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Memorandum 2002-22

Appellate and Writ Review Under Trial Court Unification (Comments on Tentative Recommendation)

The Commission has circulated for comment its Tentative Recommendation on *Appellate and Writ Review Under Trial Court Unification* (November 2001). We have received the following comments on the proposal:

This memorandum analyzes the comments received and poses the question whether the Commission wishes to proceed to a final recommendation on the matter.

BACKGROUND

Before unification of the trial courts, appeals of municipal court proceedings were to the appellate division of the superior court, and writ review of municipal court actions were in the superior court.

With unification of the trial courts and elimination of the municipal court, this historical scheme of appellate and writ review was disrupted. Appeals of matters formerly within the municipal court's original jurisdiction (limited civil cases and misdemeanor and infraction cases) are still to the appellate division of the superior court, but now the appeals are from the superior court, not the municipal court. Writs in matters formerly within the municipal court

jurisdiction are in the appellate division of the superior court, but are directed to the superior court, not to the municipal court.

There are other anomalies in review procedures under trial court unification. In criminal proceedings, the process involves various preliminary determinations by a magistrate (formerly a municipal court judge), with an opportunity for review by a superior court judge. Under unification, the magistrate is now a superior court judge, with review conducted by another judge of the same court. The Commission has initiated a separate investigation of this problem, which is not addressed in the current tentative recommendation on appellate and writ review. (We have in hand a background study prepared for the Commission — Uelmen, *California Criminal Procedure and Trial Court Unification* (March 2002) — which will be scheduled for Commission consideration at the July 2002 meeting.)

After reviewing the appeal and writ situation, the Commission concluded that the current system causes too many problems, and a restructuring is appropriate. The main concern is collegiality and the lack of a truly independent review by peers in the superior court. There are other concerns as well, including confusion over the proper court in which to bring a writ proceeding or an appeal. This issue has the potential to become even more troublesome in the future due to a constitutional provision that reserves to courts of appeal causes of a type within their appellate jurisdiction on June 30, 1995.

The solution proposed by the Commission in the tentative recommendation is to abolish the appellate division of the superior court and substitute for it a limited jurisdiction division in the court of appeal. The limited jurisdiction division would handle cases assigned to it by the court of appeal (presumably misdemeanor, infraction, and limited civil cases, but not necessarily). The limited jurisdiction division would be staffed by judges sitting by assignment and would hear cases in the counties in which the cases arose.

Among the benefits to be achieved by this restructuring, besides mitigating the peer review problem, are that the courts of appeal could better control their workload and filings would be centralized in one court (avoiding the problem of erroneous filings in the wrong court).

The Commission's proposal is similar in practical effect (though not in legal theory), to a proposal developed by the Judicial Council's Ad Hoc Task Force on the Superior Court Appellate Divisions. That proposal would create regional superior court appellate divisions, corresponding to the Court of Appeal Districts:

> The Task Force is convinced substantial improvements in the administration of justice will be achieved by conceptually restructuring the appellate divisions along the same geographic lines as the courts of appeal. That is, instead of having fifty-eight appellate divisions each of which is staffed by judges from the county in which the appellate division sits, appointment would be made to each of the appellate divisions within a district so that, as a practical matter, there would be only one appellate division within a Court of Appeal district. For example, the Court of Appeal for the Sixth District encompasses four counties: Monterey, San Benito, Santa Clara and Santa Cruz. Instead of having four different appellate divisions and twelve appellate division judges within the district, the Chief Justice could appoint one sitting or retired judge from each of the four counties to serve on a four-judge district-wide appellate division. Technically, since this proposal does not anticipate formally creating a new appellate court with new judicial positions, the Chief Justice would have to appoint the same four judges to the appellate division in each of the four counties. The practical result, however, is to create the equivalent of a district-wide appellate division.

Ad Hoc Task Force on the Superior Court Appellate Divisions, *Report to the Appellate Process Task Force on the Superior Court Appellate Divisions* 16-17 (May 2001).

The Commission considered the relative simplicity with which the Task Force proposal could be implemented without the need for any constitutional or statutory revisions. However, the Commission concluded that a preferable approach would be actually to reconfigure the appellate court structure. Restructuring would more adequately address the peer review concern, would create flexibility for the court of appeal to manage its workload, would eliminate the need to track the jurisdiction of the court of appeal as of June 30, 1995, and would minimize the possibility of misfiling by consolidating in the court of appeal both appeals from and writs to the superior court.

GENERAL COMMENTS

We received a number of thoughtful comments on the tentative recommendation. In general, the comments reveal a significant gap between the bench and the bar in their attitudes toward the issue of appellate and writ review under trial court unification.

Commentators from the judicial branch oppose the proposal to shift review of misdemeanor, infraction, and limited civil cases to a limited jurisdiction division of the court of appeal. The commentators question whether the peer review problem is sufficiently serious that it warrants a restructuring of the appellate court system, and they point out logistical problems with the tentative recommendation. They suggest that if in fact peer review is a serious issue, there are other simpler and more effective means of addressing it. Their attitude may be summed up in the following pithy sentiments:

> I see no justification for setting up new departments, assigning more judicial resources and expending more funds in a time of limited availability of resources and funds. (Justice Ward, Exhibit p. 3)

> In short, I disagree with the proposal. It is unnecessary. It creates work, a massive bureaucracy, an increase in personnel and costs, and solves a nonexistent problem. (Justice Gaut, Exhibit p. 8)

> Therefore, to avoid exacerbating an already difficult budget situation by an untried proposal for which there is no demonstrated need, I strongly urge the Commission to reject the tentative recommendation and retain the present appellate-department-review system ... (Justice Ramirez, Exhibit p. 13)

Attorneys, on the other hand, believe the peer review problem is serious. They indicate that the proposed shift in appellate structure would be an improvement over existing law. If anything, they believe the proposal does not go far enough in ensuring an independent review of trial court decisions. Like the judges, our attorney commentators felt there would be logistical problems that should be addressed before a new system is put into place.

The remainder of this memorandum is devoted to a closer examination and evaluation of issues raised by the commentators. Possible solutions to problems raised are suggested. The Commission will then need to decide how, or whether, it wishes to proceed on this matter.

SPECIFIC ISSUES

Peer Review

The tentative recommendation is predicated on the Commission's perception that review of a superior court judge's actions by another judge of the same court is not an adequate review. "The greatest problem with the current scheme is the

reality that judges of equal rank are required to overturn each other's decisions. The law attempts to create institutional protection of independence by various techniques. However, this does not appear to have worked well in practice." Tentative Recommendation at p. 4.

