

**Memorandum 2001-66****Trial Court Unification:  
Cases Within Jurisdiction of Court of Appeal on June 30, 1995**

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**BACKGROUND**

At the June 2001 meeting, the Commission directed the staff to develop a proposed revision of the court appellate structure. The revision would convert the superior court appellate division into a lower division of the court of appeal.

Such a scheme would mitigate the present undesirable situation of superior court judges overturning decisions of other superior court judges. It would avoid the problem of an appeal filed in the wrong court, with the attendant consequence of dismissal or transfer between courts. And it would eliminate the problematic constitutional provision preserving court of appeal jurisdiction in causes within its appellate jurisdiction on June 30, 1995.

To implement this scheme, a number of constitutional and statutory revisions would be required. See the Exhibit to this memorandum. The memorandum discusses several issues concerning the proposal.

If the Commission decides to proceed with the proposal, the staff believes the proposal should be circulated for comment as a separate tentative recommendation. It should not be buried in the trial court restructuring material.

Before making that decision, the Commission should review the alternate approach proposed by the Ad Hoc Task Force on Superior Court Appellate Divisions. The task force report is discussed in this memorandum.

**ELIMINATION OF APPELLATE DIVISION OF SUPERIOR COURT AND  
CREATION OF LOWER DIVISION OF COURT OF APPEAL****Existing Law**

Under existing law, appeals from the superior court follow different appeal paths, depending on the nature of the case. Statutes specify the appellate jurisdiction of the court of appeal and of the appellate division of the superior

court. The court of appeal may not be statutorily deprived of appellate jurisdiction, however, “in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995.” Cal. Const. art. VI, § 11(a).

For civil cases, review of limited civil cases (other than small claims) is in the appellate division of the superior court. Code Civ. Proc. § 904.2. Review of small claims cases is by trial de novo before a superior court judge. Code Civ. Proc. §§ 116.710, 116.770. Review of unlimited civil cases is in the court of appeal. Code Civ. Proc. § 904.1.

For criminal cases, review of misdemeanors and infractions is in the appellate division of the superior court. Penal Code § 1466. Review of felony cases is in the court of appeal. Penal Code § 1235.

This system has its roots in pre-unification days, when proceedings in municipal court were reviewed in the superior court appellate departments and proceedings in superior court were reviewed in the court of appeal. At the time the trial court unification structure was created, the Commission considered and rejected the possibility of having all appeals go to the court of appeal. The reasons for this decision, and related considerations, are discussed below.

## **Public Policy**

The Commission estimated that if all appeals were to go to the court of appeal, its workload would increase by about 25%, representing the volume of work handled by the superior court appellate departments. The Commission considered a number of alternatives for handling appeals in the unified trial courts. An edited version of the Commission’s conclusions follows:

### **All Appeals to Courts of Appeal with Workload Adjustment**

All appeals could be made to the courts of appeal. In this event, measures would be necessary to deal with the expected increased workload of the courts of appeal. Suggestions to handle the increased workload of the court of appeal under this proposal include:

- (1) Increase the size of the court of appeal.
- (2) Allow disposition of some cases without written opinions.
- (3) Make acceptance of an appeal discretionary with the court of appeal.
- (4) Limit appealability of small claims matters.
- (5) Limit appealability of traffic matters.
- (6) Eliminate review under Penal Code Sections 995 and 1538.5.

The Commission believes as a matter of policy that trial court unification should not be the occasion for making substantial

changes in the Constitution affecting fundamental concepts of justice and reviewability. Written opinions are fundamental to the development of a sound body of interpretive law. Review of matters now within the original jurisdiction of the municipal and justice courts should not be too remote or formal, but should be available locally, immediately, and inexpensively. Trial court unification should not be accomplished at the expense of the fairness that has been built into the California judicial system over the years. Any necessary changes should be the result of a careful statutory revision.

#### **Appeals Between Counties**

Appeals from matters formerly within the jurisdiction of the municipal and justice courts might be made to the trial court in an adjoining county, rather than internally within the unified court. This proposal would avoid the problem inherent in having peer review among colleagues of equal standing who serve on the same court.

The Commission does not recommend this approach. It still involves a judge or panel of judges overruling the decision of a judge of equal rank. It also inconveniences the parties. The concept of an appellate capacity in the trial court in part is to provide easy accessibility of review within the county. And cross-county appeals undoubtedly would create management problems, particularly where the workload and staffing of adjoining counties differ substantially.

#### **Appellate Jurisdiction in Unified Court**

One approach to the issue of appeals from causes currently within the jurisdiction of the municipal and justice courts is to provide for appellate jurisdiction within the unified court. This is suggested in the 1993 Judicial Council Report, which notes that there is sufficient authority to create an appellate department in the unified court by court rule, as is done now in the superior court.

The primary concern with appellate jurisdiction within the unified court is the problem of conflicts of interest arising in peer review. A judge should not be in a position of having to reverse a judge of equal rank. There may be a collegiality or deference on the court that will destroy the independent judgment necessary for a fair review.

The unification proposal addresses this problem by creating a constitutional appellate division in the unified trial court. Although an appellate division could be created by statute or court rule, the Commission believes the proposal is correct in its constitutional establishment of an appellate division. The existing superior court appellate department works because the appellate department exercises review over lower court cases, not over other superior court cases. To ensure proper functioning of an appellate

department staffed by judges of the same jurisdiction as the judges being reviewed, a constitutional hierarchy is desirable. This will avoid the dilemma of judges of equal rank claiming the constitutional right to reverse (and possibly overrule reversals of) each other.

An added way to ensure independence within the trial court setting is to mandate that appointments to the appellate division be made by the Chief Justice and that they be for a specified term. The Judicial Council can be required to adopt rules that will promote independence. The rules might set forth relevant factors to be used by the Chief Justice in making appointments to the appellate division, including criteria such as length of service as a judge, reputation within the district, and degree of separateness of the appellate department's workload from the judge's regular assignments (e.g., a unified court judge who routinely handles large numbers of misdemeanors should ordinarily not serve in the appellate department). In addition, appointments might include judges assigned from other counties if necessary for proper operation of the appellate division in a small county.

### **Changed Circumstances**

Now that unification of the trial courts is complete, it can be argued that changed circumstances shift the balance towards sending all appeals to the court of appeal, rather than splitting them between the court of appeal and the appellate division.

Among the considerations affected by changed circumstances are:

**(1) Disruptive effect of unification.** The Commission sought to minimize any disruptive effect of unification by minimally changing procedures. Now that unification is complete and all courts are functioning successfully in a unified environment, it is appropriate to consider whether procedures in unified courts could be improved.

**(2) Equal protection no longer a factor.** A consistent Commission policy was that unification should not create inequalities for litigants in unified versus nonunified courts. Thus providing for appeals to the court of appeal in unified counties while keeping the status quo in nonunified counties would have violated this principle. With all counties now unified, the potential for unequal treatment is gone.

**(3) June 30, 1995, problem.** At the time the Commission proposed split jurisdiction between the court of appeal and the appellate division, the constitutional protection of the court of appeal's jurisdiction in "causes of a type

within the appellate jurisdiction of the court of appeal on June 30, 1995” had not been contemplated. It was contemplated that the Legislature would spell out the jurisdiction of the appellate courts in a rational way. This awkward political compromise argues for elimination by putting all jurisdiction in the court of appeal.

**(4) Collegiality solutions unsatisfactory in practice.** The biggest problem with the superior court appellate division is the reality that judges of equal rank are required to overturn each other’s decisions. The Commission tried to build in institutional protection of independence by various techniques. However, this does not appear to have worked well in practice. The report of the Ad Hoc Task Force on Superior Court Appellate Divisions concludes that, “the appearance of impartial appellate justice at the superior court level is seriously threatened in many counties because of (1) negative perceptions association with ‘peer review’ (i.e., judges on the appellate division of a superior court reviewing decisions by their colleagues on the same superior court), and (2) the frequency with which appellate division judges in many counties have disqualifying conflicts arising out of prior involvement with a case.” *Report* at p. 9. The only county in which the Task Force found no problem of this sort was Los Angeles, because of its size and because the appellate division judges work full time on handling appeals and writs in a separate facility dedicated to that purpose.

