Study J-1300 December 4, 1997

Memorandum 97-82

Trial Court Unification: Revision of Code of Civil Procedure

The following persons have submitted comments on revision of the Code of Civil Procedure to implement SCA 4:

- Paul Crane (Memorandum 97-66, Exhibit pp. 18-19)
- Los Angeles Superior Court (Memorandum 97-81, Exhibit pp. 1-2)
- Prof. Gregory L. Ogden, Pepperdine University School of Law (Exhibit p. 1)
- State Bar Committee on Appellate Courts ("CAC") (Memorandum 97-66, Exhibit pp. 1-2)
- State Bar Litigation Section (Memorandum 97-66, Exhibit pp. 3-5, 6-17)

The Commission has already considered some parts of these comments. See First Supplement to Memorandum 97-58; Memorandum 97-66; First Supplement to Memorandum 97-66; September 1997 Minutes; November 1997 Minutes. This memorandum discusses portions of the comments not previously covered, as well as a number of new issues identified by the staff or raised by the Judicial Council.

SECTION 77: APPELLATE DIVISION

Under existing Code of Civil Procedure Section 77, there is an appellate department of the superior court in every county. SCA 4 would create an appellate division, rather than an appellate department, in each superior court:

> In each superior court there is an appellate division. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division.

Cal. Const. art. VI, § 4 (as it would be amended by SCA 4). The appellate division would be similar to the existing appellate department, but it is intended to have greater autonomy, because in a unified superior court it will review decisions rendered by judges of the same court, not by lower court judges. As the Law Revision Commission explained in proposing the amendment of Article VI, Section 4 in its recommendation on SCA 3 (the unsuccessful predecessor of SCA 4), the amendment

> requires adoption of court rules intended to foster independence of judges serving in the appellate division. Rules may set forth relevant factors to be used in making appointments to the appellate division, such as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the "circuit."

Trial Court Unification: Constitutional Revision (SCA 3), 24 Cal. L. Revision Comm'n Reports 1, 77 (1994).

Composition of the Appellate Division

Existing Section 77 sharply restricts the Chief Justice's discretion in selecting appointees to the appellate department. To help foster the independence of the appellate division under SCA 4, the tentative recommendation would revise Section 77 to give the Chief Justice broad discretion in appointing judges to the appellate division:

> 77. (a) In every county and city and county, there is an appellate ~~department~~ division of the superior court consisting of three judges or, when the ~~Chairperson of the Judicial Council~~ Chief Justice finds it necessary, four ~~judges~~.
>
> ~~(1) In a county with three or fewer judges of the superior court, the appellate department shall consist of those judges, one of whom shall be designated as presiding judge by the Chairperson of the Judicial Council, and an additional judge or judges as designated by the Chairperson of the Judicial Council. Each additional judge shall be a judge of the superior court of another county or a judge~~

~~retired from the superior court or court of higher jurisdiction in this state.~~

~~(2) In a county with four or more judges of the superior court, the appellate department shall consist of judges of that court designated by the Chairperson of the Judicial Council, who shall also designate one of the judges as the presiding judge of the department.~~ judges. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence and quality of each appellate division. Each judge assigned to the appellate division of a superior court shall be a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state. The Chief Justice shall designate one of the judges of each appellate division as the presiding judge of the division.

….

Comment. Section 77 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e).

Subdivision (a) requires adoption of court rules intended to promote the independence and quality of judges serving in the appellate division. See Cal. Const. art. VI, § 4 (expressly recognizing the goal of promoting the independence of the appellate division). Rules may provide relevant factors to be used in making appointments to the appellate division, such as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the "circuit."

In drafting this proposed amendment, the Commission considered whether there should be a preference for or against judges who are locally accountable, as opposed to judges lacking ties to the county in which the appellate division sits. Approaches to this issue could range from mandating that some or all of the appointees be local judges, to requiring appointment of nonlocal judges (at least in counties with only a few judges).

As explained at pages 3-4 of Memorandum 97-38, proposed Section 77 is a middle ground:

> …It neither favors a local judge nor makes a local judge ineligible for appointment. This reflects the competing considerations involved. On the one hand, California has embraced the principle that a judge should be accountable to the people served by the court to which the judge is assigned. *See, e.g.,* Cal. Const. art. VI, § 16 ("judges of courts of appeal shall be elected in their districts"). On the other hand, a judge with local ties may be unfairly biased in favor of local litigants, and unduly influenced by local public opinion and pressure from other judges on the court.