The question whether peer review is in fact a problem, or is a sufficiently serious problem to warrant restructuring, is raised by every judicial commentator. See, e.g., the comments of Justice Ward ("I believe attorneys and litigants understand its function and have no problem with it." Exhibit p. 3), Justice Gaut ("I heard no complaints about Superior Court judges reviewing the decisions of other Superior Court judges. I cannot understand why we would create a bureaucracy to cure a problem that is either non-existent or miniscule." Exhibit p. 6), California Judges Association ("The problems of peer review most often cited in support of the proposal are not widespread and are mostly ones of perception. For most counties, peer review is not a problem." Exhibit p. 15).

The most fully developed presentation of this perspective is made by Justice Ramirez (Exhibit pp. 9-10):

> I first observe that no evidence has been presented of even a perception of any impropriety in the current system of appellate division review — the so-called "peer review problem." The present appellate department process works quickly and inexpensively as an extra part-time assignment for judges throughout California, except in Los Angeles. This expenditure of resources is appropriate because of the lesser impact of these cases as opposed to unlimited civil and felony cases. I have not heard of litigants, lawyers, or judges complaining about peer review, nor have I seen any documentation that such complaints have been made; my impression is that the litigants, often representing themselves, are satisfied with peer review because they have not just one other superior court judge review their case, but three. And we know that they are right in that appraisal because judges, on both the trial and appellate benches, are professionals — with objectivity and without animosity, they have long been overturning each others' decisions when the standards of review, the law, and the facts require reversal. We should not even consider revising our current system unless a significant percentage of litigants, lawyers, and judges are documented as expressing dissatisfaction with peer review. Until then the so-called peer review problem merely represents an attempted reification of the abstracted proposition that a panel of superior court judges cannot review the decision of another superior court judge, a proposition which has no empirical support.

Attorneys who commented on the tentative recommendation expressed the opposite perspective, and in fact felt the proposals do not go far enough in correcting the peer review problem. See, e.g., the comments of the San Diego County Bar Association ("we do not believe the Commission recommendation adequately addresses the peer review problem that was created by the unification of the superior and municipal courts, because in many instances superior court judges sitting by assignment to the limited jurisdiction division will continue to be reviewing the decisions of their superior court peers." Exhibit p. 17). Appellate Defenders, Inc., states (Exhibit pp. 26-27):

> The ADI board sees peer review as one of the most serious deficiencies in the current system of appeals from what used to be judgments and orders of municipal courts (called "limited appeals" here , for ease of reference). [Small claims and traffic cases are not covered by these comments.] From the viewpoint of litigants, lawyers, and the public, review by judges from the same court as the judges whose rulings are under challenge creates, at the very least, the appearance of lack of disinterested objectivity. It may even set the conditions for improper considerations *actually* to the decision-making process, despite every good-faith effort on the part of the reviewing judges to maintain distance from their colleagues under review. The reality is that they are and will continue to be peers, social friends, confidants, and advisors; and the temporarily assigned appellate judges know the judges they review today may in turn be reviewing them in the future.

The Judicial Council states that it is in the process of surveying practitioners in an effort to determine whether there is even a perception of a peer review problem. "Until that review is complete, the council believes this change would be premature." Exhibit p. 24.

The staff has made inquiries about the status of the Judicial Council survey. The survey was prompted by the judiciary's negative reaction to the report of the Ad Hoc Task Force on the Superior Court Appellate Divisions. That report finds:

> Echoing the concerns expressed by members of the California Law Revision commission and by members of the bar around the State, the Appellate Division Task Force concludes that the appearance of impartial appellate justice at the superior court level is seriously threatened in many counties because of (1) negative perceptions associated 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.

Ad Hoc Task Force on the Superior Court Appellate Divisions, *Report to the Appellate Process Task Force on the Superior Court Appellate Divisions* 9 (May 2001).

The work of the Task Force appears to be dead in the water in the judicial branch, at least until advocates of change come up with data substantiating the peer review problem. A survey of practitioners is being prepared and apparently is nearly ready to go out. Results of the survey probably will not be available for three to six months.

In the staff's opinion, it is indisputable that the peer review situation creates at least a perception of impropriety. Law Revision Commission members themselves, perhaps reflecting a practitioner's perspective, have been greatly concerned about the peer review situation, to the extent of promulgating the current tentative recommendation.

We are not sure a survey will tell us much more than we already know. However, a survey may help lay a foundation for reform in the face of judicial skepticism. The staff thinks that if the Commission wishes to proceed towards a final recommendation on this matter, the Commission should not hold off until the results of a survey are in, but should work to perfect the recommendation. The results of the survey may or may not help people formulate their position on the final recommendation.

Does the Proposal Mitigate Peer Review Issues?

The tentative recommendation would seek to solve the peer review problem by creating a new division of the court of appeal and staffing it with superior court judges sitting by assignment. The Commission's concept was that this would help achieve an additional degree of independence and separateness in judges sitting by assignment as court of appeal justices.

Neither our judicial commentators nor our attorney commentators thought this really was an adequate solution. The Judicial Council, for example, notes that "Cases in the proposed 'limited jurisdiction divisions' would still be heard and decided by superior court judges serving in temporary assignments in the court of appeal. Since judges of equal rank would still be reviewing their peers, the proposal does not eliminate peer review." Exhibit p. 24. Justice Ramirez elaborates (Exhibit p. 10):

> [N]either the solution proposed by Justice Rylaarsdam's Task Force nor the similar solution proposed by the California Law Revision Commission (CLRC) addresses the problem they invent. Both propose the use of superior court judges to solve a supposed problem resulting from the use of superior court judges. What both proposals add to the use of superior court judges is nothing but window dressing. The Task Force proposes the use of superior court judges appointed for a term (e.g., a year) and selected from counties throughout the Court of Appeal district to decide the misdemeanor and limited civil appeals in those counties. The CLRC adds only that we will call these temporarily appointed judges the lower division of the Court of Appeal instead of the appellate department of the superior court. In both proposals, panels of superior court judges are still reviewing other superior court judges. So both attempt to cover the nakedness of their chimerical emperor by telling everyone that he has new clothes.

(Justice Ramirez also criticizes the tentative recommendation for allowing the Los Angeles County Superior Court to retain its own appellate division. Exhibit p. 10. He is mistaken. The tentative recommendation treats all courts alike.)

Practitioners indicate that the tentative recommendation would be an improvement over both existing law and the Task Force proposal in this respect. See comments of San Diego County Bar Association (Exhibit p. 17) and Howard C. Cohen (Exhibit p. 20). Appellate Defenders, Inc., observes (Exhibit p. 27):

> The Law Revision Commission's Tentative Recommendation does alleviate some peer review problems in the existing system (more so than does the report of the Judicial Council's Ad Hoc Task Force on Superior Court Appellate Divisions, which would keep the appellate divisions at the superior court level). Moving limited appeals to the Court of Appeal and taking them from the entire district, rather than a single county, gives the reviewing judges a status superior in both title and scope of authority to the judges they review and also increases their distance from those judges.