**(5) Workload solution.** A major concern about assigning all appeals to the court of appeal was the workload and staffing problem that would create. The Commission’s current thought is to create a “lower division” within the court of appeal, staffed by superior court judges sitting by assignment. In effect, that would transfer the superior court appellate division, judges and all, to the court of appeal.

**(6) Local access problem.** Elimination of the superior court appellate divisions in favor of a court of appeal lower division has at least one potentially serious problem. A major argument in favor of the superior court appellate division was that it would keep appeals in small cases local. As the Commission noted at the time, “Review of matters now within the original jurisdiction of the municipal and justice courts should not be too remote or formal, but should be available locally, immediately, and inexpensively.”

Nothing has changed to mitigate this concern, but there are possible solutions for it. The Ad Hoc Task Force suggests:

Geographic convenience could be maintained in a district-wide appellate division if the judges were to employ teleconferencing or video-conferencing technologies, or if the appellate division were to “ride circuit” to each of the counties. Riding circuit would appear to be a possible solution in the Second, Sixth, and Fourth districts, but riding circuit becomes increasingly problematic as the number of counties, and the frequency of sessions for each county, increases. ... These complicating factors — the number of counties within districts, travel distances between counties, seasonal variations that complicate travel, and caseload differences — suggest the need for special tailoring of the appellate division for each district. One size will definitely not fit all districts.”

*Report at p. 19.*

We have added language in the draft to require the lower division of the court of appeal to hold session in the county in which the case originates.

### **Political Considerations**

At the time the appellate structure for trial court unification was under consideration, several political concerns influenced the attitude of the appellate courts. One concern related to workload, and the possibility that the Legislature would overburden the court of appeal. The other concern related to the relative importance of the cases on appeal, and the possibility that the Legislature would diminish the historic role of the court of appeal by removing some of its jurisdiction.

The present proposal should satisfy both of these concerns. With respect to workload, the proposal provides for superior court judges to sit by assignment on the lower division. There should be no impact on the workload of court of appeal judges.

With respect to the integrity of the court of appeal’s historic jurisdiction, the proposal puts all appellate jurisdiction in the court of appeal and leaves it to the court’s discretion which causes to assign to the lower division for resolution.

An alternative would be to fix the lower division’s jurisdiction either in the constitution or by statute. Thus limited civil cases and misdemeanor and infraction cases would be assigned to the lower division. The staff suspects this approach would satisfy the political concerns about appellate restructuring just as well as having the court of appeal designate which cases go to the lower division.

The chief advantage of designation by the court is the flexibility it allows. The chief disadvantage is that it may give too much control of this matter to the judicial branch. The Commission discussed a similar issue in its trial court unification report:

The 1993 Judicial Council Report would remove authority to define appellate jurisdiction from the Legislature and vest it in the Judicial Council, with approval of the Supreme Court. The report indicates that while the Legislature indirectly controls appellate jurisdiction now by defining the jurisdiction of the municipal and justice courts, this is really incidental: “As a practical matter, however, the Legislature exercises little control over appellate jurisdiction since the reassignment of a class of cases from the original jurisdiction of the superior court to the original jurisdiction of the municipal and justice courts has such significant implications entirely apart from which court has appellate jurisdiction.”

Removal of decisions concerning appellate jurisdiction from the legislative branch and vesting them in an administrative agency within the judicial branch would signal a major shift in constitutional policy. The Commission has not seen any documentation or demonstration of a need for this change, and does not recommend it as part of trial court unification.

The Commission believes that both the existing constitutional authority of the Legislature to define the appeal path of causes within the trial court, and the existing statutory allocation of workload between the courts of appeal and appellate divisions of the superior courts, should be maintained to the extent practicable in the context of trial court unification.

The staff thinks it would be useful to highlight the question of court versus legislative control of lower division jurisdiction when we circulate a draft for comment.

### **Terminology**

We have referred to the proposed new division of the court of appeal as the “**lower division**”. Does this suggest an inferior quality of justice would be dispensed?

Other names are possible. For example, “**local division**” could imply a more immediate brand of justice, in which the judges ride circuit. The term “**limited division**” could be used to suggest the smaller character of cases being reviewed in that division. “**Special division**” is a generic term that reflects the principle that appeals are in the court of appeal generally unless there is a special assignment of them.

## **Funding**

Currently funding for appellate division operations is part of the trial court budget. If that division is eliminated and the work transferred to the court of appeal, an appropriate funding adjustment must be made.

The staff draft does not deal with this issue directly. It appears to us that existing statutes are written in such a way as to enable Judicial Council to make the necessary funding change without the need for special legislation. See, e.g., Gov't Code §§ 69141 (appropriation of funds for expenses of courts of appeal), 77200 (state funding of trial court operations).

Nonetheless, the staff thinks we should highlight this issue in the tentative recommendation so as to generate comment if it appears the existing funding scheme will require adjustment.

## **Small Claims Appeals**

Appeal in a small claims case is by trial de novo in the superior court. Code Civ. Proc. §§ 116.710, 116.770. We do not want to lose this feature of the law by putting all appeals in the court of appeal. The staff draft of the constitutional amendment, below, preserves superior court appellate jurisdiction in causes in which the appeal is a new trial. See Cal. Const. art. VI, § 11(b) (appellate jurisdiction).

## **Original Jurisdiction**

Appellate review by the appellate division is not the only type of review that is problematic. Writ review also poses challenges.

Generally speaking, the appellate courts have writ authority over lower courts. Cal. Const. art. VI, § 10.

But under the existing scheme, the appellate division of the superior court also has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in limited civil cases and misdemeanor and infraction cases. Cal. Const. art. VI, § 10 (2d ¶). Apart from other issues concerning collegiality and effective review, this situation creates the anomaly of a superior court in effect slapping its own wrist.

Elimination of the appellate division would put writ review of these matters in the court of appeal. There is potentially a workload concern here, but again it can be handled by the court of appeal assigning writ review in limited civil cases and misdemeanor and infraction cases to its lower division.

The superior court and its judges also have habeas corpus authority, although the Constitution does not require that this jurisdiction be exercised by the appellate division. Cal. Const. art. VI, § 10 (1st ¶).

At least one recent case has tested the habeas corpus scheme. *In re Ramirez*, 108 Cal. Rptr. 2d 229 (2001), involved a habeas corpus proceeding brought in the court of appeal to challenge the superior court's actions. The question before the court was whether the superior court or the court of appeal should have habeas jurisdiction in the case. The defendant, citing precedent, argued that the court of appeal must have jurisdiction since one superior court judge cannot review the actions of another superior court judge. The court distinguished that precedent (it related to appellate, rather than writ, jurisdiction) and held that the general prohibition of peer review is overridden in this instance by the express constitutional grant of habeas authority to the superior court and its judges. A one-judge department of the superior court has habeas corpus authority over other judges of the superior court.

While *Ramirez* may be technically correct, the staff thinks it is probably wrong on policy. Writ review authority is analogous to appellate review authority, and should only run from a higher jurisdiction to a lower jurisdiction. We are not sure whether *Ramirez* is simply an aberrant case or whether the matter needs to be addressed in the Constitution or by statute. If revision is required, we would do this as a separate project, not as part of the current statutory cleanout. The Commission has previously contracted for a study of the impact of trial court unification on criminal procedures. We expect to receive the study by the end of the year. The staff has requested our consultant — Prof. Gerald Uelmen — to take *Ramirez* into account in preparing the study.

#### DRAFT OF COURT OF APPEAL LOWER DIVISION PROPOSAL

Set out immediately below are a few key provisions of the court of appeal lower division proposal. A more complete draft, including conforming revisions, is set out in the Exhibit to this Memorandum.

#### **Cal. Const. Art. VI, § 3 (amended). Court of Appeal**

SEC. 3. (a) The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment.

(b) An acting presiding justice shall perform all functions of the presiding justice when the presiding justice is absent or unable to act. The presiding justice or, if the presiding justice fails to do so, the Chief Justice shall select an associate justice of that division as acting presiding justice.

(c) In each court of appeal there is a lower division. The lower division shall exercise the jurisdiction of the court in causes designated by the court. The Chief Justice shall assign judges to the lower division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to govern practice and procedure in, and disposition of the business of, the lower division.