Not surprisingly, reaction on the issue of local accountability is mixed. The State Bar Committee on Appellate Courts ("CAC") "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." (Memorandum 97-66, Exhibit p. 1.) 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." (*Id.*)

The State Bar Litigation Section also expresses great concern about the independence of the appellate division, regarding the "reorganization of the appellate division in the unified courts" as "a major flaw in the unification proposal contained in SCA 4." (Memorandum 97-66, Exhibit p. 8.) The Litigation Section does not consider appointment of judges from outside the county an acceptable solution to that problem. In part, it cautions that "[c]ompetitions among superior court judges for appointments to out-of-county appellate divisions will be distasteful." (*Id.* at 9.) The Litigation Section also emphasizes the importance of local accountability:

> 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.

(*Id.*) The Litigation Section proposes 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." (*Id.* at 10.)

That approach would be similar to existing Section 77, but would not further the constitutionally recognized goal of promoting the independence of the appellate division. As the Litigation Section acknowledges with concern, judges "in the same court work together, eat together, socialize together, and dictate each other's administrative burdens," impeding the independence of appellate review. (*Id.* at 8.)

That obstacle could be alleviated to some extent by appointing one or more nonlocal judges to the appellate division, as would be possible but not mandatory under the Commission's proposed amendment of Section 77(a). The disparate views of CAC and the Litigation Section on that proposed amendment, as well as the lack of dissent from the judicial sector, suggest that the amendment strikes an appropriate balance between competing concerns. If challenged, its constitutionality is likely to be upheld, in light of SCA 4's mandate to promote the independence of the appellate division and the Commission's Comment explaining that "[r]eview by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the 'circuit.'" While recognizing the significance of the expressed concerns, the staff recommends leaving the proposed amendment in its current form.

Terms of Appointments to the Appellate Division

SCA 4 would direct the Chief Justice to appoint judges to the appellate division "for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division." CAC "favors fixed and reasonably lengthy terms for appellate division judges." (Memorandum 97-66, Exhibit p. 1.) CAC does not state whether such

terms should be specified by statute, as opposed to rules promulgated by the Judicial Council.

The Commission considered this issue in drafting its tentative recommendation. See Memorandum 97-38, p. 4; June 1997 Minutes. It decided that a statutory requirement was unnecessary, at least initially. The Judicial Council has expertise on how appellate divisions function, so it is well-situated to determine how long appointments should be. Although "fixed and reasonably lengthy terms" may help promote the independence of appellate division judges, there is no reason to doubt that the Judicial Council will follow that approach, as it has in the past. If the Legislature becomes dissatisfied with how the Judicial Council handles this matter, it can impose statutory restrictions at that time. In the absence of comments clearly advocating a different approach, the staff advises the Commission to stick with its tentative recommendation on this point.

Out-of-County Judge's Travel Expenses

Section 77(c) concerns reimbursement for travel expenses incurred by a judge who serves on an appellate division outside the judge's own county. The tentative recommendation would make only technical revisions:

> (c) In addition to their other duties, the judges designated as members of the appellate ~~department~~ division of the superior court shall serve for the period specified in the order of designation. Whenever a judge is designated to serve in the appellate ~~department~~ division of the superior court of a county other than the county in which such judge was elected or appointed as a superior court judge, or if ~~he~~ the judge is retired, in a county other than the county in which ~~he resides, he~~ the judge resides, the judge shall receive from the county to which ~~he is designated his~~ the judge is designated expenses for travel, board, and lodging. If the judge is out of ~~his~~ the judge's county overnight or longer, by reason of the designation, such judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for such purposes to justices of the Supreme Court under the rules of the State Board of Control. In addition, a retired judge shall receive from the state and the county to which ~~he~~ the judge is designated, for the time so served, amounts equal to that which ~~he~~ the judge would have received from each if ~~he~~ the judge had been assigned to the superior court of the county.