Some of our commentators suggest improvements on the tentative recommendation to make it more adequately handle the peer review problem. Others suggest alternative schemes that would be preferable. We will first examine the suggested improvements. Later in this memorandum we will review the suggested alternatives.

Suggested Improvements

Exclusive Assignment

The San Diego County Bar Association believes it is desirable to have the assigned judges work exclusively on limited jurisdiction division appeals during the terms of their assignments, rather than rotating between handling those appeals and superior court work. Exhibit p. 17.

Minimum Term of Appointment

The San Diego County Bar Association suggests that appointments to the limited jurisdiction division be a minimum of one year in duration. "[T]he longer the term of the superior court judge's assignment to the limited jurisdiction division of the Court of Appeal, the less of a problem there will be with perceptions that peer review remains." Exhibit p. 17.

Howard C. Cohen proposes a longer period. "If a superior court judge has had no previous appellate experience, given the learning curve required to become familiar with the process of appellate review, just when the appellate jurist has attained a true expertise, his or her tenure could very well be ending if it was a year or less." Exhibit pp. 20-21.

Appellate Defenders, Inc., would go further and make assignments permanent — "that would completely address the issues of peer review and lost expertise." Exhibit p. 27.

District-Wide Jurisdiction

The San Diego County Bar Association notes that some peer review situations can be avoided if the new court of appeal divisions are district-wide, rather than division-wide. "For example, if one limited jurisdiction division is created within the Fourth Appellate District, there is less likelihood that the assigned judges will be reviewing decisions of the superior court judges with whom they regularly work than if three separate limited jurisdiction divisions are created for that same area." Exhibit p. 18.

Howard C. Cohen agrees that district appointments would help, but notes that they would not completely solve the problem in a district whose judicial business is dominated by one superior court within that district. Exhibit p. 21.

The intent of the tentative recommendation is that the limited jurisdiction division be district-wide. The Bar Association suggests that specific language be

added on the point. The staff has no problem with doing that, should the Commission decide to proceed with this proposal.

Local Access

One concern with district, as opposed to county, appellate divisions is potential loss of local access to justice. This has been a serious concern to the Commission, particularly in consideration of the fact that we are talking about smaller cases here, for which appeals ought to be simple, convenient, and inexpensive. That is the reason that the tentative recommendation would require the judges of the limited jurisdiction division to ride circuit and hear cases in the counties in which the cases arise.

Critics of the tentative recommendation indicate they believe there would be a loss of local access nonetheless. The California Judges Association, for example, states that the district appellate tribunals runs counter to and will frustrate the goal of insuring fair and easy access to justice. "In other words, the proposal removes appellate review from local judicial authorities to a multi-county agency housed remotely. (Even with circuit riding, this is true.)" Exhibit pp. 15-16. CJA does not explain why circuit riding fails to solve the problem.

Likewise, the Judicial Council elaborates the importance of providing a local forum for review (Exhibit p. 25):

> Appeals in misdemeanor, infraction, and limited civil cases should remain in the county of origin, in the local superior court in which they were filed — both for the convenience of the parties and to provide the local "flavor" of a decision by members of their own community. Generally, these appeals are not as complex as felony and unlimited civil cases, and the parties' resources to pursue them are more limited. Review by the courts of appeal is by necessity more expensive given the travel, filings in remote locations, more burdensome record preparation procedures, and more in-depth briefing involved in such appeals. Containing appellate costs and retaining local decision-making are likely to be viewed as beneficial to the litigants. For these reasons, the committee concluded it is best to keep appeals in misdemeanor and limited civil cases "closer to home" for the litigants.

(The reference to the "committee" in the last sentence presumably means the Judicial Council.)

The Council's suggestion that justice should have a "local flavor" and that local decision-making by members of the community is "likely to be viewed as

beneficial to the litigants" goes to the heart of the peer review debate. The staff cannot add anything further to that discussion.

The Council's observation that appeals to the limited jurisdiction division will increase costs assumes that the same procedures will be used in limited jurisdiction appeals as in general appeals. That is a point worth exploring. The question of applicable procedures in limited jurisdiction appeals is examined further below.

The California Judges Association notes that requiring the limited jurisdiction court to ride circuit will add problems and cost. Exhibit p. 16. Justice Gaut argues that superior courts are already operating with many fewer judges than required, and that "To take a busy judge from his regular duties in order to 'ride circuit' merely exacerbates the problem." Exhibit p. 8.

These are facially valid points. If judges have to travel to hear cases, the time spent traveling will diminish the time spent working, and travel expenses must be factored in. However, there would be offsetting savings in cost and efficiency resulting from consolidation of the 58 appellate divisions into six limited jurisdiction divisions that must be taken into consideration as well. These savings would result not only from a more efficient division of labor among judges but also from a consolidation of administrative expenses. The staff is not in a position to make any estimates on these matters, but we do think that the costs of circuit riding must be viewed in context.

The staff thinks local access needs to be preserved in whatever appellate and writ review scheme ultimately prevails. The California County Counsels' Association emphasizes this point. "Access, particularly for more rural counties is a significant concern. ... It is important to maintain your proposal for the limited jurisdiction division to convene in the county in which a case originates." Exhibit p. 1.

Jurisdiction and Workload

One feature of the tentative recommendation that attracted a fair amount of attention was the flexible jurisdiction provided in the scheme. Rather than fixing the new court of appeal division's jurisdiction at misdemeanor, infraction, and limited civil cases, the tentative recommendation would allow each court of appeal to assign such cases to the limited jurisdiction division as it deems appropriate, based on workload and other considerations. The concept is that this could help equalize and balance the appellate workload, in the same way

that trial court unification has helped resolve imbalances between superior and municipal court workloads in various counties. It would also eliminate the need to maintain a system for transfer of cases where that appears necessary to secure uniformity of decision or to settle important questions of law. See Code Civ. Proc. § 911 (transfer from appellate division to court of appeal).

None of the attorney commentators was enthusiastic about the concept of flexible jurisdiction. The California County Counsels' Association observes that it appears jurisdiction will depend only on the inclination of present appellate courts to assign cases; CCCA believes that it is important to maintain some continuity in the types of cases subject to any new appellate division. Exhibit p. 2. Appellate Defenders, Inc., is similarly concerned that the tentative recommendation fails to provide any standards for the court of appeal's distribution of cases between the regular and limited jurisdiction divisions. "Litigants could find themselves shunted onto the second-class track despite enormous stakes or complex issues, on the basis of the court's completely unguided and unreviewable discretion." Exhibit p. 28. The San Diego County Bar Association comments (Exhibit p. 18):

> In the absence of any standards governing the exercise of such discretion, we are concerned that courts of appeal may designate for review by limited jurisdiction divisions classes of cases that have traditionally been reviewed in the Court of Appeal. Moreover, allowing for such discretion could easily result in the same types of appeals being handled differently in the different limited jurisdiction divisions across the state, a result we oppose.