**Comment.** Section 3 is amended to provide for a lower division of the court of appeal. The lower division of the court of appeal replaces the appellate division of the superior court. See Cal. Const. art. VI, §§ 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

Subdivision (c) is intended to allow the Legislature and the Judicial Council latitude in providing for proceedings in the lower division. It is intended to enable, for example, assignment of superior judges to sit on the lower division, and review by one judge rather than three in traffic infraction cases. Cf. Gov't Code §§ 69162 (judges of lower division), 69164 (number of judges of lower division).

#### **Cal. Const. Art. VI, § 4 (amended). Superior Court**

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

~~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.~~

**Comment.** Section 4 is amended to eliminate the appellate division of the superior court. The appellate division is replaced by the lower division of the court of appeal. See Cal. Const. art. VI, §§ 3 (court of appeal), 10 (original jurisdiction), 11 (appellate jurisdiction).

Nothing in this section limits the ability of the superior court, or of the judicial branch by court rule, to establish or provide for divisions or departments within the superior court dealing with specific causes such as probate, juvenile, or traffic matters, or the

authority of the Legislature to prescribe special procedures or divisions for specific causes. Nothing in this section affects the ability of superior courts of different counties to share resources or consolidate administrative activities.

**Cal. Const. Art. VI, § 10 (amended). Original jurisdiction**

SEC. 10. (a) The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.

Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. ~~The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.~~

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

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

**Comment.** The second paragraph of Section 10(a) is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, § 4. The function of the appellate division is performed by the court of appeal.

The third paragraph is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. Although the superior court has original jurisdiction of all causes, nothing in this section limits the ability of the superior court, or of the judicial branch by court rule, to establish or provide for divisions or departments within the superior court dealing with specific causes such as probate, juvenile, or traffic matters, or the authority of the Legislature to prescribe special procedures or divisions for specific causes, or to create administrative tribunals that make adjudicative decisions, subject to judicial review. *Cf.* Section 4 & Comment.

**Cal. Const. Art. VI, § 11 (amended). Appellate jurisdiction**

SEC. 11. (a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction ~~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. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.~~

~~(b) Except as provided in Notwithstanding subdivision (a), the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute in which the appeal is a retrial in the superior court.~~

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

**Comment.** Section 11 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution, and to reflect the elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

Appeal in a small claims case is by retrial in the superior court. See Code Civ. Proc. §§ 116.710, 116.770.

**Code Civ. Proc. § 77 (repealed). Appellate division**

~~77. (a) In every county and city and county, there is an appellate division of the superior court consisting of three judges or, when the Chief Justice finds it necessary, four 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 the 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.~~

~~(b) In each appellate division, no more than three judges shall participate in a hearing or decision. The presiding judge of the division shall designate the three judges who shall participate.~~

~~(c) In addition to their other duties, the judges designated as members of the appellate 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 division of the superior court of a county other than the county in which that judge was elected or appointed as a superior court judge, or if the judge is retired, in a county other than the county in which the judge resides, the judge shall receive from the county to which the judge is designated expenses for travel, board, and lodging. If the judge is out of the judge's county overnight or longer, by reason of the designation, that judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for those 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 the judge is designated, for the time so served, amounts equal to that which the judge would have received from each if the judge had been assigned to the superior court of the county.~~

~~(d) The concurrence of two judges of the appellate division of the superior court shall be necessary to render the decision in every case in, and to transact any other business except business that may be done at chambers by the presiding judge of, the division. The presiding judge shall convene the appellate division when necessary. The presiding judge shall also supervise its business and transact any business that may be done at chambers.~~

~~(e) The appellate division of the superior court has jurisdiction on appeal from the following courts, in all cases in which an appeal may be taken to the superior court or the appellate division of the superior court as provided by law, except where the appeal is a retrial in the superior court:~~

~~(1) The municipal courts within the county.~~

~~(2) The superior court in a county in which there is no municipal court.~~

~~(f) The powers of each appellate division shall be the same as are now or may hereafter be provided by law or rule of the Judicial Council relating to appeals to the appellate division of the superior courts.~~

~~(g) The Judicial Council shall promulgate rules, not inconsistent with law, to promote the independence of, and govern the practice and procedure and the disposition of the business of the appellate division.~~

~~(h) Notwithstanding any other provision of law, the Chief Justice may designate any municipal court judge as a member of the appellate division of the superior court if the municipal court is participating in a trial court coordination plan approved by the Judicial Council and the designated municipal court judge has been assigned to the superior court of the county by the Chief Justice.~~

~~(i) A reference in any other statute to the appellate department of the superior court means the appellate division of the superior court.~~

~~(j) Notwithstanding the provisions of subdivisions (b) and (d), appeals from convictions of traffic infractions may be heard and decided by one judge of the appellate division of the superior court.~~

**Comment.** Former Section 77 is repealed to reflect elimination of the appellate division of the superior court and its replacement by the lower division of the court of appeal. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction). It is superseded by Article 3

(commencing with Section 69160) of Chapter 4 of Title 8 of the Government Code (lower division of court of appeal).

**Gov't Code §§ 69160-69167 (added). Lower division**

**Article 3. Lower Division**

**Comment.** Sections 69160-69167 are added to implement Section 3(c) of Article VI of the California Constitution (court of appeal). The article supersedes former Code of Civil Procedure Section 77 (appellate division).

☞ **Staff Note.** This draft does not address funding issues. To the extent the court of appeal has assumed the function of the appellate division, funding for that function should be provided to the court of appeal.

**69160. “Lower division” defined**

69160. As used in this article, “lower division” means lower division of the court of appeal.

**69161. Jurisdiction of lower division**

69161. (a) In each court of appeal there is a lower division.

(b) The lower division shall exercise the jurisdiction of the court of appeal in all cases designated by the court of appeal.

(c) The court of appeal does not have jurisdiction where the appeal is a retrial in the superior court.

☞ **Staff Note.** The jurisdiction of the lower division of the court of appeal may include writ proceedings as well as appellate proceedings.

The staff suggests that the Commission solicit comment as to whether the jurisdiction of the lower division should be in those matters designated by the court of appeal, or whether its jurisdiction should be prescribed by the Constitution or statute — limited civil cases and misdemeanor and infraction cases.

**69162. Judges of lower division**

69162. (a) The lower division consists of three judges or, when the Chief Justice finds it necessary, four judges.

(b) The Chief Justice shall assign judges to the lower division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council.

(c) Each judge assigned to the lower division shall be a judge of a superior court in a county within the court of appeal district, a judge of the superior court of another county, or a judge retired from a superior court or a court of higher jurisdiction in the state. In addition to other duties, a judge assigned as a member of the lower division shall serve for the period specified in the order of assignment.

**69163. Presiding judge of lower division**

69163. (a) The Chief Justice shall designate one of the judges of each lower division as the presiding judge of the division.

(b) The presiding judge shall supervise the business of the lower division and transact any business that may be done at chambers. The presiding judge shall convene the lower division when necessary.

**69164. Number of judges required for decision**

69164. (a) In the lower division, no more than three judges shall participate in a hearing or decision. The presiding judge of the division shall designate the three judges who shall participate.

(b) The concurrence of two judges of the lower division is necessary to render the decision in every case and to transact any other business except business that may be done at chambers by the presiding judge of the division.

(c) Notwithstanding any other provision of this section, an appeal from conviction of a traffic infraction may be heard and decided by one judge of the lower division.

**69165. Sessions of lower division**

69165. The lower division shall hold session in the county within the court of appeal district in which the case before it originates, unless otherwise agreed to by the parties and the court.

☞ **Staff Note.** This section would require that the lower division judges ride circuit.

**69166. Compensation and reimbursement of judges**

69166. (a) Whenever a judge is assigned to serve in a lower division holding session in a county other than the county in which the judge's superior court is located, or if the judge is retired, in a county other than the county in which the judge resides, the judge shall receive expenses for travel, board, and lodging. If the judge is out of the county overnight or longer by reason of the assignment, the judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for those purposes to justices of the Supreme Court under the rules of the State Board of Control.

(b) In addition to the amount provided in subdivision (a), a retired judge shall receive for the time served an amount equal to that which the judge would have received if the judge had been assigned to the superior court.

**69167. Judicial Council rules**

69167. The Judicial Council shall promulgate rules, not inconsistent with statute, to govern practice and procedure in, and disposition of the business of, the lower division.

