that this will be a Chapter 5.1 Civil Matter.

4. Defaults

CCP § 580 is to be amended to state that the substantive relief in a Chapter 5.1 Civil Matter cannot exceed $25,000.00, but this should be revised to be in conformity with present CCP § 91 and proposed § 85 which exclude attorney's fees, interest and costs from the $25,000.00 limit.

5. Costs Where Plaintiff Has a Small Recovery

The present CCP § 1033 makes costs discretionary where a superior court plaintiff's recovery could have been rendered in a municipal court. In municipal court, recovery of costs may depend on whether the case should have been brought in small claims court. The proposal appears to intend to retain that arrangement, but subparagraph (b) should continue to be limited to "Chapter 5.1 Civil Matters" as otherwise there is a conflict between § 1033(a) and § 1003(b)(2).

6. Municipal Court

Lastly, when we spoke a few weeks ago, I mentioned that I thought the proposed "Chapter 5.1 Civil Matter" nomenclature was artificial and difficult to work with. No matter what is said and done, cases need different treatment based on their size. I would urge the retention of the "Municipal Court" nomenclature, perhaps by establishing a "Municipal" or "Municipal Court Division" of the unified Superior Court. That designation ought to appear in the case caption and case numbering ought to distinguish the difference. While apparently some find the "Municipal Court" terminology pejorative, it seems unwise to abandon that nomenclature which has been used successfully for so many years in California.

Very truly yours,

Paul N. Crane

PNC:pk
934\C\970904.2

ADDITIONAL REVISIONS TO IMPLEMENT SCA 4

The following revisions should be added to the Law Revision Commission's tentative recommendations on implementation of SCA 4:

Bus. & Prof. Code § 6341 (amended). Law library branches

SEC. ____. Section 6341 of the Business and Professions Code is amended to read:

6341. Any board of law library trustees may establish and maintain a branch of the law library in any city in the county, other than the county seat, in which a session of the superior court or of a municipal court is held, or in which a municipal court has been authorized by statute but has not yet begun to operate. In any city constituting the county seat, any board of law library trustees may establish and maintain a branch of the law library at any location therein where four or more judges of the municipal court, or of the superior court in a county in which there is no municipal court, are designated to hold sessions more than 10 miles distant from the principal office of the ~~municipal~~ court. In any city and county any board of law library trustees may establish and maintain branches of the law library. A branch is in all respects a part of the law library and is governed accordingly.

Comment. Section 6341 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e).

Code Civ. Proc. § 1167.2 (amended). Rent deposit pilot program

SEC. ____. Section 1167.2 of the Code of Civil Procedure is amended to read:

1167.2. (a) (1) There is hereby established a pilot project in the Los Angeles Municipal Court downtown courthouse for the Los Angeles Judicial District, for those cases within the venue of the Central Division, and the municipal courts for the County of San Bernardino. Nothing herein shall be construed to preclude those municipal courts that were implementing the pilot project as of January 1, 1996, from continuing to do so subject to the provisions of this section as amended by Assembly Bill 2966 of the 1995-96 Regular Session. Nothing herein shall preclude other municipal courts, or the superior court in limited cases in a county in which there is no municipal court, from opting to implement the pilot project.

The pilot project shall be considered successful if delays and abuses in the unlawful detainer system are reduced, due process protections are maintained for all parties, and significant administrative burdens are not imposed on the courts. Failure to meet one or more of the numerical measurements of success shall not be interpreted as a lack of success of the project if, in the Judicial Council's view, the totality of circumstances reflect success of the project. Measurements of success shall include:

(A) A 50 percent reduction of time from filing an unlawful detainer action to regaining possession of property in cases in which a deposit demand is made as compared to cases in which a deposit demand is not made. The measurement of this reduction shall exclude any action to obtain possession of any nonresidential premises and any action in which the trial was held on the date set for the pretrial hearing and the defendant was not represented by counsel at this trial.

(B) No more than 5 percent of the unlawful detainer cases are appealed in which a demand for prospective rent is made. The measurement of this percentage shall exclude any action to obtain possession of a nonresidential premises and any action in which the trial was held on the date set for the pretrial hearing and the defendant was not represented by counsel at this trial.

(C) A 40 percent reduction of total administrative and judicial time for the courts when disposing of unlawful detainer actions in which a deposit demand is made as compared to cases in which a deposit demand is not made.