These concerns are echoed by Howard C. Cohen, who adds that disparate treatment among the courts of appeal would arguably be a denial of equal protection. Exhibit p. 22.

The judicial branch likewise appears to be unenthusiastic about the opportunity to control its workload. Justice Gaut observes, "That will require someone with substantial knowledge, probably an appellate justice, to review each appeal to decide whether it should be assigned to the limited jurisdiction division. You ignore the time and cost of such a review." Exhibit p. 8. These concerns are also voiced by the California Judges Association. Exhibit p. 16.

The staff does not conceive this feature to be central to the tentative recommendation. Given the concerns it raises, we would drop it if the

Commission decides to proceed with the concept of the limited jurisdiction division.

Second Class Justice

Appellate Defenders, Inc., expresses concern about the possibility of an inferior brand of justice in the limited jurisdiction division of the court of appeal. They believe that under the "lower division" approach, some appeals would be treated as a second-class family of cases, with a lower-status bench and quite possibly fewer resources and lesser procedural protections. Exhibit p. 28.

The staff does not understand this concern. The quality of appellate justice in these cases should be enhanced, rather than diminished, by having appeals go to the limited jurisdiction division of the court of appeal rather than the appellate division of the superior court. Apparently, the ADI concern is a prelude to their suggestion that all superior court appeals should be heard by the court of appeal. See discussion below of "Alternatives".

Volume of Appeals

Appellate Defenders, Inc., raises the question whether there would be a sufficient volume of appeals in smaller districts to justify the minimum of three full time appellate judges needed to constitute a limited jurisdiction division appellate branch. Exhibit p. 27.

Fortunately, the Ad Hoc Task Force has done a substantial amount of research on workload. Their analysis suggests that a full time limited jurisdiction division would be needed in the First, Second, and Fourth appellate districts, a half-time appellate division in the Third appellate district, and quarter-time divisions in the Fifth and Sixth appellate districts.

Part time appointments are less than ideal, but would be appropriate given present caseloads. Logistical issues on housing and staffing the limited jurisdiction division are discussed below.

Logistical Problems

Commentators raise a number of logistical concerns with the concept of creating a limited jurisdiction division in the court of appeal. These concerns include funding, facilities, personnel, equipment and supplies, and filing, notices, and records.

Funding

What is the source of funding for operation of the new court of appeal division? Obvious costs will include salaries of judges and staff and travel costs for riding circuit, among others.

The tentative recommendation observes that funding for the superior court appellate division is derived from the trial court budget, and a shift of duties to the court of appeal implicates a shift of funding. The tentative recommendation notes that the Judicial Council should be able to make a reallocation of resources between the superior courts and the courts of appeal without the need for special legislation. The tentative recommendation also particularly solicits comment on this issue.

The California County Counsels' Association is not satisfied that existing resources will cover the matter (Exhibit p. 1):

> Obviously, funding for the new appellate court would be derived from the finite resources of trial court funding. Presumably, funds would be carved from local courts and diverted to this function. Local courts are currently funded on the basis of prior year expenditures. Further, local courts have existing administrative infrastructure which supports the superior court appellate function. It is not clear that sufficient funds exist to adequately replace the existing system.

The California Judges Association is likewise concerned that administrative overhead needs to be factored in and will result in an increase in the cost of running the review function. Exhibit p. 16. See also comments of Justice Gaut, Exhibit pp. 7-8.

The staff is not convinced that there will be increased administration costs. Clearly 58 courts currently run an appellate function, generally devoting existing staff part time to administering the system. Whatever other costs may be implicated, it is unlikely that centralized administration for this function in six locations will cost more than decentralized administration in 58 locations. Experience will ultimately tell the tale, but at least initially the staff would resist anything more than a reallocation of existing resources for operation of the limited jurisdiction division of the court of appeal.

Facilities

A number of commentators raise concerns about the adequacy of the court of appeal infrastructure to house the limited jurisdiction divisions and the potential cost of expansion. Justice Ramirez notes (Exhibit p. 13):

> If the lower divisions are centralized in District Court of Appeal Courthouses, with the superior court judges and newly hired and equipped clerical staff in the same building, the cost of starting and operating the new lower divisions will be like that for adding on the new Division Eight of the Second District Court of Appeal. The lives of the superior court judges appointed to the new lower divisions would be disrupted, and litigants and lawyers inconvenienced, depending on how far their county is from the city in which the lower division is housed.

See also California Judges Association ("The proposal does not address or consider the infrastructure and budgetary problems that implementation of the proposal will foster (i.e., office/chambers space, clerks, records, etc." Exhibit p. 16.) and Howard C. Cohen (there is likely to be a "need for more space at each Court of Appeal, which will most likely affect previous planning for the need of appellate courts' infrastructures." Exhibit p. 22.)

The tentative recommendation seeks to address this issue in part by requiring the limited jurisdiction division of the court of appeal to ride circuit. The tentative recommendation notes that this would "mitigate concerns about the adequacy of court of appeal facilities. The court of appeal limited jurisdiction division could use the same facilities formerly used by the superior court appellate division." Tent. Rec. at p, 5.

This is not a complete answer, however, for several reasons. To begin with, existing trial court facilities are inadequate for this function. The County Counsels' Association emphasizes this point — "The recent report of the Court Facilities Task Force does not make it apparent that in most counties such "separate" facilities exist. Absent the existence of separate facilities, the new division would displace functioning trial courts whenever it is sitting in a particular locations." Exhibit pp. 1-2.

Moreover, it is likely some sort of central office space will be required for the limited jurisdiction divisions, if only for administrative purposes. To some extent this need could be minimized by electronic communications, use of local court facilities for record storage, etc. But this is not necessarily the best way to operate. Justice Ramirez observes (Exhibit p. 13):

> If the lower divisions are dispersed (all judges and staff remaining where they are now located), the new lower division will create administrative difficulties. Widely dispersed judges will have difficulties obtaining files, conferring with each other, and coordinating with the as many as 23 different clerical staffs in their respective county superior court locations, for example the Third District Court of Appeal.

The staff believes these are legitimate concerns. It would obviously be beneficial from an administrative perspective to have at least a small central office, and more adequate central facilities such as conference rooms and chambers are desirable. If we proceed with this proposal, we should attempt to coordinate it with current efforts to improve the trial court infrastructure. Moneys that might otherwise be allocated to improvement of facilities for the superior court appellate divisions might instead be more efficiently and less expensively allocated to an appropriate expansion of court of appeal facilities.

Personnel, Equipment, and Supplies

Several commentators raise the question how support staff for the limited jurisdiction division will be hired, housed, compensated, supervised, and how equipment and supplies will be purchased, accounted for, etc. See, e.g., comments of Justices Gaut (Exhibit pp. 7-8) and Justice Ramirez (Exhibit p. 13).