The Los Angeles Superior Court raises a substantive issue: Whether it conflicts with "the intent of trial court funding" to identify as a county

responsibility "an out-of-county judge's travel expenses in connection with appellate division duty." (Memorandum 97-81, Exhibit p. 1.) "Should not this be a direct responsibility of the State, out of an account maintained at the state level for this purpose?" (*Id.*)

The staff has not analyzed the trial court funding measures (in particular, AB 233 (Escutia)) to assess the merits of this argument. Such analysis seems unnecessary, because this would be a problem with existing law, apart from unification. The Commission has strictly and deliberately limited its proposal to revisions necessary to implement SCA 4. As reported at page 11 of the Minutes for May 1997:

> …[I]n general, the legislation implementing SCA 4 should not attempt to effect policy changes. Otherwise, it would be extremely difficult to introduce the legislation, have it approved by as many as four policy committees in each house (Judiciary, Public Safety, Governmental Organization, and Fiscal) and have it enacted as an urgency measure by June 1998, as the Legislature expects from the Commission.

The concerns that prompted the Commission to adopt this approach remain as strong as ever. Unless and until a clear consensus to revise the financial aspects of Section 77(c) develops, the staff recommends leaving the proposed amendment as is.

SECTIONS 85 AND 86: LIMITED CASES

A unified superior court will have original jurisdiction of all causes. For many purposes (e.g., application of economic litigation procedures), however, it will be necessary to differentiate between traditional superior court civil cases and civil cases like those now brought in municipal court. See tentative recommendation, p. 3 & Section 85 Comment.

After much discussion, the Commission decided to facilitate such differentiation by identifying the types of civil cases now brought in municipal court and referring to such cases as "limited cases." Proposed Section 85 is the key provision:

> 85. An action or special proceeding shall be treated as a limited case if all of the following conditions are satisfied, and, notwithstanding any statute that classifies an action or special proceeding as a limited case, an action or special proceeding shall

not be treated as a limited case unless all of the following conditions are satisfied:

(a) The amount in controversy does not exceed twenty-five thousand dollars ($25,000). As used in this section, "amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, which is in controversy in the action, exclusive of attorney fees, interest, and costs.

(b) The relief sought is a type that may be granted in a limited case.

(c) The relief sought, whether in the complaint, a cross-complaint, or otherwise, is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited case or that provide that an action or special proceeding is within the original jurisdiction of the municipal court, including, but not limited to, the following provisions:

Civil Code Section 798.61
Civil Code Section 1719
Civil Code Section 3342.5
Code of Civil Procedure Section 86
Code of Civil Procedure Section 86.1
Code of Civil Procedure Section 1710.20
Food and Agricultural Code Section 7581
Food and Agricultural Code Section 12647
Food and Agricultural Code Section 27601
Food and Agricultural Code Section 31503
Food and Agricultural Code Section 31621
Food and Agricultural Code Section 52514
Food and Agricultural Code Section 53564
Government Code Section 53069.4
Government Code Section 53075.6
Government Code Section 53075.61
Public Utilities Code Section 5411.5
Vehicle Code Section 9872.1
Vehicle Code Section 10751
Vehicle Code Section 14607.6
Vehicle Code Section 40230
Vehicle Code Section 40256

The Commission did not coin a term to refer to cases other than limited cases.

Paul Crane's Comments

A staff draft that preceded the tentative recommendation used the term "Chapter 5.1 civil matter" instead of "limited case." See Memorandum 97-47. Attorney Paul Crane found that nomenclature "artificial and difficult to work

with." (Memorandum 97-66, p. 19.) He urges "the retention of the 'Municipal Court' nomenclature, perhaps by establishing a 'Municipal' or 'Municipal Court Division' of the unified Superior Court." (*Id.*) He explains that "[n]o matter what is said and done, cases need different treatment based on their size.... 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." (*Id.*)

Other Views

Professor Gregory Ogden is troubled by the concept of unification by county option, as opposed to statewide unification. (Exhibit p.1.) Reluctantly accepting that premise, however, he "support[s] the 'limited case' concept as well as the provisions of proposed Chapter 5.1, Limited Cases." (*Id.*)

The Litigation Section has not commented on the "limited case" terminology, but has expressed approval of the phrases "Chapter 5.1 civil matter" and "general civil matter," which appeared in the draft it reviewed. Comparing those phrases to phrases used in previous staff drafts (major civil action and minor civil action; alpha matter and beta matter), the Litigation Section concluded: "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." (Memorandum 97-66, Exhibit p. 10.)

The Litigation Section emphasizes the importance of using nonpejorative terminology:

> 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 the 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.

(*Id.* at 11.)