## PROPOSAL OF AD HOC TASK FORCE ON SUPERIOR COURT APPELLATE DIVISIONS

### **Summary of Task Force Report**

The Chief Justice has created an Ad Hoc Task Force on the Superior Court Appellate Divisions to evaluate court organizational structures, including subject matter and geographical jurisdiction, judicial assignments to the appellate division, support staff needs, workloads, and the concerns of peer review. The task force is composed of four judges who have appellate department experience, an appellate division research attorney, and two attorneys who have handled civil and criminal matters in the appellate division. The task force is staffed by an Administrative Office of the Courts attorney and Professor J. Clark Kelso.

The Appellate Division Task Force issued its report in May 2001. The task force finds the same problems with the superior court appellate division structure that the Commission has been concerned about, as well as other deficiencies, including trial court judges not properly trained for occasional appellate work, insufficient support for the appellate division, inadequate facilities, workload inequalities, and variant procedures.

The task force recommends structural change including, among others, the following key features:

(1) Rather than an appellate division in each superior court, there should be district-wide appellate divisions. The boundaries of appellate division districts should be coextensive with the boundaries of court of appeal districts.

(2) Judges in the district-wide appellate divisions should receive training and be supported by trained staff.

(3) Court of appeal districts should make facilities available to the appellate division. New courthouse construction should contemplate local sessions of the district appellate division.

(4) Apply court of appeal procedural rules in the appellate division and require written opinions in all causes.

The task force points out that these structural reforms will eliminate peer review problems, create a corps of dedicated appellate division judges, create efficiencies in support operations, even out workload discrepancies among courts, and improve the quality of justice in causes within the jurisdiction of the appellate division.

## **Critique of Task Force Report**

From this overview, it can readily be seen that the Task Force recommendation for district-wide superior court appellate divisions is quite similar to the Commission's concept of lower divisions in the courts of appeal. The two approaches would operate essentially the same in practice.

In fact, the Ad Hoc Task Force had before it a proposal to eliminate the superior court appellate division. Their report includes a separate concurrence by one of the task force attorney members, who states, "I am confident that if there is no necessity to have one state trial court instead of two, there is none for retaining two separate appellate courts." *Report* at 29.

What are the advantages and disadvantages of each approach?

(1) **Legal authority.** The Task Force approach could be implemented largely without constitutional or statutory change. Court rules could direct that the Chief Justice appoint the same judges to serve all superior courts in a particular district, thereby satisfying the basic constraint of an appellate division in each superior court.

By contrast, the court of appeal lower division concept would require both constitutional and statutory change. It should be noted, however, that the Constitution already recognizes the possibility of divisions within each court of appeal district; and the appellate jurisdiction of the courts of appeal and the superior courts is within legislative control. It would be a relatively simple matter legislatively to assign all cases on appeal to the courts of appeal, and let those courts designate cases for the lower division.

(2) **Peer review.** While both schemes will go far to eliminate the concern about peer review on appeal, the court of appeal lower division has the edge here because it solves the problem theoretically as well as practically. This was a key concern raised in the Task Force concurrence — "Moreover, while our proposal will do much to reduce the concerns about peer review that may well be the single greatest problem created by unification, it will not eliminate the *perceptions* that a judge of the appellate division still is a superior court judge who is sitting in judgment on his or her colleagues' appeals." *Report* at p. 29.

Of course, it can also be argued that with superior court judges sitting by assignment on the court of appeal lower division, they are still at bottom trial court rather than appellate court judges. While removing them to the court of appeal may change things theoretically, the assignment is only temporary, and effectively there is still peer review going on.

**(3) Funding.** Perhaps the Task Force approach is less disruptive to funding issues. Because the appellate division of the superior court is still a trial court operation, the same trial court funds that support it now will continue to support it, only more efficiently.

In contrast, creating a court of appeal lower division would require reallocation of trial court funding to support court of appeal operations; this may present some complexities. (However, it is possible that shifting from county-based appellate division funding to district-based appellate division funding would likewise create complexities.)

In any event, now that we have state funding of both trial court and court of appeal operations, it should not be a major challenge to achieve the necessary funding shifts either way.

**(4) June 30, 1995.** One advantage of the court of appeal lower division is that it would no longer be necessary to distinguish between causes within the jurisdiction of the court of appeal on June 30, 1995, and other causes; all appeals would be to the court of appeal.

This distinction would still be maintained under the Task Force approach. An appeal filed in the wrong court would not need to be dismissed, however, since a court rule could provide for transfer in that situation. The Task Force proposes just such a rule. See *Report* at p. 89.

**(5) Original jurisdiction.** The Task Force proposal of a district-wide appellate division would help somewhat with the issue of peer review in original jurisdiction writ cases, just as it would with appellate jurisdiction. However, it still entails the theoretical anomaly of the court issuing a writ to itself.

The lower division of the court of appeal would not be subject to this defect. It would conform to the traditional theory of a court of higher jurisdiction reviewing the decisions of a court of lower jurisdiction.

Neither approach would solve the habeas corpus problem. This will need to be addressed in the future in any event.

**(6) Other options.** This memorandum has focused on the concepts of a district-wide appellate department of the superior court and a lower division of the court of appeal, but there are other options that could be explored. For example, in reaction to the Ad Hoc Task Force proposal, Solano County presiding judge William Harrison, president of the California Judges Association, was quoted as saying that a simpler option might be to use judges from neighboring counties to hear appeals:

“I believe that adjoining counties could act as the appellate division for the neighboring superior court,” he said. For example, Solano’s 15 judges could handle appeals from nearby Napa and Yolo counties, which have six and nine judges, respectively. Those counties, in turn, could hear Solano’s appeals.

“This would avoid more bureaucracy,” he said, noting it would also avoid the necessity of judges riding circuit or having litigants travel great distances.

*Domino, Panel Wants to Avoid “Peer Review” of Trial Court Rulings*, 107 S.F. Daily J. No. 146, p. 8 (July 30, 2001).

The Commission has previously considered and rejected such a scheme. See discussion above at page 3.

#### CONCLUSION

The staff believes that both the Ad Hoc Task Force proposal and the court of appeal lower division concept would be feasible and would make a substantial improvement in the review structure of the court system. The two approaches would be quite similar in effect. One perhaps significant difference is that under the Task Force proposal causes of a type within the jurisdiction of the court of appeal on June 30, 1995, could not be assigned to the superior court appellate division, whereas under the Commission approach those causes could be assigned to the court of appeal lower division.

The court of appeal lower division is a theoretically cleaner approach, whereas the district-wide superior court appellate division would be somewhat simpler to implement.

It would be possible to do both. The district-wide appellate division could be implemented immediately, and could be rather simply converted to a lower division of the court of appeal on completion of any necessary constitutional and statutory revisions.

We have tentatively arranged for Joshua Weinstein, the staff attorney for the Administrative Office of the Courts who works with the Ad Hoc Task Force, to be present at the Commission meeting for the discussion of these issues.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

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Exhibit

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**CASES WITHIN JURISDICTION OF COURT OF APPEAL**

CALIFORNIA CONSTITUTION

**Cal. Const. Art. VI, § 3 (amended). Court of Appeal**

SEC. 3. (a) The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment.

(b) An acting presiding justice shall perform all functions of the presiding justice when the presiding justice is absent or unable to act. The presiding justice or, if the presiding justice fails to do so, the Chief Justice shall select an associate justice of that division as acting presiding justice.

(c) In each court of appeal there is a lower division. The lower division shall exercise the jurisdiction of the court in causes designated by the court. The Chief Justice shall assign judges to the lower division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to govern practice and procedure in, and disposition of the business of, the lower division.

**Comment.** Section 3 is amended to provide for a lower division of the court of appeal. The lower division of the court of appeal replaces the appellate division of the superior court. See Cal. Const. art. VI, §§ 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

Subdivision (c) is intended to allow the Legislature and the Judicial Council latitude in providing for proceedings in the lower division. It is intended to enable, for example, assignment of superior judges to sit on the lower division, and review by one judge rather than three in traffic infraction cases. Cf. Gov't Code §§ 69160-69167 (lower division).

**Cal. Const. Art. VI, § 4 (amended). Superior Court**

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

~~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.~~

**Comment.** Section 4 is amended to eliminate the appellate division of the superior court. The appellate division is replaced by the lower division of the court of appeal. See Cal. Const. art. VI, §§ 3 (court of appeal), 10 (original jurisdiction), 11 (appellate jurisdiction).