The tentative recommendation contemplates that the limited jurisdiction division is part of the court of appeal. Thus any personnel hired for that division would be court of appeal employees and any operating expenses would be court of appeal expenses. Whether the court of appeal hires full time employees for purposes of the limited jurisdiction division, or assigns current employees to that function, or contracts for services, and how it equips and supplies the limited jurisdiction division, is up to the court. The funding for this function is discussed above, as well as the question of facilities. The staff can add nothing more on this point.

Filing, Notices, and Records

Where are appeals filed — locally or centrally? Who sends out notices — local staff or central staff? Where are records kept? How do briefs and other materials get to the judges? Who rules on motions for augmentation and extension?

Justices Gaut and Ramirez, and the California Judges Association, raise a number such logistical questions. See, e.g., Exhibit pp. 7-8, 11-13, 15-16. These are

among the types of concerns that suggest to them that the limited jurisdiction division concept is ill-advised and costly.

> You do not mention such mundane issues as physical space, supervision of clerks, coordination between the superior court judges and the appellate justices, notices to appellants, maintenance of records on appeal, and coordination of those records with the records of standard appeals. Those issues alone will cost substantial money and massive expenditures of the time of busy appellate clerks and justices. (Justice Gaut)

> Whatever solutions may be proposed, one thing is clear — the people of the State of California are going to have to pay a lot more money for appellate review of misdemeanor and limited civil cases than they pay for the current superior court appellate departments. (Justice Ramirez)

The staff believes these are legitimate concerns. If we wish to keep the review process local for appeals in small cases, we will need to provide for local filings and local access to records. Yet for greatest efficiency, limited jurisdiction division personnel need to be centralized. Justice Ramirez remarks that, "The CLRC proposal is caught between the Scylla of expense and inconvenience disproportionate to the importance of the cases and the Charybdis of an unwieldy administration." Exhibit p. 13.

The staff thinks that if the Commission decides to proceed with the present proposal, we will need to give greater attention to these matters, and must devise some operational solutions.

Legal Issues

General Appeal Procedures

A number of commentators raise the question of the appeal procedures that will be used in the limited jurisdiction division. Will the limited jurisdiction division use standard court of appeal procedures, or will it use the procedures currently used in the superior court appellate divisions?

The San Diego County Bar Association notes that some of its committee members feel a single set of rules should apply to all appeals from rulings of the superior court, to eliminate confusion and resulting prejudice to the parties to an appeal. Others believe that application of uniform rules to limited jurisdiction division cases would be unworkable. "Although we did not reach a consensus on this point, we agree that the Commission's recommendation should specify its

intent on these issues." Exhibit p. 18. The California County Counsels' Association likewise thought attention should be given to such issues as whether existing filing deadlines and permitted briefing schedules should be maintained or made uniform. Exhibit p. 2.

The appeals procedure is generally governed by court rules rather than statute. Existing rules provide a number of differences between court of appeal procedures and superior court appellate division procedures. For example, the time for filing an appeal is longer for the court of appeal than for the superior court appellate division. Rules of Court 2(a), 122(a). The record on appeal in the court of appeal is a transcript, whereas in the superior court appellate division it is a settled statement. Rules of Court 7, 227, 187. Briefing schedules differ, as do rules relating to oral arguments. Rules of Court 16(a), 22, 22.1, 105(a).

Perhaps the most significant difference in procedures relates to the record on appeal. A move away from settled statements to transcripts implicates potentially added costs in misdemeanor, infraction, and limited civil cases. Appellate Defenders, Inc., notes that, assuming these appeals are treated as regular court of appeal matters, it would be necessary to have an adequate record on appeal in all cases, including needed documents and reporters' transcripts. Exhibit p. 29.

Whether an official reporter is requested in a limited civil case or misdemeanor case may depend on the appeal procedure applicable to that case. Since the court of appeal could assign the particular case to the general division rather than the limited jurisdiction division for resolution, a careful litigant will need to request an official reporter in every case. This is an argument for fixing the jurisdiction of the new court of appeal division, rather than allowing the court of appeal discretion on the matter.

The tentative recommendation does not address issues of appeal procedures because appeal procedures have historically been within the purview of the courts. Certainly there are substantial arguments both for uniformity of appeal procedure and for more expeditious handling of limited jurisdiction appeals. The staff would continue to leave these matters to the courts to determine, based on their experience with the rules.

Specific procedural issues such as representation of parties, written opinions, and further review are treated separately below.

Representation of Parties

One commentator notes that with all appeals going to the court of appeal, prosecutorial agencies may need to reorient their representation structures among the Attorney General, district attorney, and city attorney. This may be made more difficult if the court of appeal retains discretion concerning assignment to the limited jurisdiction division. Howard C. Cohen, Exhibit p. 22.

On the defense side, contracts with appellate projects for appellate representation of indigent defendants in the court of appeal would need to be renegotiated. *Id.* Appellate Defenders, Inc., notes that expansion of the role of appellate projects to misdemeanor appeals would provide an opportunity to improve the quality of representation in those appeals, in cases not handled by public defenders or other institutional defenders. Exhibit pp. 29-30.

The staff does not think the Commission needs to get involved in this matter, other than to note that a change in the appellate system could prompt changes in the way representation of parties is handled.

Written Opinions

Article VI, Section 14, of the California Constitution requires that court of appeal decisions be in writing with reasons stated, and provides for publication of such opinions as the Supreme Court deems appropriate. Will these requirements cause problems if all appeals go to the court of appeal?

Certainly it would increase the cost of appeals. Appellate Defenders, Inc., also argues that it would improve their quality — "That development would be desirable, to the extent it gives added dignity, thoughtfulness, and a sense of authentic justice to limited appeals." Exhibit p. 29.

ADI suggests that the cost issue could be addressed in two ways — (1) revise the constitutional requirement to provide added flexibility in dealing with limited jurisdiction division cases or (2) use central staff more broadly to draft relatively short, but still constitutionally adequate, opinions in simpler cases for justices' approval.

The staff does not see the need for a constitutional amendment on this point. The Constitution requires only that court of appeal decisions be in writing with reasons stated. This does not require a lengthy opinion; a memorandum opinion should be adequate for the routine case. Nor does the staff see the need for the Supreme Court to change any standards for determining what opinions should be published. Any added cost resulting from use of memorandum opinions in

routine cases is justified by the improvement in the quality of justice in those cases.

Howard C. Cohen suggests that there may be more published decisions from the limited jurisdiction Court of Appeal divisions than from the superior court appellate divisions. "A greater publication rate (and a proportional greater number of requests for depublication) may be either better or worse." Exhibit p. 22.

This concern is worth noting. While in theory it may be useful to have limited jurisdiction division decisions provide guidance, that will certainly exacerbate the practical problem for lawyers and judges to keep up with the mushrooming volume of law.