The Litigation Section also agrees with the approach of statutorily cataloguing the types of actions that will be "Chapter 5.1 civil matters." (*Id.*) It would, however, disapprove of having a municipal division in unified superior courts, at least if "some judges and some administrative personnel handle what are now

municipal court cases, and others handle only what are now superior court cases." (*Id.*) "This would mean that unification would create a difference in name without an improvement over the consolidation steps now being taken in many counties." (*Id.*)

Analysis

In many respects, establishing a municipal division in unified superior courts would make it easier to adapt existing statutory provisions to accommodate unification. References to the "municipal court" could simply be changed to "municipal division," without having to define categories of civil cases.

As the Litigation Section points out, however, the concept of unification is to increase efficiency by affording greater flexibility in allocating judicial resources. While establishing a municipal division is not necessarily inconsistent with flexibility in assigning personnel, retention of the existing terminology and two tribunal structure may help perpetuate existing rigidity. Switching to such an approach may also make it difficult to have implementing legislation in place before SCA 4 appears on the ballot in June 1998. Thus, the staff recommends continuing with the Commission's current approach (establishing categories of civil cases), rather than creating a municipal division within the unified superior court.

The question remains, however, what to call the different categories of cases. The Judicial Council has alerted us that references to a "limited case" already appear as a figure of speech in case law. For example:

> The United States Supreme Court has recognized that Portash was a unique and limited case, demonstrating the essence of coerced testimony in the 'classic Fifth Amendment' sense ….
>
> [People v. Macias, 16 Cal. 4th 739, 754, 941 P.2d 838, 66 Cal. Rptr. 2d 659 (1997).]

> As noted, the Bunches assert that Belair's reasonableness rule should apply only in those limited cases in which the public entity's conduct would have been privileged at common law ….
>
> [Bunch v. Cochella Valley Water District, 15 Cal. 4th 432, 448, 935 P.2d 796, 63 Cal. Rptr. 2d 89 (1997).]

If "limited case" becomes a term of art defined in Section 85, future jurists may misinterpret pre-SCA 4 references such as these.

That problem could be avoided by using the term "limited civil case," instead of "limited case." Although a few causes are difficult to classify as either civil or criminal (e.g., a proceeding to expunge a criminal record), this a minor glitch could be addressed where necessary and on the whole the term "limited civil case" should work fine. The staff would make this change.

The Commission should also consider whether to coin a term for cases like those now brought in superior court. Such a term would facilitate drafting of some provisions (e.g., Code Civ. Proc. §§ 86, 425.10, 425.11, 489.220, 564, 631, 1033), but the proposed legislation is workable if not elegant as is. If the Commission does not select a term, courts and litigants almost certainly will, or the Legislature may insist on it in reviewing the Commission's bill. In submitting its comments, the Los Angeles Superior Court has already resorted to the phrase "unlimited case." (Memorandum 97-81, Exhibit p. 2.) The staff would prefer "general civil case," but the Commission may be able to think of a better alternative. If we can reach consensus on an appropriate term, incorporating it now may speed enactment of the proposed legislation and help prevent confusion.

SB 150 (Kopp)

SB 150 (Kopp), enacted this year, amends Code of Civil Procedure Section 86 to make technical changes and "extend the jurisdiction of the municipal court to include all actions to enforce restitution orders or restitution fines that were imposed by the municipal court." This new version of Section 86 needs to be incorporated into the Commission's proposal. It may also be necessary to revise proposed Section 85(a) (the amount in controversy provision) or take other steps to account for the new legislation. The staff is working on these points and will cover them in a supplement this memorandum.

SECTION 116.250: SESSIONS OF SMALL CLAIMS COURT

Section 116.250 concerns sessions of the small claims court. The Commission's proposed amendment reads:

> 116.250. (a) Sessions of the small claims court may be scheduled at any time and on any day, including Saturdays, but excluding other judicial holidays. They may also be scheduled at any public building within the judicial district, including places outside the courthouse.

(b) Each small claims division of a municipal court with four or more judicial officers, and each small claims division of a superior court with eight or more judicial officers, shall conduct at least one night session or Saturday session each month. The term "session" includes, but is not limited to, a proceeding conducted by a member of the State Bar acting as a mediator or referee.

Comment. Section 116.250 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). For guidance in applying Section 116.250, see Section 38 (judicial districts) & Comment.

Applicability to Courts Hearing Small Claims Appeals

The Los Angeles Superior Court urges the Commission to make clear that "the small claims division does not include courts hearing small claims appeals, and that night sessions are not required for these courts." (Memorandum 97-81, Exhibit p. 1.) The staff agrees that greater clarity on this point would be helpful. There are two potential areas of confusion: (1) whether a superior court hearing only small claims appeals, not other small claims cases (i.e., a nonunified superior court), is subject to Section 116.250, and (2) whether the night or Saturday sessions in a unified superior court are solely for purposes of conducting initial small claims hearings, or also for resolving small claims appeals.