Nothing in this section limits the ability of the superior court, or of the judicial branch by court rule, to establish or provide for divisions or departments within the superior court dealing with specific causes such as probate, juvenile, or traffic matters, or the authority of the Legislature to prescribe special procedures or divisions for specific causes. Nothing in this section affects the ability of superior courts of different counties to share resources or consolidate administrative activities.

**Cal. Const. Art. VI, § 10 (amended). Original jurisdiction**

SEC. 10. (a) The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.

Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. ~~The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.~~

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

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

**Comment.** The second paragraph of Section 10 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, § 4. The function of the appellate division is performed by the court of appeal.

The third paragraph is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. Although the superior court has original jurisdiction of all causes, nothing in this section limits the ability of the superior court, or of the judicial branch by court rule, to establish or provide for divisions or departments within the superior court dealing with specific causes such as probate, juvenile, or traffic matters, or the authority of the Legislature to prescribe special procedures or divisions for specific causes, or to create administrative tribunals that make adjudicative decisions, subject to judicial review. Cf. Section 4 & Comment.

**Cal. Const. Art. VI, § 11 (amended). Appellate jurisdiction**

SEC. 11. (a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction ~~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. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.~~

(b) ~~Except as provided in subdivision (a), the appellate division of the~~ The superior court has appellate jurisdiction in causes prescribed by statute in which the appeal is a retrial in the superior court.

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

**Comment.** Section 11 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution, and to reflect the elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

Appeal in a small claims case is by retrial in the superior court. See Code Civ. Proc. §§ 116.710, 116.770.

**Cal. Const. Art. VI, § 23 (amended). Transitional provision**

Sec. 23. (a) The purpose of the amendments to Sections 1, 4, 5, 6, 8, 10, 11, and 16, of this article, and the amendments to Section 16 of Article I, approved at the November 5, 1996, general election is to permit the Legislature to provide for the abolition of the municipal courts and unify their operations within the superior courts. Notwithstanding Section 8 of Article IV, the implementation of, and orderly transition under, the provisions of the measure adding this section may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests, where otherwise permitted under this Constitution.

(b) When the superior and municipal courts within a county are unified, the judgeships in each municipal court in that county are abolished and the previously selected municipal court judges shall become judges of the superior court in that county. The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court. The 10-year membership or service requirement of Section 15 does not apply to a previously selected municipal court judge. Pursuant to Section 6, the Judicial Council may prescribe appropriate education and training for judges with regard to trial court unification.

(c) Except as provided by statute to the contrary, in any county in which the superior and municipal courts become unified, the following shall occur automatically in each preexisting superior and municipal court:

(1) Previously selected officers, employees, and other personnel who serve the court become the officers and employees of the superior court.

(2) Preexisting court locations are retained as superior court locations.

(3) Preexisting court records become records of the superior court.

(4) Pending actions, trials, proceedings, and other business of the court become pending in the superior court under the procedures previously applicable to the matters in the court in which the matters were pending.

(5) Matters of a type previously within the appellate jurisdiction of the superior court ~~remain~~ come within the jurisdiction of the ~~appellate division of the superior court~~ court of appeal.

(6) Matters of a type previously subject to rehearing by a superior court judge remain subject to rehearing by a superior court judge, other than the judge who originally heard the matter.

(7) Penal Code procedures that necessitate superior court review of, or action based on, a ruling or order by a municipal court judge shall be performed by a superior court judge other than the judge who originally made the ruling or order.

**Comment.** Section 23 is amended to eliminate the appellate division of the superior court. The appellate division is replaced by the lower division of the court of appeal. See Cal. Const. art. VI, §§ 3 (court of appeals), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Note.** The Commission solicits comments on whether this section may be repealed to reflect completion of the process of unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. Statutory transitional provisions for trial court unification based on this section are more complete. See Gov't Code §§ 70200-70219.

## BUSINESS AND PROFESSIONS CODE

### **Bus. & Prof. Code § 17209 (amended). Notice to Attorney General and county district attorney**

SEC. \_\_\_\_\_. Section 17209 of the Business and Professions Code is amended to read:

17209. If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, or a state court of appeal, ~~or the appellate division of a superior court~~, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice ~~or judge~~ for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

**Comment.** Section 17209 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

### **Bus. & Prof. Code § 17536.5 (amended). Notice to Attorney General and county district attorney**

SEC. \_\_\_\_\_. Section 17536.5 of the Business and Professions Code is amended to read:

17536.5. If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, or a state court of appeal, ~~or the appellate division of a superior court~~, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the

attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

**Comment.** Section 17536.5 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

## CODE OF CIVIL PROCEDURE

### **Code Civ. Proc. § 77 (repealed). Appellate division**

SEC. \_\_\_\_\_. Section 77 of the Code of Civil Procedure is repealed.

~~77. (a) In every county and city and county, there is an appellate division of the superior court consisting of three judges or, when the Chief Justice finds it necessary, four 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 the 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.~~

~~(b) In each appellate division, no more than three judges shall participate in a hearing or decision. The presiding judge of the division shall designate the three judges who shall participate.~~

~~(c) In addition to their other duties, the judges designated as members of the appellate 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 division of the superior court of a county other than the county in which that judge was elected or appointed as a superior court judge, or if the judge is retired, in a county other than the county in which the judge resides, the judge shall receive from the county to which the judge is designated expenses for travel, board, and lodging. If the judge is out of the judge's county overnight or longer, by reason of the designation, that judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for those 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 the judge is designated, for the time so served, amounts equal to that which the judge~~

would have received from each if the judge had been assigned to the superior court of the county.

~~(d) The concurrence of two judges of the appellate division of the superior court shall be necessary to render the decision in every case in, and to transact any other business except business that may be done at chambers by the presiding judge of, the division. The presiding judge shall convene the appellate division when necessary. The presiding judge shall also supervise its business and transact any business that may be done at chambers.~~

~~(e) The appellate division of the superior court has jurisdiction on appeal from the following courts, in all cases in which an appeal may be taken to the superior court or the appellate division of the superior court as provided by law, except where the appeal is a retrial in the superior court:~~

~~(1) The municipal courts within the county.~~

~~(2) The superior court in a county in which there is no municipal court.~~

~~(f) The powers of each appellate division shall be the same as are now or may hereafter be provided by law or rule of the Judicial Council relating to appeals to the appellate division of the superior courts.~~

~~(g) The Judicial Council shall promulgate rules, not inconsistent with law, to promote the independence of, and govern the practice and procedure and the disposition of the business of the appellate division.~~

~~(h) Notwithstanding any other provision of law, the Chief Justice may designate any municipal court judge as a member of the appellate division of the superior court if the municipal court is participating in a trial court coordination plan approved by the Judicial Council and the designated municipal court judge has been assigned to the superior court of the county by the Chief Justice.~~

~~(i) A reference in any other statute to the appellate department of the superior court means the appellate division of the superior court.~~

~~(j) Notwithstanding the provisions of subdivisions (b) and (d), appeals from convictions of traffic infractions may be heard and decided by one judge of the appellate division of the superior court.~~

**Comment.** Former Section 77 is repealed to reflect elimination of the appellate division of the superior court and its replacement by the lower division of the court of appeal. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction). It is superseded by Article 3 (commencing with Section 69160) of Chapter 4 of Title 8 of the Government Code (lower division of court of appeal).

#### **Code Civ. Proc. § 170.7 (amended). Judge serving on appellate division**

SEC. \_\_\_\_\_. Section 170.7 of the Code of Civil Procedure is amended to read:

170.7. Section 170.6 does not apply to a judge ~~designated or assigned to serve on the appellate division of a superior court~~ lower division of a court of appeal in the judge's capacity as a judge of that division.

**Comment.** Section 170.7 is amended to reflect elimination of the appellate division of the superior court and its replacement by the lower division of the court of appeal. See Cal. Const.

art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Code Civ. Proc. § 904 (amended). Appeal in civil case**

SEC. \_\_\_\_\_. Section 904 of the Code of Civil Procedure is amended to read:

904. (a) An appeal may be taken in a civil action or proceeding as provided in Sections 904.1, 904.2, 904.3, 904.4 and 904.5.

(b) An appeal in a civil action or proceeding is to the court of appeal.