(D) No increase in costs to the courts in cases in which a deposit demand is made as compared to cases in which no deposit demand is made.

(E) Less than 1 percent of the unlawful detainer cases in which a deposit demand was made involved property subject to an outstanding violation.

(2) Criteria to be considered for determining the success of the pilot project shall include, but not be limited to, all of the following:

(A) The time for disposition of unlawful detainer cases using the pretrial rent deposit procedure as compared to cases under subdivision 2 of Section 1161 from previous years for which records are available and other unlawful detainer cases in the same time period, in which a deposit is not demanded. However, this comparison shall exclude any action to obtain possession of any nonresidential premises and any action in which the trial was held on the date set for the pretrial hearing and the defendant was not represented by counsel at this trial.

(B) The percentage of hearings that are contested as compared to failures of parties to appear at the hearing, the number of deposits ordered to be made after a hearing, the number of deposits actually made, and the number of occasions the court found a substantial conflict as to material fact or facts.

(C) The effect of the procedure on the ability of the parties to prepare and present a case at the hearing.

(D) Analysis of compliance with subdivision (d) using random samples that are sufficient to produce statistically valid data.

(E) Assessment by the courts as to the efficiency of the procedure, and whether there was an overall increase or decrease in the administrative burden of dealing with unlawful detainer cases.

(F) The number of cases in which trials are held at the time and date set for the pretrial hearing and the disposition of the cases.

Each court participating in the pilot project shall develop procedures to survey participants in the process and to gather data on its experience with the process. Survey participants shall include, but not be limited to, members of the

judiciary, court administration, court clerks, counsel for plaintiffs and defendants, landlords, tenants, sheriffs, and marshals.

The presiding judges of participating courts shall report on the success of the pilot project to the Judicial Council on or before September 30, 1998, and the Judicial Council shall report to the Legislature on or before December 31, 1998.

(b)(1) In any action for unlawful detainer brought under subdivision (2) of Section 1161, the plaintiff may make a demand for a pretrial prospective rent deposit, provided the plaintiff has alleged in the body of the unlawful detainer complaint that no citation of a type described in subdivision (c) is outstanding as of the date the complaint is filed. The demand shall be made in the body of the unlawful detainer complaint, on the first page thereof immediately under the case number, and on the summons issued by the court.

(2) The summons and complaint shall be accompanied by a reply form. The reply form shall be prepared by the Judicial Council to allow the defendant to advise the court and the plaintiff that the defendant denies the allegations of the unlawful detainer complaint and intends to appear and defend the action. The information to be contained in the form shall include, but not be limited to, the following:

(A) A statement that in order for the defendant to protect his or her rights, the form should be completed and returned to the court immediately, but in no event later than five days from receipt of the summons and complaint. The form shall be returned to the court by personal delivery or by registered or certified mail, return receipt requested, postmarked within five days from receipt of the summons and complaint.

(B) A statement that, if the form is not returned to the court in the time and manner prescribed herein, the defendant shall be required to deposit with the court the prospective rent as defined in subdivision (e) by the date of the hearing in order to preserve the right to have a trial of this matter.

(C) A statement that if the defendant does not return the form to the court as prescribed herein and subsequently fails to deposit the amount of prospective rent as defined in subdivision (d) up to and including the date of the hearing, the court shall order judgment for possession of the premises to be entered in favor of the plaintiff at the pretrial hearing.

(3) Upon the filing of the proof of service of the summons and complaint for unlawful detainer containing a demand for a pretrial prospective rent deposit, the clerk of the court shall set a pretrial hearing date no less than eight nor more than 13 days from the filing of the proof of service, and give notice of that date to all parties by first-class mail if the plaintiff pays the fee required by Section 72055 of the Government Code, plus an additional sum in an amount set by the court to cover actual costs of the court associated with the procedure established by this section. The proceeds from this additional fee shall be deposited with the county treasurer and, upon appropriation, be available solely to the court and the county in which the court is located and shall be used exclusively for costs associated with

this procedure. If the court provides procedures for holding a trial on the same date as the day scheduled for the pretrial hearing, the court shall use a Judicial Council form to inform defendants of the date, time, and place of the pretrial hearing. The form shall include a statement that is substantially in the following form:

"If you are represented by counsel on the date set for the pretrial hearing, the court may ask you to waive your right to the pretrial hearing and proceed directly to trial. If you agree, the trial will begin and you will be expected to have all your evidence and witnesses present in the courtroom. You should seriously consider whether it is in your interest to waive your right to a pretrial hearing. If you agree to waive your right to a pretrial hearing and lose at trial, judgment will be entered against you for eviction and money damages. Whereas, if you lose your pretrial hearing and fail to make the pretrial rent deposit within two court days, the court can only enter judgment for eviction without any money damages."