Further Review

What should be the path for further review of a limited jurisdiction decision? The Judicial Council notes that, as a court of appeal decision, it would logically be subject to discretionary review by the Supreme Court. But, given the historical opportunity to transfer superior court appellate division cases to the court of appeal, this may suggest that there should be further review of limited jurisdiction division decisions by the general division of the court of appeal. "If the proposal contemplates such a procedure, it will not provide a short, simpler path to finality. It will simply increase the total workload on the reviewing courts without any significant improvement in the quality of available review, and will call upon the courts of appeal to bear the full brunt of that increased workload." Exhibit p. 25.

Howard C. Cohen does not assume intermediate court of appeal review, but is nonetheless concerned about the cost of Supreme Court review. "Does the Commission's proposed Court of Appeal limited jurisdiction appeal regime truly anticipate these requirements and additional consumption of time by the courts? If not, other constitutional and statutory amendments would have to be drafted to remedy any oversight." Exhibit p. 21.

The staff agrees that, if the Commission proceeds with this proposal, we should define any further review path for a limited jurisdiction division decision. We will further develop this matter, depending on the direction the Commission takes.

Precedential and Stare Decisis Effects

What are the precedential and stare decisis effects of a limited jurisdiction division decision? Superior court appellate division decisions are (or were) binding on municipal courts within the county, and now are presumably binding on all superior court departments within the county. Court of appeal decisions are binding on superior courts statewide, absent a conflict between court of appeal districts. Does creation of the limited jurisdiction division make its decisions applicable statewide, or only within the appellate district?

Howard C. Cohen notes that, "if the Commission's Recommendation is approved, a Court of appeal limited jurisdiction conflict-free appellate decision will bind all superior courts. Is that the Commission's intent?" Exhibit p. 22.

That is a good question. (We note, though, that even under the current scheme, a published superior court appellate division decision, while not entitled to stare decisis effect in other jurisdictions, does carry some precedential weight.) The Commission should decide and specify the precedential and stare decisis effects of limited jurisdiction division decisions, if we proceed.

Drafting Details

A few of the comments we received address drafting details in the tentative recommendation.

Justice Gaut questions use of the terms "limited civil case" and "unlimited civil case" in Code of Civil Procedure Sections 904.1 and 904.1. Exhibit p. 8. We will add cross-references in the Comments to the existing statutory definitions of these terms.

Howard C. Cohen suggests simplification of language in Government Code Sections 69162 and 69165. Exhibit p. 23. The staff agrees the language could be simplified, but we are also slightly concerned about potential loss of context. If the Commission proceeds with this proposal, the staff will look at possible language improvements.

Transitional Issues

Howard C. Cohen suggests that, whatever proposals finally emerge, there should be an effective date sufficiently far enough out to permit promulgation of rules governing limited jurisdiction division procedures. Exhibit p. 23.

The staff agrees with this suggestion. There will be other transitional provisions as well, including assignment of personnel, transfer of court records,

disposition of pending cases, and the like. In addition, statutory revisions will need to be made contingent on adoption of the constitutional revisions. Depending on how the Commission decides to proceed, the staff will propose an appropriate transitional scheme.

ALTERNATIVE APPROACHES

Commentators suggest a number of alternative approaches they believe would be preferable to that of the tentative recommendation in handling the peer review problem.

Expand Jurisdiction of Court of Appeal

Perhaps the simplest and most direct alternative is simply to expand the jurisdiction of the Court of Appeal. Justice Ward says (Exhibit p. 3):

> While I see no justification for change, if there must be a change, then I suggest that the appeals be simply transferred to the appellate courts. I know that this suggestion is met with shrieks of anguish from some of my colleagues. I believe, however, that the appellate courts could set up a system which would expeditiously handle these very minor appeals. The appellate courts are accustomed to handling routine appellate and writ matters. They could do it without wasteful proposals for unnecessary new judicial procedures.

Appellate Defenders, Inc., also proposes that all appeals simply go to the court of appeal. They acknowledge that a number of practical problems would need to be dealt with, including adding more justices and expanding facilities. However, they believe this solution would not only eliminate the problem of peer review but also would obviate some of the thorny legal issues created by the tentative recommendation. Exhibit pp. 28-29.

Perhaps that is where we are ultimately headed. But the staff would be concerned about the loss of access to local justice inherent in such a scheme.

Separate Judicial Officers

The San Diego County Bar Association proposes (Exhibit p. 18):

> In conclusion, considering our continued concern over the issues related to peer review even under the Commission's recommendation, we take this opportunity to respectfully suggest our preference for a separate division of the Court of Appeal comprised of judicial officers that are neither justices of the Court of

> Appeal nor judges of the superior court. Whether they are called "appellate commissioners," "appellate magistrates" or something altogether different, the concept is that they will not be reviewing decisions of their colleagues on the superior court; yet, at the same time, they will not have the authority to hear or decide matters currently reserved for the Court of Appeal.

If the Commission is interested in pursuing this concept, the staff will attempt to flesh it out. We would anticipate more significant personnel costs up front resulting from this scheme, but presumably over time the costs would even out as case loads rise to the point where they consume the time previously spent by superior court judges on appellate matters.

Rotate Judges in Superior Court Appellate Division

Justice Gaut suggests that, "If there were such a problem [i.e., peer review], I believe it could easily be solved by relatively frequent change of personnel in the existing appellate division of each superior court." Exhibit p. 7.

The staff tends to think that this approach would aggravate, rather than ameliorate, the problem.

Neighboring Courts

Justice Ramirez makes a case for having misdemeanor, infraction, and limited civil case appeals heard by superior court appellate division panels from adjoining counties. See Exhibit pp. 11-13. He points out that this scheme is already in use to some extent in smaller counties — one or more judges from an adjoining county or counties are appointed in addition to any non-conflicted judges in the county in which the appeal originates; the originating county's facilities and staff are used. Alternatively, the whole cause could be transferred to an adjoining county for resolution. In either case, the use of adjoining county personnel would only be triggered on request by a judge or litigant, on an ad hoc basis.

Justice Ramirez argues that this approach is at least as good or better than the approach of the tentative recommendation on several fronts — it uses superior court judges ("calling a panel of superior court judges a lower division of the Court of Appeal does not change the fact that they are still superior court judges"), it limits the amount of travel required of judges, and it minimizes the management problems involved with case files, rulings on motions, and the like.

Justice Ramirez also argues that costs can be further reduced under the proposed alternative by making it operative only on demand (Exhibit p. 13):

> The ad hoc character of this alternative reduces the difficulties involved in sending cases to, or bringing a judge or judges from, adjoining counties. This reduction is due to the strong likelihood that a small minority of litigants or judges will request an alternative to the current appellate division review process. This alternative, already in regular use to the extent of bringing judges from other counties to decide appeals in the smallest counties, is very inexpensive compared to the elaborate character of the CLRC and Task Force proposals.