**Comment.** Subdivision (b) of Section 904 supersedes the former first sentences of Sections 904.1 (taking appeal) and 904.2 (taking appeal in limited civil case). It reflects elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Code Civ. Proc. § 904.1 (amended). Taking appeal**

SEC. \_\_\_\_\_. Section 904.1 of the Code of Civil Procedure is amended to read:

904.1. (a) ~~An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, in an unlimited civil case~~ may be taken from any of the following:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt that is made final and conclusive by Section 1222, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or the superior court in a county in which there is no municipal court or the judge or judges thereof that relates to a matter pending in the municipal or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(13) From an order granting or denying a special motion to strike under Section 425.16.

(b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

**Comment.** The first sentence of Section 904.1(a) is superseded by subdivision (b) of Section 904 (appeal in civil case). The second sentence is amended to replace the reference to “other than a limited civil case” with a reference to an “unlimited civil case.” See Code Civ. Proc. § 88 (civil action or proceeding other than limited civil case may be referred to as unlimited civil case).

**Code Civ. Proc. § 904.2 (amended). Taking appeal in limited civil case**

SEC. \_\_\_\_\_. Section 904.2 of the Code of Civil Procedure is amended to read:

904.2. ~~An appeal in a limited civil case is to the appellate division of the superior court.~~ An appeal in a limited civil case may be taken from any of the following:

(a) From a judgment, except (1) an interlocutory judgment, or (2) a judgment of contempt that is made final and conclusive by Section 1222.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order changing or refusing to change the place of trial.

(d) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(e) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(f) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(g) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(h) From an order appointing a receiver.

**Comment.** Section 904.2 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

An appeal in a limited civil case is to the court of appeal. Section 904 (appeal in civil case). The court of appeal may confer jurisdiction on its lower division in a limited civil case. Cal. Const. art. VI, § 3.

**Code Civ. Proc. § 911 (repealed). Transfer from appellate division to court of appeal**

SEC. \_\_\_\_\_. Section 911 of the Code of Civil Procedure is repealed.

~~911. A court of appeal may order any case on appeal to a superior court in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the court of appeal determines, that the transfer appears necessary to secure uniformity of decision or to settle important questions of law.~~

~~No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in the case becomes final therein.~~

~~A court to which any case is transferred pursuant to this section shall have similar power to review any matter and make orders and judgments as the appellate division of the superior court would have in the case, except that if the case was tried anew in the superior court, the court of appeal shall have similar power to review any matter and make orders and judgments as it has in a case appealed pursuant to Section 904.1.~~

**Comment.** Section 911 is repealed to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Code Civ. Proc. § 1068 (amended). Courts authorized to grant writ of review**

SEC. \_\_\_\_\_. Section 1068 of the Code of Civil Procedure is amended to read:

1068. (a) A writ of review may be granted by any court, ~~except a municipal court~~, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

~~(b) The appellate division of the superior court may grant a writ of review directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.~~

**Comment.** Subdivision (a) of Section 1068 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (b) is deleted to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Code Civ. Proc. § 1085 (amended). Courts authorized to grant writ of mandate**

SEC. \_\_\_\_\_. Section 1085 of the Code of Civil Procedure is amended to read:

1085. (a) A writ of mandate may be issued by any court, ~~except a municipal court~~, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

~~(b) The appellate division of the superior court may grant a writ of mandate directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.~~

**Comment.** Subdivision (a) of Section 1085 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (b) is deleted to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Code Civ. Proc. § 1103 (amended). Courts authorized to grant writ of prohibition**

SEC. \_\_\_\_\_. Section 1103 of the Code of Civil Procedure is amended to read:

1103. (a) A writ of prohibition may be issued by any court, ~~except municipal courts,~~ to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested.

~~(b) The appellate division of the superior court may grant a writ of prohibition directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.~~

**Comment.** Subdivision (a) of Section 1103 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (b) is deleted to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**GOVERNMENT CODE**

**Gov't Code § 26824 (amended). Filing fee for appeal**

SEC. \_\_\_\_\_. Section 26824 of the Government Code is amended to read:

26824. The fee for filing a notice of appeal to the ~~appellate division of the superior court~~ court of appeal in a limited civil case is fifty dollars (\$50). The Judicial Council may make rules governing the time and method of payment and providing for excuse.

**Comment.** Section 26824 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

☞ **Staff Note.** Section 26824 is located among the county fee statutes. It should be relocated to a more appropriate location relating to appeals to the court of appeal. Cf. Gov't Code § 68926 (fee for notice of appeal generally). The Judicial Council has Section 26824 and related fee statutes under review. The present draft does not address the matter of relocation.

**Gov't Code § 68081 (amended). Appellate decisions**

SEC. \_\_\_\_\_. Section 68081 of the Government Code is amended to read:

68081. Before the Supreme Court, ~~a court of appeal, or the appellate division of a superior court~~ Court or a court of appeal renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

**Comment.** Section 68081 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Gov't Code § 68902 (amended). Publication of opinions**

SEC. \_\_\_\_\_. Section 68092 of the Government Code is amended to read:

68902. Such opinions of the Supreme Court, ~~of the courts of appeal, and of the appellate divisions of the superior courts~~ Court and the courts of appeal as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court.

**Comment.** Section 68902 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Gov't Code § 69107 (amended). Appointment of court of appeal judges**

SEC. \_\_\_\_\_. Section 69107 of the Government Code is amended to read:

69107. Upon the creation of a new court of appeal district or division, ~~other than a lower division,~~ the Governor shall appoint pursuant to subdivision (d) of Section 16 of Article VI of the Constitution three or more persons to serve as judges thereof as provided in the legislation creating the district or division. The judges of said district or division elected at the first general election at which they had the right to become candidates shall so classify themselves by lot that the term of office for at least one of them expires at the end of four years, at least one of them at the end of eight years, and at least one of them at the end of 12 years, and entry of such classification shall be made in the minutes of said district or division, signed by each of the judges thereof, and a duplicate thereof filed in the office of the Secretary of State.

**Comment.** Section 69107 is amended to reflect the fact that the Chief Justice makes assignments to the lower division of the court of appeal. See Cal. Const. art. VI, §3(c) (court of appeal); Gov't Code § 69160 (lower division).

**Gov't Code §§ 69160-69167 (added). Lower division**

SEC. \_\_\_\_\_. Article 3 (commencing with Section 69160) is added to Chapter 4 of Title 8 of the Government Code, to read:

### Article 3. Lower Division

**Comment.** Sections 69160-69167 are added to implement Section 3(c) of Article VI of the California Constitution (court of appeal). The article supersedes former Code of Civil Procedure Section 77 (appellate division).

☞ **Staff Note.** This draft does not address funding issues. To the extent the court of appeal has assumed the function of the appellate division, funding for that function should be provided to the court of appeal.

#### **69160. “Lower division” defined**

69160. As used in this article, “lower division” means lower division of the court of appeal.

#### **69161. Jurisdiction of lower division**

69161. (a) In each court of appeal there is a lower division.

(b) The lower division shall exercise the jurisdiction of the court of appeal in all cases designated by the court of appeal.

(c) The court of appeal does not have jurisdiction where the appeal is a retrial in the superior court.

☞ **Staff Note.** The jurisdiction of the lower division of the court of appeal may include writ proceedings as well as appellate proceedings.

The staff suggests that the Commission solicit comment as to whether the jurisdiction of the lower division should be in those matters designated by the court of appeal, or whether its jurisdiction should be prescribed by the Constitution or statute — limited civil cases and misdemeanor and infraction cases.

#### **69162. Judges of lower division**

69162. (a) The lower division consists of three judges or, when the Chief Justice finds it necessary, four judges.

(b) The Chief Justice shall assign judges to the lower division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council.

(c) Each judge assigned to the lower division shall be a judge of a superior court in a county within the court of appeal district, a judge of the superior court of another county, or a judge retired from a superior court or a court of higher jurisdiction in the state. In addition to other duties, a judge assigned as a member of the lower division shall serve for the period specified in the order of assignment.

#### **69163. Presiding judge of lower division**

69163. (a) The Chief Justice shall designate one of the judges of each lower division as the presiding judge of the division.

(b) The presiding judge shall supervise the business of the lower division and transact any business that may be done at chambers. The presiding judge shall convene the lower division when necessary.

**69164. Number of judges required for decision**

69164. (a) In the lower division, no more than three judges shall participate in a hearing or decision. The presiding judge of the division shall designate the three judges who shall participate.