Additional statutory language does not seem necessary to clarify the first point, because the Commission's proposed amendment of Section 116.210 calls for a small claims division only in each municipal court and "each superior court in a county in which there is no municipal court." A superior court in a county with a municipal court would not have a small claims division and thus would not be subject to Section 116.250. Adding the following paragraph to the Comment to Section 116.250 may help make this more clear:

> By its terms, subdivision (b) applies only to courts with a small claims division. A superior court that hears small claims appeals, but not other small claims cases, does not have a small claims division and so is not subject to subdivision (b). See Section 116.210 (small claims division).

On the second issue, under existing law small claims appeals cannot be considered at the night or Saturday sessions mandated by Section 116.250, because such appeals are heard in superior court, not municipal court. That policy could be preserved by revising the first sentence of Section 116.250(b) to

read: "Each small claims division of a municipal court with four or more judicial officers, and each small claims division of a superior court with eight or more judicial officers, shall conduct at least one night session or Saturday session each month for the purpose of hearing small claims cases other than small claims appeals." Revising Section 116.250(b) in this manner would not preclude superior courts from hearing small claims appeals at night or Saturday sessions, because there are other sources of authority for conducting such sessions. See Gov't Code §§ 69790, 69791. The revision would, however, ensure that the monthly night or Saturday session mandated by Section 116.250 is used only for initial small claims hearings.

Number of Judicial Officers in Superior Court

The Los Angeles Superior Court also comments that increasing the number of judicial officers from four to eight "is appropriate only if that approximates the average ratio of municipal judicial officers to total judicial officers" in counties having four or more judicial officers. (Memorandum 97-81, Exhibit p. 2.) The court does not elaborate on this point.

Selecting the appropriate number of superior court judicial officers to use in Section 116.250 is complicated, because some counties will unify several municipal courts with the superior court, while other counties will only unify one municipal court with the superior court. The Commission sought input on the appropriate number in its tentative recommendation. The comment from the Los Angeles Superior Court is the only response so far, but we expect the Judicial Council to be able to assist in this determination.

SECTION 116.770: SMALL CLAIMS HEARING DE NOVO

The Commission's proposed amendment of Section 116.770(a) reads:

> 116.770. (a) The appeal to the superior court shall consist of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division.

The Los Angeles Superior Court suggests that small claims appeals be heard by a judicial officer "at the same or a higher level" than the judicial officer who originally heard the case. (Memorandum 97-81, Exhibit p. 2.) "This would avoid the situation in which an attorney acting as a judge pro tem would be reviewing the actions of a judge or commissioner of the small claims division." (*Id.*)

This suggestion could be implemented as follows:

> 116.770. (a) The appeal to the superior court shall consist of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division. In a county in which there is no superior court, the judicial officer who conducts the new hearing shall be at the same level as, or at a higher level than, the judicial officer who heard the action in the small claims division.

While it may help provide meaningful review of small claims cases in unified courts, such a revision is not essential to ensure that the new hearing is more than a repeat of the first. Under Sections 116.530 and 116.770(c), attorneys may participate in the new hearing, but generally not in the initial hearing. The tentative recommendation comments: "A hearing before a new judicial officer, with legal representation, is a sufficient review opportunity for the litigants without being a substantial burden on judicial resources."

Nonetheless, the review process in a unified court may be more effective with an additional requirement that the judicial officer who conducts the new hearing be at the same level as, or at a higher level than, the judicial officer who heard the action in the small claims division. The staff recommends imposing such a requirement as set forth above, unless it would seriously impede flexibility in assigning cases and distributing judicial workloads. The Judicial Council may be able to provide practical insight on the likely impact of the suggested approach.

SECTION 198.5: SELECTION OF JURORS FROM JUDICIAL DISTRICTS

Section 198.5 raises important issues. Because those issues extend beyond civil cases, they are discussed in Memorandum 97-81.