(c)(1) At the pretrial hearing, the court shall determine whether a substantial conflict exists as to a material fact or facts relevant to the unlawful detainer for purposes of requiring the defendant to deposit with the clerk of the court prospective rent as defined in subdivision (e) as a condition of continuing to trial. If at the pretrial hearing the court determines, based upon the written declarations or oral testimony of the parties, that (A) the plaintiff is the landlord of the premises, the defendant failed to pay contract rent, the defendant was properly served with a three-day notice, and the defendant failed to tender the rent or quit the premises, and (B) no substantial conflict exists as to a material fact or facts relevant to the unlawful detainer after considering any written or oral answer to the unlawful detainer complaint made by the defendant and any and all affirmative defenses offered by the defendant, and considering any oral testimony and written declarations presented by all of the parties, then the court shall have the discretion to order the defendant to deposit, with the clerk of the court, prospective rent as defined in subdivision (e). If the court orders a deposit of prospective rent and if the defendant fails to deposit the prospective rent within two court days from the date of the hearing, judgment for the plaintiff for possession of the premises shall be entered and a writ of possession for the premises shall be issued forthwith. If the defendant has not returned the reply form as described in paragraph (2) of subdivision (b) in the time and manner required, any deposit of prospective rent ordered by the court shall be made by the date of the hearing. If a defendant has not returned the reply form and then fails to deposit the prospective rent on the day of the hearing, judgment for the plaintiff for possession of the premises shall be entered and a writ of possession shall be issued forthwith. Upon entry of judgment for possession of the premises for the plaintiff pursuant to this subdivision, the court shall dismiss any claim for money relief without prejudice.

(2) For purposes of the pretrial hearing held pursuant to paragraph (1), the parties shall have the right to offer declarations, affidavits, and documentary evidence in addition to oral testimony of the parties, but no witnesses other than

the parties may be called to testify. The court shall consult the parties to ascertain whether there is a substantial conflict as to a material fact or facts relevant to the unlawful detainer. The pretrial hearing of the case shall be informal, the object being to dispense justice promptly, fairly, and inexpensively. Except as provided in paragraph (3), for the purposes of the pilot project in Los Angeles County, no attorney may take part in the conduct of the pretrial hearing unless the attorney is appearing to maintain an action (A) by or against himself or herself, (B) by or against a partnership in which he or she is a general partner and in which all the partners are attorneys, or (C) by a corporation. If an attorney appears at the pretrial hearing to maintain an action as authorized by this paragraph, an attorney may appear for the opposing party in this action.

(3) Notwithstanding whether the defendant has returned the reply form pursuant to paragraph (2) of subdivision (b), a defendant may respond to the summons and complaint with an oral answer at the pretrial hearing or by written answer, motion, or demurrer. An oral answer shall be reduced to a writing by the court clerk, recorded electronically, or recorded by a court reporter. The court, in issuing its decision, shall make findings as to the matters specified in paragraph (1) of subdivision (b), including any defenses. The decision and findings shall be reduced to a writing. If the defendant responds to the unlawful detainer by demurrer or motion, this motion or demurrer shall be filed and served pursuant to Sections 1167 and 1167.3 and shall be heard and decided at the pretrial hearing held pursuant to this section. Notwithstanding paragraph (2) of subdivision (c), attorneys may appear in any county for parties prosecuting or contesting a demurrer or motion. Notwithstanding Section 1005, papers opposing the defendant's motion or demurrer may be filed and personally served no later than one day prior to the day appointed for the hearing. If the defendant fails to respond to the unlawful detainer by written answer, motion, demurrer, or oral answer at the pretrial hearing, the court shall order judgment for possession of the premises to be entered in favor of the plaintiff forthwith at the pretrial hearing.