(b) The concurrence of two judges of the lower division is necessary to render the decision in every case and to transact any other business except business that may be done at chambers by the presiding judge of the division.

(c) Notwithstanding any other provision of this section, an appeal from conviction of a traffic infraction may be heard and decided by one judge of the lower division.

**69165. Sessions of lower division**

69165. The lower division shall hold session in the county within the court of appeal district in which the case before it originates, unless otherwise agreed to by the parties and the court.

☞ **Staff Note.** This section would require that the lower division judges ride circuit.

**69166. Compensation and reimbursement of judges**

69166. (a) Whenever a judge is assigned to serve in a lower division holding session in a county other than the county in which the judge's superior court is located, or if the judge is retired, in a county other than the county in which the judge resides, the judge shall receive expenses for travel, board, and lodging. If the judge is out of the county overnight or longer by reason of the assignment, the judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for those purposes to justices of the Supreme Court under the rules of the State Board of Control.

(b) In addition to the amount provided in subdivision (a), a retired judge shall receive for the time served an amount equal to that which the judge would have received if the judge had been assigned to the superior court.

**69167. Judicial Council rules**

69167. The Judicial Council shall promulgate rules, not inconsistent with statute, to govern practice and procedure in, and disposition of the business of, the lower division.

PENAL CODE

**Penal Code § 1466 (amended). Appeals**

SEC. \_\_\_\_\_. Section 1466 of the Penal Code is amended to read:

1466. An appeal may be taken from a judgment or order, in an infraction or misdemeanor case, to the appellate division of the superior court of the county court of appeal of the district in which the 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 all or any portion of the action, including such an order or judgment, entered after a verdict or finding of guilty or a verdict or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(C) From sustaining a demurrer to any portion of the complaint or pleading.

(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.

(G) From the imposition of an unlawful sentence, whether or not the court suspends the execution of sentence. As used in this subparagraph, “unlawful sentence” means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court that strikes or otherwise modifies the effect of an enhancement or prior conviction. A defendant shall have the right to counsel in the people’s appeal of an unlawful sentence under the same circumstances that he or she would have a right to counsel under subdivision (a) of Section 1238.

(H) Nothing in this section shall be construed to authorize an appeal from an order granting probation. Instead, the people may seek appellate review of any grant of probation, whether or not the court imposes sentence, by means of a petition for a writ of mandate or prohibition that is filed within 60 days after probation is granted. The review of any grant of probation shall include review of any order underlying the grant of probation.

(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.

**Comment.** Section 1466 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Penal Code § 1468 (repealed). Appeals to appellate division**

SEC. \_\_\_\_\_. Section 1468 of the Penal Code is repealed.

~~1468. Appeals to the appellate divisions of superior courts shall be taken, heard and determined, the decisions thereon shall be remitted to the courts from which~~

~~the appeals are taken, and the records on such appeals shall be made up and filed in such time and manner as shall be prescribed in rules adopted by the Judicial Council.~~

**Comment.** Section 1468 is repealed to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Penal Code § 1471 (repealed). Transfer to court of appeal**

SEC. \_\_\_\_\_. Section 1471 of the Penal Code is repealed.

~~1471. A court of appeal may order any case on appeal to a superior court in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.~~

~~A court to which any such case is transferred shall have similar power to review any matter and make orders and judgments as the appellate division of the superior court by statute would have in such case, except as otherwise expressly provided.~~

**Comment.** Section 1471 is repealed to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Penal Code § 1538.5 (amended). Motion to return property or suppress evidence**

SEC. \_\_\_\_\_. Section 1538.5 of the Penal Code is amended to read:

1538.5. (a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 to 170.6, inclusive, of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the ~~municipal~~ or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention or if the time for initiating the proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 or 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of the proceedings, the property is no longer subject to lawful detention.

(f) (1) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing ~~in the municipal court or in the superior court in a county in which there is no municipal court~~, but the motion shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

(2) The motion may be made at the preliminary examination only if at least five court days before the date set for the preliminary examination the defendant has filed and personally served on the people a written motion accompanied by a memorandum of points and authorities as required by paragraph (2) of subdivision (a). At the preliminary examination, the magistrate may grant the defendant a continuance for the purpose of filing the motion and serving the motion upon the people, at least five court days before resumption of the examination, upon a showing that the defendant or his or her attorney of record was not aware of the evidence or was not aware of the grounds for suppression before the preliminary examination.

(3) Any written response by the people to the motion described in paragraph (2) shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing at which the motion is to be made.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made ~~in the municipal court or in the superior court in a county in which there is no municipal court~~ before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates

to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time. Any written response by the people to the motion shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing, unless the defendant is willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint

and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If the defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the ~~municipal court or superior court in a county in which there is no municipal court~~ prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion ~~to the superior court of the county in which the municipal or superior court is located, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases.~~ If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and not returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318, unless (1) he or she is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he or she is

charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, and the court orders that the defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

(m) The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) This section establishes only the procedure for suppression of evidence and return of property, and does not establish or alter any substantive ground for suppression of evidence or return of property. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions. Nothing in this section shall be construed as altering (1) the law of standing to raise the issue of an unreasonable search or seizure; (2) the law relating

to the status of the person conducting the search or seizure; (3) the law relating to the burden of proof regarding the search or seizure; (4) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court in a felony case, the people may file a petition for writ of mandate or prohibition in the court of appeal, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date that is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court in a felony case, the people, if they have not filed such a petition and wish to preserve their right to file a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file a petition and shall serve a copy of the notice upon the defendant.

(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available.

(q) The amendments to this section enacted in the 1997 portion of the 1997-98 Regular Session of the Legislature shall apply to all criminal proceedings conducted on or after January 1, 1998.

**Comment.** Section 1538.5 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution, and to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

## VEHICLE CODE

### **Veh. Code § 11205. Traffic violator school list (as amended by 1998 Cal. Stat. ch. 931, § 455.5)**

SEC. \_\_\_\_\_. Section 11205 of the Vehicle Code, as amended by Section 455.5 of Chapter 931 of the Statutes of 1998, is amended to read:

11205. (a) The department shall publish a traffic violator school referral list of all the approved locations of traffic violator school classes, by school name, to be transmitted to each municipal superior court in the state, ~~and to each superior court in a county in which there is no municipal court,~~ in sufficient quantity to allow the courts to provide a copy to each person referred to traffic violator school. The list

shall be revised at least twice annually and transmitted to the courts by the first day of January and the first day of July. It shall include all of the following:

(1) The name of each traffic violator school or, pursuant to subdivision (d), the general term “traffic violator school” followed by its traffic violator school license number.

(2) A phone number used for student information.

(3) The county ~~and the judicial district~~.

(4) The cities where classes are available.

(b) Each traffic violator school owner shall be permitted one school name in a ~~judicial district~~ county.

(c) The list shall be organized alphabetically in sections for each county ~~and subsections for each judicial district within the county~~. The order of the names within each ~~judicial district~~ county shall be random pursuant to a drawing or lottery conducted by the department.

(d) On the list prepared by the department under subdivision (c), each traffic violator school shall appear by name unless a court determines, pursuant to subdivision (e), that a name is inappropriate and directs the department to delete the name and instead list the school by the term “traffic violator school” followed by its license number. The deletion of the name of a school from the list for a ~~judicial district~~ county shall not affect whether that school appears by name on the list for any other ~~judicial district~~ county within the state. In making a determination under this subdivision regarding the deletion of a name from the list, the court shall use as its criteria whether the name is misleading to the public, undignified, or implies that the school offers inducements or premiums which derogate or distort the instructional intent of the traffic safety program.

(e) When the department transmits any referral list pursuant to subdivision (a), each court shall do all of the following:

(1) Within 30 days of receipt of the list, notify the school owner of any school name that the court intends to remove from the referral list.

(2) Within 60 days of receipt of the list, make every effort to schedule, conduct, and complete a hearing for the school owner, or a representative, if requested, at which the sole issue shall be whether the name violates the standards set forth in subdivision (d). A substitute name may be submitted to the court at the conclusion of the hearing, pursuant to subdivision (h).

(3) Within 10 days of the completion of that hearing, notify the department and school owner of any school names it intends to remove from the referral list.