SECTION 199.3: JURY SELECTION IN NEVADA COUNTY

Former Section 199.3, concerning jury selection in Nevada County, was repealed in 1997 and a new Section 199.3 on the same topic enacted. The Commission's proposed amendment of former Section 199.3 should therefore be deleted. It could be replaced with a proposed amendment of new Section 199.3, along the following lines:

> 199.3. In Nevada County, trial jury venires for the Truckee Branch of the Superior Court shall be drawn from residents of the

Truckee Division of the Nevada County Municipal Court or, if there is no municipal court in Nevada County, then from residents of the area encompassed by the former Truckee Division of the Nevada County Municipal Court, except as otherwise provided in this section. Prospective jurors residing in the Truckee Division of Nevada County Municipal Court or, if there is no municipal court in Nevada County, in the area encompassed by the former Truckee Division of the Nevada County Municipal Court, except as otherwise provided in this section, shall only be included in trial court venires or sessions of the municipal court, if any, and superior court held within that division or area. However, each prospective juror residing in the county shall be given the opportunity to elect to serve on juries with respect to trials held anywhere in the county in accordance with the rules of the superior court and municipal court, if any, which shall afford to each eligible resident of the county an opportunity for selection as a trial jury venireman. Additionally, nothing in this section shall preclude the superior court or municipal court, if any, in its discretion, from ordering a countywide venire in the interest of justice.

Comment. Section 199.3 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5 (e).

Alternatively, the Commission could omit this somewhat awkward amendment from its proposal altogether, because Section 199.3 pertains specifically to Nevada County, not to all counties. The amendment will have a practical effect only if the municipal and superior courts in Nevada County elect to unify; otherwise it will only add verbiage to Section 199.3. The staff recommends omitting the amendment of Section 199.3, because that would be consistent with the Commission's approach of streamlining its recommendation and revising only statutes concerning courts generally. See Memorandum 97-66, p. 9; Memorandum 97-84, pp. 1-3. If the courts in Nevada County elect to unify, this is only one of dozens of statutes specific to Nevada County that will need to be adjusted.

SECTIONS 395.9, 399.5, 400, 430.10, 430.80: MISCLASSIFICATION AS A LIMITED CASE OR OTHERWISE

Sections 395.9, 399.5, 400, 430.10, and 430.80 of the tentative recommendation specify procedures for challenging a litigant's classification of a civil case as a limited case or otherwise. A number of suggestions and concerns relate to these

procedures. The staff is still analyzing these suggestions and the best means of revising these provisions. We will present our analysis in a supplement to this memorandum.

SECTION 422.30: CAPTION

The tentative recommendation would amend Section 422.30 as follows:

> 422.30. (a) Every pleading shall contain a caption setting forth:
> ~~(a)~~ (1) The name of the court and county, and, in municipal ~~and justice~~ courts, the name of the judicial district, in which the action is brought; and
> ~~(b)~~ (2) The title of the action.
> (b) In a limited case in a county in which there is no municipal court, the caption shall state that the case is a limited case.

As proposed, Section 422.30(b) would only require an affirmative act in a limited case; litigants in other cases would not have to label them as such. This is largely because the tentative recommendation provides no term to refer cases like those now brought in superior court.

The Los Angeles Superior Court strongly suggests, however, that the pleadings "indicate affirmatively whether it is a limited or unlimited case." (Memorandum 97-81, Exhibit p. 2.) The court explains that this "is the best assurance that the required information will be provided." (*Id.*) Professor Ogden would also extend the labeling requirement to all cases. (Exhibit p. 1.)

These suggestions could be implemented by revising proposed Section 422.30(b) as follows:

> (b) In ~~a limited case in~~ a county in which there is no municipal court, the caption shall state ~~that~~ whether the case is a limited case.

Alternatively, the new requirement could apply to all counties, not just counties with a unified superior court:

> 422.30. Every pleading shall contain a caption setting forth all of the following:
> (a) The name of the court and county, and, in municipal ~~and justice~~ courts, the name of the judicial district, in which the action is brought~~; and~~.
> (b) The title of the action.
> (c) Whether the case is a limited case.

The staff recommends the latter approach, because it would be practical (e.g., the same forms could be used in superior courts in all counties) and it would help prevent confusion where there is a change of venue from a non-unified court to a unified court.

SECTION 564: APPOINTMENT OF RECEIVER

Section 564 specifies circumstances under which a superior court may appoint a receiver. There is no parallel provision for appointment of a receiver by a municipal court, except Section 86(a)(8), which is much less extensive and detailed than Section 564.

To implement SCA 4, the staff recommends making Section 564 inapplicable to a limited case. See Exhibit pp. 3-5. That would preserve the existing situation, in which appointment of a receiver is authorized in numerous specific circumstances in cases now brought in superior court, but only in two (albeit more general) circumstances in cases now brought in municipal court.