The staff sees some logistical problems in this approach. Presumably, it could be implemented by court rules, without the need for legislation.

WHAT NEXT?

The Commission needs to make a decision whether or not to proceed along the lines of the tentative recommendation. If the decision is to pursue the concept of the tentative recommendation, we will need to grapple with a number of the issues raised in this memorandum, such as whether or not the jurisdiction of the new court of appeal division should be fixed, whether judicial appointments should be full time, whether funds need to allocated for expansion of court of appeal facilities, the logistics of filing and records, adoption of appeal procedures, the stare decisis effect of limited jurisdiction division decisions and further review of those decisions, etc.

If the Commission's decision is not to proceed along the lines of the tentative recommendation, does the Commission wish to explore any of the alternatives suggested? In this connection, it is worth considering the suggestion of the Judicial Council and the California Judges Association to the effect that Commission action in this area is premature. The Judicial Council states that it is currently examining the issue of appellate review of limited jurisdiction cases. Exhibit p. 24. The California Judges Association would like to see some experimentation before any solutions are adopted (Exhibit p. 16):

> The proposal, if enacted, will preempt other less costly and likely more helpful programs to address the perceived problems of peer review and resources. The Judicial Council has already established a Task Force to evaluate possible solutions. These solutions are presently under discussion. The CLRC proposal

would prevent the Judicial Council from implementing various pilot programs to determine the most economical and effective means of solving the difficulties at which Proposal Number J-1310 is aimed.

At the time the Commission issued its tentative recommendation, the Ad Hoc Task Force proposal was still being aired. The Commission considered the possibility of holding off in light of ongoing work within the Judicial Council. The Commission decided to pursue this matter nonetheless because the Commission sensed that it could act as a catalyst by keeping the pressure on. There was a concern that otherwise the issue would be allowed to lapse.

The staff has made inquiries as to what actually is underway at the Judicial Council. It appears that the Appellate Process Task Force on the Superior Court Appellate Divisions is currently leaderless. The proposals of the Ad Hoc Task Force have not been well-received. Personnel from that project are currently putting together a survey of attorney perceptions of peer review problems; the survey results will not be available for three to six months. There are no pilot programs currently underway or contemplated. We are assured, informally, that there is a commitment within the Council to address this matter, and that it will be addressed eventually.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

COUNTY OF SACRAMENTO
OFFICE OF THE COUNTY COUNSEL - DOWNTOWN OFFICE

700 H Street, Suite 2650, Sacramento, California 95814 Telephone (916) 874-5544 Facsimile (916) 874-8207

December 18, 2001

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

Law Revision Commission
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DEC 2 0 2001
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Re: Appellate and Writ Review under Trial Court Unification

Dear Commissioners:

This is in response to your request for comments on a proposal to eliminate the Appellate Divisions of the local Superior Courts. In their stead would be a court of limited jurisdiction within each Circuit Court of Appeals which would be assigned cases by each Appellate Court.

The California County Counsels' Association has no substantive concern with this programmatic change. However, members of the Association are concerned that the details of the elimination of the Superior Court Appellate Division are not sufficiently outlined in this proposal.

Obviously, funding for the new appellate court would be derived from the finite resources of trial court funding. Presumably, funds would be carved from local courts and diverted to this function. Local courts are currently funded on the basis of the prior year expenditures. Further, local courts have existing administrative infrastructure which supports the superior court appellate function. It is not clear that sufficient funds exist to adequately replace the existing system.

Access, particularly for more rural counties is a significant concern. As your staff notes: "Other significant benefits of maintaining superior court appellate and writ jurisdiction in misdemeanor, infraction, and limited civil cases included providing local and less expensive access to justice in smaller cases. . . ." It is important to maintain your proposal for the limited jurisdiction division to convene in the county in which a case originates.

However, this proposal is based upon the assumption that this new division ". . .could use the same facilities formerly used by the superior court appellate division." The recent report of the Court

Facilities Task Force does not make it apparent that in most counties such "separate" facilities exist. Absent the existence of separate facilities, the new division would displace functioning trial courts whenever it is sitting in a particular county.

It is strongly recommended that, prior to moving forward with recommended legislation (including constitutional amendments) that you verify your proposal against trial court funding and facilities realities.

It is also, we believe, important to maintain some continuity in the types of cases subject to any new appellate division. That is, the jurisdiction should be the same as that of the present superior court appellate divisions. It appears from your proposal that jurisdiction will depend only upon the inclination of present appellate courts to assign cases. This seems to be less than an ideal standard.

Finally, filing deadlines and permitted briefing schedules differ from superior court appellate divisions and the Circuit Courts of Appeal. It is not apparent that any attention has been given to requiring maintenance of the current system or uniformity with existing appellate procedure.

Sincerely,

ROBERT A. RYAN, JR.
County Counsel

cc: Ms. Ruth Sorensen

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Court of Appeal

FOURTH DISTRICT, DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501

CHAMBERS OF
JAMES D. WARD
ASSOCIATE JUSTICE

(909) 248-0325

December 28, 2001

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

Dear Mr. Sterling,

I am writing to object to the changes being proposed in the handling of appeals to the appellate departments of superior courts in California.

As I understand it, a number of proposals are being floated to create a new, different and more involved type of appellate department. From what I have been told, the reason is that there is a perception that there is some sort of a problem with the present system. I challenge that premise. I was involved with the appellate department both as an attorney and as a trial judge. I believe attorneys and litigants understand its function and have no problem with it. I have yet to see any justification for the creation of an elaborate appellate procedure for really very minor types of cases.

Most superior courts are able to handle these appeals to the appellate departments with a minimum of court time and personnel. I see no justification for setting up new departments, assigning more judicial resources and expending more funds in a time of limited availability of resources and funds.

While I see no justification for change, if there must be a change, then I suggest that the appeals be simply transferred to the appellate courts. I know that this suggestion is met with shrieks of anguish from some of my colleagues. I believe, however, that the

appellate courts could set up a system which would expeditiously handle these very minor appeals. The appellate courts are accustomed to handling routine appellate and writ matters. They could do it without wasteful proposals for unnecessary new judicial procedures.

Thanks for your attention. If you need more specifics regarding this subject please feel free to contact me.

James D. Ward
Associate Justice

Court of Appeal
FOURTH DISTRICT, DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501

CHAMBERS OF
BARTON C. GAUT
ASSOCIATE JUSTICE

(909) 248-0331

January 14, 2002

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

Re: Appellate and Writ Review

Gentlemen:

I am writing in response to your proposal for modifying appellate department procedures of the superior court. I had hoped to be able to go into some detail with my views. Even though I requested more detail from the Commission three weeks ago, I have yet to receive a response. As a result, I will have to respond to the general concepts given to us by E-mail.