(f) In order for a court action to delete a school name from the next referral list published by the department, the department shall receive court notification no later than 90 days prior to publication of the next referral list and, absent a direct order by ~~the appellate division of the superior court or a court of higher jurisdiction~~ an appellate court, the department shall not fail to publish a referral list on the grounds that there exists pending litigation or appeals concerning the lists.

(g) Any court notifying the department of a school name it intends to remove from the list, pursuant to this section, shall provide the school owner with the name of the judge making those findings.

(h) When a court informs a school owner, pursuant to subdivision (e), of its decision to delete the name of a traffic violator school from that ~~judicial district's~~ county's subsection of the department's traffic violator school referral list, the owner may, on a form approved by the department, submit a substitute name to the court and request approval of that name. The court shall, within 30 days of receipt of the request for approval of the substitute name, inform the department and the school owner, on a form approved by the department, of its approval or rejection of the substitute name. The school owner may continue this appeal process for approval of a substitute name until the court determines that the name does not violate the standard set forth in subdivision (d). A name approval in a ~~judicial district~~ county shall not affect the school's name or listing in any other ~~district~~ county in the state. The department shall not impose any fee or license requirement under this subdivision.

(i) If a court fails to act within 30 days on a request of a traffic violator school owner, pursuant to subdivision (h), the proposed substitute name shall be deemed approved by the court for the purposes of the traffic violator school referral list.

(j)(1) Every application filed with the department on and after June 1, 1991, for an original license by a traffic school owner or for approval to conduct classes in a ~~judicial district~~ county not previously approved, shall be accompanied by the approval of the court in each ~~judicial district~~ county proposed for those operations of the name of the school, on a form approved by the department for that purpose. For the approved name to be included in the traffic violator school referral list, the form shall be received by the department no later than 90 days prior to publication.

(2) When a court disapproves a school name pursuant to this subdivision, the court shall notify the school owner within 30 days of its disapproval and schedule a hearing for that school owner, or a representative, if requested, at which the sole issue shall be whether the name violates the standards set forth in subdivision (d). A substitute name may be submitted to the court at the conclusion of the hearing, pursuant to subdivision (h).

(3) The court shall make every effort to schedule, conduct, and complete a hearing within 60 days of receipt of the school owner's request for a school name approval. A name approval in a ~~judicial district~~ county shall not affect the school's name or listing in any other ~~district~~ county in the state. A change in physical location by a school within a ~~judicial district~~ county shall not require approval pursuant to this subdivision.

(k) The department shall publish a list of the owners of traffic violator schools. One copy shall be provided to each ~~municipal~~ superior court in the state, ~~and to each superior court in a county in which there is no municipal court.~~ This list shall be revised at least twice annually and transmitted to the courts by the first day of January and the first day of July. This list shall include all of the following:

- (1) The name of each school, grouped by owner.
- (2) The business office address.
- (3) The business office telephone number.
- (4) The license number.
- (5) The owner's name.
- (6) The operator's name.

(l) Except as otherwise provided in subdivision (d) of Section 42005, the court shall use either the current list of traffic violator schools published by the department when it orders a person to complete a traffic violator school pursuant to subdivision (a) or (b) of Section 42005 or, when a court utilizing a nonprofit agency for traffic violator school administration and monitoring services in which all traffic violator schools licensed by the department are allowed the opportunity to participate, a statewide referral list may be published by the nonprofit agency and distributed by the court. The agency shall monitor each classroom location situated within the ~~judicial districts~~ counties in which that agency provides services to the courts and is represented on its referral list. The monitoring shall occur at least once every 90 days with reports forwarded to the department and the respective courts on a monthly basis.

(m) The court may charge a traffic violator a fee to defray the costs incurred by the agency for the monitoring reports and services provided to the court. The court may delegate collection of the fee to the agency. Fees shall be approved and regulated by the court. Until December 31, 1996, the fee shall not exceed the actual cost incurred by the agency or five dollars (\$5), whichever is less.

(n) If any provision of subdivision (d) or (e), as added by Section 4 of Assembly Bill 185 of the 1991-92 Regular Session or as subsequently amended, or the application thereof to any person, is held to be unconstitutional, this section is repealed on the date the decision of the court so holding becomes final.

**Comment.** Section 11205 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. See also Code Civ. Proc. § 38 (judicial districts).

The section is also amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).

**Veh. Code § 11205. Traffic violator school list (as amended by 1998 Cal. Stat. ch. 931, § 456)**

SEC. \_\_\_\_\_. Section 11205 of the Vehicle Code, as amended by Section 456 of Chapter 931 of the Statutes of 1998, is amended to read:

11205. (a) The department shall publish semiannually, or more often as necessary to serve the purposes of this act, a list of all traffic violator schools which are licensed pursuant to this section. The list shall identify classroom facilities within a ~~judicial district~~ county that are at a different location from a licensed school's principal facility. The department shall transmit the list ~~to each municipal court and to each superior court in a county in which there is no municipal court,~~ with a sufficient number of copies to allow the courts to provide

one copy to each person referred to a licensed traffic violator school. The department shall, at least semiannually, revise the list to ensure that each court has a current list of all licensed traffic violator schools.

(b) Each licensed traffic violator school owner shall be permitted one school name per ~~judicial district~~ county.

(c) The referral list shall be organized alphabetically, in sections for each county, and ~~contain subsections for each judicial district within the county~~. The order of the names within each ~~judicial district~~ county shall be random pursuant to a drawing or lottery conducted by the department.

(d) Except as otherwise provided in subdivision (d) of Section 42005, the court shall use either the current referral list of traffic violator schools published by the department when it orders a person to complete a traffic violator school pursuant to subdivision (a) or (b) of Section 42005 or, when a court utilizing a nonprofit agency for traffic violator school administration and monitoring services in which all traffic violator schools licensed by the department are allowed the opportunity to participate, a statewide referral list may be published by the nonprofit agency and distributed by the court. The agency shall monitor each classroom location situated within the ~~judicial districts~~ counties in which that agency provides services to the courts and is represented on its referral list. The monitoring shall occur at least once every 90 days with reports forwarded to the department and the respective courts on a monthly basis.

(e) The court may charge a traffic violator a fee to defray the costs incurred by the agency for the monitoring reports and services provided to the court. The court may delegate collection of the fee to the agency. Fees shall be approved and regulated by the court. Until December 31, 1996, the fee shall not exceed the actual cost incurred by the agency or five dollars (\$5), whichever is less.

(f) If any provision of subdivision (d) or (e) of Section 11205, as added by Section 4 of Assembly Bill 185 of the 1991-92 Regular Session or as subsequently amended, or the application thereof to any person, is held to be unconstitutional, that Section 11205 is repealed on the date the decision of the court so holding becomes final, and on that date, this section shall become operative.

**Comment.** Section 11205 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. See also Code Civ. Proc. § 38 (judicial districts).

## UNCODIFIED

### **Section 4 of the Drainage Dist. Act of 1903 (amended). Appeals**

SEC. \_\_\_\_\_. Section 4 of the Drainage District Act of 1903 (Chapter 238 of the Statutes of 1903) is amended to read:

Sec. 4. The right of appeal from the order to the superior court of the county where the petition is heard, is hereby given to any person interested, who is a party to the record; provided, that if more than one appeal be taken they shall be

consolidated and tried together. Such appeal shall be taken within 10 days after the entry of such order upon the minutes of the board of supervisors. The appeal shall be taken and heard in the same manner as ~~other appeals to the appellate division of a writ proceeding before~~ the superior court, except as herein otherwise provided. Upon the appeal, the superior court may make and enter its judgment affirming, modifying, or reversing the order appealed from. Within 10 days thereafter, the superior court must cause its remittitur to issue to the board of supervisors, and if said order of the board of supervisors is modified or reversed, the judgment of the superior court and its remittitur shall direct the board of supervisors what order it shall enter. Such remittitur shall be filed by the clerk of the board of supervisors, and at the first regular meeting of the board thereafter, it shall cause to be entered in its minutes the order as directed by the superior court. The appeal herein provided for shall be heard and determined within thirty days from the time of filing the notice of appeal.

**Comment.** Section 4 is amended to reflect elimination of the appellate division of the superior court. See Cal. Const. art. VI, §§ 3 (court of appeal), 4 (superior court), 10 (original jurisdiction), 11 (appellate jurisdiction).