It may make sense, however, to study the circumstances for appointment of a receiver in greater detail in the future. Differing statutory language for cases now brought in superior court and cases now brought in municipal court may not really be necessary. The Commission could include this matter on its list of topics that may be appropriate for future study.

ADDITIONAL REVISIONS

In its continuing review of the statutes, the staff has discovered some additional revisions necessary to implement SCA 4. These changes are set out at Exhibit pp. 2-6. Assuming there are no objections, the staff will incorporate these revisions into the draft legislation.

Respectfully submitted,

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Memo 97-82 **EXHIBIT** Study J-1300

PEPPERDINE

PEPPERDINE UNIVERSITY SCHOOL OF LAW

November 5, 1997

Executive Director Nat Sterling
California Law Revision Commission
4000 Middlefield Road, ROOM D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation on Trial Court Unification: Revision of Code of Civil Procedure, #J-1300 July 1997

Dear Nat:

I have read the tentative recommendation on trial court unification: revision of Code of Civil Procedure (July 1997). The hybrid system that would be created if SCA4 is adopted by the voters is very awkward because it is very likely that there will be a substantial period of time in which some courts are unified, and some are not unified. Thus, we will have a hybrid court system in California, and eventually we may have a statewide unified system. However, the SCA4 proposal may have been the result of a political compromise needed to allow SCA4 to be voted through the legislature. It would have been much simpler to have a constitutional amendment that unified courts on a statewide basis. However, since that is the reality, the draft revision of the Code of Civil Procedure makes a lot of sense, by directly addressing the hybrid court system.

I support the "limited case" concept as well as the provisions of proposed Chapter 5.1, Limited Cases. I do not believe that misclassification of a case in a unified court (See note to CCP Section 395.9) is the same as a lack of jurisdiction challenge, in that state courts have general jurisdiction of most claims not within the exclusive jurisdiction of the federal courts, and thus there is usually one state court that has jurisdiction of the claim. I recommend treating misclassification of a case more like a venue issue than a subject matter jurisdiction challenge. This is because one is in the right court system, i.e., the unified court for that county, but not the right part of that court system. As to the CCP 422.30 issue, I believe that identifying the case in the caption is sufficient, but I would extend that requirements to all cases so that the limited case designation is not merely the new substitute in a unified court for the old Municipal court designation. I would be willing to review other written materials related to this project.

Very Truly Yours,

Greg

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Additional Code of Civil Procedure Revisions to Implement SCA 4

The following revisions should be added to the Law Revision Commission's draft revising the Code of Civil Procedure to implement SCA 4:

Code Civ. Proc. § 425.10 (amended). Content of complaint

SEC. ____. Section 425.10 of the Code of Civil Procedure is amended to read:

425.10. A complaint or cross-complaint shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the pleader claims ~~he is~~ to be entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated, except in a limited case.

Comment. Section 425.10 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).

Code Civ. Proc. § 425.11 (amended). Damages for personal injury or wrongful death

SEC. ____. Section 425.11 of the Code of Civil Procedure is amended to read:

425.11. (a) As used in this section:

(1) "Complaint" includes a cross-complaint.

(2) "Plaintiff" includes a cross-complainant.

(3) "Defendant" includes a cross-defendant.

(b) When a complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought, except in a limited case. The request shall be served upon the plaintiff, who shall serve a responsive statement as to the damages within 15 days. In the event that a response is not served, the party, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement.

(c) If no request is made for the statement referred to in subdivision (a), the plaintiff shall serve the statement on the defendant before a default may be taken.

(d) The statement referred to in subdivision (b) shall be served in the following manner:

(1) If a party has not appeared in the action, the statement shall be served in the same manner as a summons.

(2) If a party has appeared in the action, the statement shall be served upon his or her attorney, or upon the party if he or she has appeared without an attorney, in the

manner provided for service of a summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(e) The statement referred to in subdivision (b) may be combined with the statement described in Section 425.115.

Comment. Section 425.11 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).

Code Civ. Proc. § 564 (amended). Appointment of receivers

SEC. ____. Section 564 of the Code of Civil Procedure is amended to read:

564. (a) A receiver may be appointed, in the manner provided in this chapter, by the court in which an action or proceeding is pending in any case in which the court is empowered by law to appoint a receiver.