(4) A defendant who is represented by counsel at the pretrial hearing may be asked to stipulate to holding the trial on the date set for the pretrial hearing where the court has advised the defendant of the following in the summons: (1) that the court may ask the defendant to stipulate to holding the trial on the same date as the pretrial hearing if the defendant is represented by counsel; (2) that he or she has the right to post a deposit and have the trial set at a later date if the court determines that a deposit is required at the pretrial hearing; (3) that if the deposit is not made, judgment for possession can only be entered against the defendant, and (4) that if trial is held, judgments for money and possession can be entered against the defendant.

In no case shall the trial be held on the same date selected for the pretrial hearing unless the defendant is represented by counsel and has been given notice as provided in paragraph (4). These provisions are nonwaivable.

(d) No deposit of prospective rent as defined in this section shall be required if the defendant has paid, or deposited with the court, all rent through the month in which the action is filed. No deposit of rent pursuant to this section shall be required if the action involves premises as to which, as of the date the complaint was filed, there was an outstanding citation issued by a state or local government agency for violations of law pertaining to health, safety, housing, building, or fire standards.

(e) "Prospective rent," for purposes of this section, means up to 15 days' prospective rent not to exceed five hundred dollars ($500). The prospective rent shall be calculated on a prorated basis utilizing a 30-day rental period and the lowest monthly rent charged for the premises during the prior six months of the defendant's occupancy. Any deposit made by the defendant pursuant to this section shall be deposited with the clerk, by cash, cashier's check, or money order made payable to the clerk. Receipt of the deposit shall be acknowledged in writing and deposited and retained by the clerk pursuant to Section 24353 of the Government Code until further order of the court. The receipt and amount of a deposit of prospective rent shall be included in the order of the court at the conclusion of the pretrial hearing.

(f) If at trial the court determines that a breach of the warranty of habitability has occurred, that the defendant, or his or her guests or invitees did not cause the breach of this warranty, that the breach of this warranty is sufficient to diminish the value of the premises in an amount greater than 60 percent of the contract rent, and that the defendant had given the owner notice to repair or eliminate the breach, the court shall order the entire amount of prospective rent deposited by the defendant pursuant to this section returned to the defendant. In this case, the obligation of payment of past rent for the period covered by the eviction notice shall be extinguished. In order to remain in the premises, the defendant shall pay the reduced rent from the time of trial until the defect is cured. The rights and remedies in this paragraph are in addition to any other rights and remedies relating to the habitability of dwelling units.

(g) Notwithstanding paragraph (1) of subdivision (c), any deposit made by the defendant pursuant to this section shall be awarded to the party entitled thereto by the trial court. The defendant shall be given credit to the extent of the deposit against any money judgment ordered against the defendant in a subsequent action.

(h) This section does not apply to actions for possession of a mobilehome or manufactured home, as those terms are defined in subdivision (a) of Section 1161a, and does not apply to actions for possession of real property in a mobilehome park subject to the Mobilehome Residency Law (Chapter 2.5 (commencing with Section 798) of Title 2 of Part 2 of Division 2 of the Civil Code), or to a manufactured housing community, as defined in Section 18801 of the Health and Safety Code.

(i) Section 473 shall apply to this section.

(j) This section shall become inoperative on December 31, 1998, and shall be repealed on July 1, 1999, unless a later enacted statute, which is enacted before July 1, 1999, deletes or extends that date.

Comment. Section 1167.2(a) is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See Section 85 (limited cases & Comment).

The following amendment already appears in the Commission's tentative recommendation, but the Comment should be revised as indicated:

Gov't Code § 71040 (amended). Judicial districts

71040. As public convenience requires, the board of supervisors shall divide the county into judicial districts for the purpose of electing judges and other officers of municipal ~~and justice~~ courts, and may change district boundaries and create other districts. No city or city and county shall be divided so as to lie within more than one district.

Comment. Section 71040 is amended to reflect elimination of the justice court. Cal. Const. art. VI, §§ 1, 5(b).

In a county in which the superior and municipal courts have unified, a statutory reference to a judicial district means the county rather than a former municipal court district (unless the provision or context requires otherwise). See Code Civ. Proc. § 38 & Comment.