(b) In superior court, a receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases, other than in a limited case:

(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

(2) In an action by a secured lender for the foreclosure of the deed of trust or mortgage and sale of the property upon which there is a lien under a deed of trust or mortgage, where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt.

(3) After judgment, to carry the judgment into effect.

(4) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or pursuant to Title 9 (commencing with Section 680.010) (enforcement of judgments), or after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law.

(5) In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

(6) In an action of unlawful detainer.

(7) At the request of the Public Utilities Commission pursuant to Sections 855 and 5259.5 of the Public Utilities Code.

(8) In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

(9) At the request of the Office of Statewide Health Planning and Development, or the Attorney General, pursuant to Section 436.222 of the Health and Safety Code.

(10) In an action by a secured lender for specified performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document. In addition, that appointment may be continued after entry of a judgment for specific performance in that action, if appropriate to protect, operate, or maintain real property encumbered by the deed of trust or mortgage or to collect the rents therefrom while a pending nonjudicial foreclosure under power of sale in the deed of trust or mortgage is being completed.

(11) In a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to subdivision (g) of Section 2938 of the Civil Code.

(c) A receiver may be appointed, in the manner provided in this chapter, including, but not limited to, Section 566, by the superior court in an action other than a limited case brought by a secured lender to enforce the rights provided in Section 2929.5 of the Civil Code, to enable the secured lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security. The secured lender shall not abuse the right of entry and inspection or use it to harass the borrower or tenant of the property. Except in case of an emergency, when the borrower or tenant of the property has abandoned the premises, or if it is impracticable to do so, the secured lender shall give the borrower or tenant of the property reasonable notice of the secured lender's intent to enter and shall enter only during the borrower's or tenant's normal business hours. Twenty-four hours' notice shall be presumed to be reasonable notice in the absence of evidence to the contrary.

(d) Any action by a secured lender to appoint a receiver pursuant to this section shall not constitute an action within the meaning of subdivision (a) of Section 726.

(e) For purposes of this section:

(1) "Borrower" means the trustor under a deed of trust, or a mortgagor under a mortgage, where the deed of trust or mortgage encumbers real property security and secures the performance of the trustor or mortgagor under a loan, extension of credit, guaranty, or other obligation. The term includes any successor-in-interest of the trustor or mortgagor to the real property security before the deed of trust or mortgage has been discharged, reconveyed, or foreclosed upon.

(2) "Hazardous substance" means (A) any "hazardous substance" as defined in subdivision (f) of Section 25281 of the Health and Safety Code as effective on January 1, 1991, or as subsequently amended, (B) any "waste" as defined in subdivision (d) of Section 13050 of the Water Code as effective on January 1, 1991, or as subsequently amended, or (C) petroleum, including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture thereof.

(3) "Real property security" means any real property and improvements, other than a separate interest and any related interest in the common area of a residential common interest development, as the terms "separate interest," "common area," and "common interest development" are defined in Section 1351 of the Civil Code, or real property consisting of one acre or less which contains 1 to 15 dwelling units.

(4) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including continuing migration, of hazardous substances into, onto, or through soil, surface water, or groundwater.

(5) "Secured lender" means the beneficiary under a deed of trust against the real property security, or the mortgagee under a mortgage against the real property security, and any successor-in-interest of the beneficiary or mortgagee to the deed of trust or mortgage.

Comment. Section 564 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).

Code Civ. Proc. § 631 (amended). Waiver of trial by jury

SEC. ____. Section 631of the Code of Civil Procedure is amended to read:

631. (a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:

(1) By failing to appear at the trial.

(2) By written consent filed with the clerk or judge.

(3) By oral consent, in open court, entered in the minutes or docket.

(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

(5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). The advanced jury fee shall not exceed the amount necessary to pay the average mileage and fees of 20 trial jurors for one day in the court to which the jurors are summoned.

(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if any be allowed by law) of the jury accrued up to that time.

(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any.

(b) In a superior court action, other than a limited case, if a jury is demanded by either party in the memorandum to set the cause for trial and the party, prior to trial, by announcement or by operation of law waives a trial by jury, then all adverse parties shall have five days following the receipt of notice of the waiver to

file and serve a demand for a trial by jury and to deposit any advance jury fees which are then due.

(c) When the party who has demanded trial by jury either waives such trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit such fees, was made, or by that party's failing promptly to deposit the fees provided in paragraph (6) of subdivision (a).

(d) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.

Comment. Section 631 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).