ADDITIONAL JUSTICE COURT CONFORMING REVISIONS

The following justice court conforming revisions should be added to the Law Revision Commission's tentative recommendations on implementation of SCA 4:

Bus. & Prof. § 12606 (amended). Deceptive packaging

SEC. ___. Section 12606 of the Business and Professions Code is amended to read:

12606. No container wherein commodities are packed shall have a false bottom, false sidewalls, false lid or covering, or be otherwise so constructed or filled, wholly or partially, as to facilitate the perpetration of deception or fraud. No container shall be nonfunctionally slack filled, that is, filled to substantially less than its capacity for reasons other than (a) protection of the contents of the package or (b) the requirements of machines used for enclosing the contents in the package.

Any sealer may seize any container which facilitates the perpetration of deception or fraud and the contents of the container. By order of the ~~justice's~~, municipal or superior court of the city or county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon such conditions as the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return.

Comment. Section 12606 is amended to reflect elimination of the justice's court. Cal. Const. art. VI, §§ 1, 5.

Elec. Code § 13109 (amended). Order of offices listed on ballot

SEC. ___. Section 13109 of the Elections Code is amended to read:

13109. The order of precedence of offices on the ballot shall be as listed below for those offices and measures that apply to the election for which this ballot is provided. Beginning in the column to the left:

(a) Under the heading, PRESIDENT AND VICE PRESIDENT:

Nominees of the qualified political parties and independent nominees for President and Vice President.

(b) Under the heading, PRESIDENT OF THE UNITED STATES:

(1) Names of the presidential candidates to whom the delegates are pledged.

(2) Names of chairpersons of unpledged delegations.

(c) Under the heading, STATE:

(1) Governor.

(2) Lieutenant Governor.

(3) Secretary of State.

(4) Controller.

(5) Treasurer.
(6) Attorney General.
(7) Insurance Commissioner.
(8) Member, State Board of Equalization.
(d) Under the heading, UNITED STATES SENATOR:
Candidates or nominees to the United States Senate.
(e) Under the heading, UNITED STATES REPRESENTATIVE:
Candidates or nominees to the House of Representatives of the United States.
(f) Under the heading, STATE SENATOR:
Candidates or nominees to the State Senate.
(g) Under the heading, MEMBER OF THE STATE ASSEMBLY:
Candidates or nominees to the Assembly.
(h) Under the heading, COUNTY COMMITTEE:
Members of County Central Committee.
(i) Under the heading, JUDICIAL:
(1) Chief Justice of California.
(2) Associate Justice of the Supreme Court.
(3) Presiding Justice, Court of Appeal.
(4) Associate Justice, Court of Appeal.
(5) Judge of the Superior Court.
(6) Judge of the Municipal Court.
(7) Marshal.
~~(8) Constable.~~
(j) Under the heading, SCHOOL:
(1) Superintendent of Public Instruction.
(2) County Superintendent of Schools.
(3) County Board of Education Members.
(4) College District Governing Board Members.
(5) Unified District Governing Board Members.
(6) High School District Governing Board Members.
(7) Elementary District Governing Board Members.
(k) Under the heading, COUNTY:
(1) County Supervisor.
(2) Other offices in alphabetical order by the title of the office.
(l) Under the heading, CITY:
(1) Mayor.
(2) Member, City Council.
(3) Other offices in alphabetical order by the title of the office.
(m) Under the heading, DISTRICT:
Directors or trustees for each district in alphabetical order according to the name of the district.
(n) Under the heading, MEASURES SUBMITTED TO THE VOTERS and the appropriate heading from subdivisions (a) through (m), above, ballot measures in

the order, state through district shown above, and within each jurisdiction, in the order prescribed by the official certifying them for the ballot.

(o) In order to allow for the most efficient use of space on the ballot in counties that use a voting system, as defined in Section 362, the county elections official may vary the order of subdivisions (j), (k), (l), (m), and (n) as well as the order of offices within these subdivisions. However, the office of Superintendent of Public Instruction shall always precede any school, county, or city office, and state measures shall always precede local measures.

Comment. Section 13109 is amended to reflect elimination of the justice court and of the office of constable. Cal. Const. art. VI, §§ 1, 5(b).

☞ ***Staff Note****. This revision was inadvertently omitted from the Miscellaneous Codes tentative recommendation. The reference to the election of a marshal is retained because there is at least one municipal court district where the marshal is elected.*

☞ ***Staff Note***. *We have not consistently referred to the office of constable in Comments to other revisions relating to constables, but we should make the other revisions consistent.*

Fish & Game Code § 4755 (amended). License tag to be countersigned

SEC. ___. Section 4755 of the Fish and Game Code is amended to read:

4755. Any person legally killing a bear in this State shall have the license tag countersigned by a fish and game commissioner, a person employed in the department, a person designated for this purpose by the commission, or by a ~~justice of the peace~~, notary public, postmaster, peace officer or by an officer authorized to administer oaths, before transporting such bear except for the purpose of taking it to the nearest officer authorized to countersign the license tag, on the route being followed from the point where the bear is taken.

Comment. Section 4755 is amended to reflect elimination of the office of justice of the peace.

Gov't Code § 41606 (amended). Fee for service of process

SEC. ___. Section 41606 of the Government Code is amended to read:

41606. For service of any process the chief of police shall receive the same fees as ~~constables. His fees~~ sheriffs. Fees of the chief of police for services in criminal actions or proceedings upon process issued from the city court are not a county charge.

Comment. Section 41606 is amended to reflect elimination of the justice court and of the office of constable. Cal. Const. art. VI, §§ 1, 5(b). For service of process by a sheriff, see Section 26721. See also Section 71266 (marshal's fees); former Section 27821 (constable's fees).

Gov't Code § 71260 (article heading) (amended). Clerk, marshal, and constable

SEC. ____. The heading of Article 7 (commencing with Section 71260) of Chapter 6 of Title 8 of the Government Code is amended to read:

Article 7. Clerk~~, Marshal, and Constable~~ and Marshal

Comment. The heading of Article 7 (commencing with Section 71260) of Chapter 6 of Title 8 is amended to reflect elimination of the justice court. Cal. Const. art. VI, §§ 1. 5(b).

ADDITIONAL SMALL CLAIMS REVISIONS

The Commission's tentative recommendations systematically change statutory references from the small claims "court" to the small claims "division." The following provision was overlooked in preparing the tentative recommendations:

> **Bus. & Prof. Code § 6323 (amended). Law library fees**
>
> 6323. Such costs shall not be collected, however, in small claims ~~courts~~ divisions, nor shall they be collected on the filing of a petition for letters of adoption, or the filing of as disclaimer.
>
> **Comment.** Section 6323 is amended to correct the reference to the small claims court, which is a division of the municipal court or, in a county in which there is no municipal court, a division of the superior court. Code Civ. Proc. § 116.210 (small claims division).

Also, we neglected to make a similar change in Civil Code Section 1719(e), even though we did make a parallel change in Section 1719(f):

> **Civ. Code § 1719 (amended). Checks passed on insufficient funds**
>
> (e) A cause of action under this section may be brought in the small claims ~~court~~ division by the original payee, if it does not exceed the jurisdiction of that court, or in any other appropriate court. The payee shall, in order to recover damages because the drawer instructed the drawee to stop payment, show to the satisfaction of the trier of fact that there was a reasonable effort on the part of the payee to reconcile and resolve the dispute prior to pursuing the dispute through the courts.
>
> **Comment.** Subdivision (e) is amended to correct the reference to the small claims court, which is a division of the municipal court or, in a county in which there is no municipal court, a division of the superior court. Code Civ. Proc. § 116.210 (small claims division).

TECHNICAL CORRECTIONS TO TENTATIVE RECOMMENDATIONS ON IMPLEMENTATION OF SCA 4

The Law Revision Commission issued four tentative recommendations on implementation of SCA 4: (1) Code of Civil Procedure, (2) Government Code, (3) Penal Code, and (4) Miscellaneous Codes. The following technical corrections should be made in those proposals:

Code of Civil Procedure

(1) At page 1, line 10, replace "June 9, 1997" with "June 2, 1997"

(2) At page 42, line 14, replace "subdivisions (b)(1)-(b)(4)" with "subdivisions (b)(2)-(b)(5)"

Government Code

(1) At page 1, line 10, replace "June 9, 1997" with "June 2, 1997"

(2) At page 4, footnote 15, replace "Gov't Code § 70201(d)" with "Gov't Code § 70210(d)"

Penal Code

(1) At page 1, line 10, replace "June 9, 1997" with "June 2, 1997"

(2) At page 83, line 21, replace "810" with "830.1"

Miscellaneous Codes

(1) At page 1, line 10, replace "June 9, 1997" with "June 2, 1997"

(2) At page 56, line 28, replace "117070" with "5560"

(3) At page 58, line 14, replace "23146" with "103100"