I have reviewed your tentative recommendation on appellate and writ review under trial court unification. It raises questions that I cannot answer. For example, what is the problem that your recommendation seeks to alleviate? I sat briefly on the Riverside County Appellate Department. We considered very few cases, mostly minor misdemeanors. The time involved was miniscule, no more than a couple of hours once a month, if that much. At the time, our court was

effectively unified. I heard no complaints about Superior Court judges reviewing the decisions of other Superior Court judges. I cannot understand why we would create a bureaucracy to cure a problem that is either non-existent or miniscule. It would add insult to injury to waste the time of a busy Superior Court Judge to assign him or her to ride circuit to hear such cases.

I also have some difficulty in understanding how this new ‰division of limited jurisdictionÂ would be ‰inÂ the court of appeal. Nor do I understand how the court of appeal would ‰control its own workload by assigning appropriate cases for resolution in the limited jurisdiction division.Â For years the appellate division of the Superior Court has been able to quite easily control its own appeals without the intervention of the Court of Appeal. I do not see how unification will alter that ability.

In short, the Law RevisionÁs proposal appears to be an effort to remedy a non-problem but in the process will waste judicial time and resources and will certainly shorten judicial tempers.

I suggest the proposal be shelved until some real problem with the appellate division can be identified.

Very truly yours,

Barton C. Gaut

Barton C. Gaut

Court of Appeal

FOURTH DISTRICT, DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501

CHAMBERS OF
BARTON C. GAUT
ASSOCIATE JUSTICE

(909) 248-0331

February 6, 2002

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

Re: Appellate and Writ Review – Trial Unification

Gentlemen:

I previously sent you my tentative comments on the above proposals, awaiting receipt of the full report. I have now received that report and want to make some additional comments.

I am struggling to understand the practical effect of your suggestions. First, I reject your suggestion that appellate division review of superior court decisions would place the appellate division judges in the "untenable position" of overturning the decisions of other judges of equal rank in the same court. I think that concern is vastly overblown. If there were such a problem, I believe it could easily be solved by relatively frequent change of personnel in the existing appellate division of each superior court.

Second, I have great difficulty in understanding how the system you propose would actually work. You suggest the Courts of Appeal would have jurisdiction of all appeals. That means that along with the present appeals to the Court of Appeal, every misdemeanor, writ, and minor civil appeal would be filed with the Court of Appeal. You propose to solve the "workload problem" in the clerk's office of the Courts of Appeal by creating a "limited jurisdiction division" within the Court of Appeal staffed by superior court judges sitting by assignment. "In effect, the proposed approach would transfer the superior court appellate division, judges and all, to the court of appeal." You observe that there should be no impact on the workload of the regular Court of Appeal judges. You do not mention such mundane issues as physical space, supervision of clerks, coordination between the superior court judges and the appellate justices, notices

to appellants, maintenance of records on appeal, and coordination of those records with the records of standard appeals. Those issues alone will cost substantial money and massive expenditures of the time of busy appellate clerks and justices.

You then propose that the limited jurisdiction judges ride circuit. The superior courts in our district are already operating with many fewer judges than required. To take a busy judge from his regular duties in order to "ride circuit" merely exacerbates the problem.

Your proposed constitutional amendment (Art. VI, § 3) clearly requires the Courts of Appeal to designate which appeals, and presumably which writs, the limited jurisdiction division will handle. That will require someone with substantial knowledge, probably an appellate justice, to review each appeal to decide whether it should be assigned to the limited jurisdiction division. You ignore the time and cost of such a review.

In short, it appears to me that you have taken a blunderbuss to kill off a fly.

On a slightly different subject, I do not understand the suggested amendments to the Code of Civil Procedure. Section 904 provides that an appeal in a civil action or proceeding is to the Court of Appeal. Section 904.1, refers to an "unlimited civil case" without defining such an animal. Section 904.2 describes the appeals that can be taken from a "limited civil case," but there is no definition of what is a limited civil case, only the kinds of appeal that can be taken if the case falls within the undefined category of a "limited civil case."

In short, I disagree with the proposal. It is unnecessary. It creates work, a massive bureaucracy, an increase in personnel and costs, and solves a nonexistent problem.

Very truly yours,

Barton C. Gaut

BARTON C. GAUT
Associate Justice

BCG:rr

Court of Appeal
FOURTH DISTRICT, DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501

CHAMBERS OF THE
PRESIDING JUSTICE
MANUEL A. RAMIREZ

(909) 248-0301

February 7, 2002

Ms. Joyce D. Cook, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Cook:

I write to you in response to the Commission's new tentative recommendation made in the study entitled Appellate and Writ Review Under Trial Court Unification, Proposal J-1310, about which comments are due March 31, 2002. Although my comments are critical, please understand that I respect the dedication, hard work, creativity, and thoroughness of the Commission and its staff, as well as the openness exemplified by the provision of a comment period. The Commission is one of the many governmental organizations that makes our Administration of Justice system great.

Nevertheless, on this particular issue, I fear that the Commission is trying to fix a judicial process that already works well and that the fix will waste scarce judicial resources. I have four observations to make about the Commission's recommendation that the superior court's appellate division be converted into a division of limited jurisdiction in the Court of Appeal. I will then propose an alternative solution to the peer review problem to the extent it might exist in smaller counties and explain why the appellate divisions should not be placed within the Court of Appeal district organization.

I first observe that no evidence has been presented of even a perception of any impropriety in the current system of appellate division review—the so-called "peer review problem." The present appellate department process works quickly and inexpensively as an extra part-time assignment for judges throughout California, except in Los Angeles. This expenditure of resources is appropriate

because of the lesser impact of these cases as opposed to unlimited civil and felony cases. I have not heard of litigants, lawyers, or judges complaining about peer review, nor have I seen any documentation that such complaints have been made; my impression is that the litigants, often representing themselves, are satisfied with peer review because they have not just one other superior court judge review their case, but three. And we know that they are right in that appraisal because judges, on both the trial and appellate benches, are professionals—with objectivity and without animosity, they have long been overturning each others' decisions when the standards of review, the law, and the facts require reversal. We should not even consider revising our current system unless a significant percentage of litigants, lawyers, and judges are documented as expressing dissatisfaction with peer review. Until then the so-called "peer review problem" merely represents an attempted reification of the abstract proposition that a panel of superior court judges cannot review the decision of another superior court judge, a proposition which has no empirical support.

Second, neither the solution proposed by Justice Rylaarsdam's Task Force nor the similar solution proposed by the California Law Revision Commission (CLRC) addresses the problem they invent. Both propose the use of superior court judges to solve a supposed problem resulting from the use of superior court judges. What both proposals add to the use of superior court judges is nothing but window dressing. The Task Force proposes the use of superior court judges appointed for a term (e.g., a year) and selected from counties throughout the Court of Appeal district to decide the misdemeanor and limited civil appeals in those counties. The CLRC adds only that we will call these temporarily appointed judges the lower division of the Court of Appeal instead of the appellate department of the superior court. In both proposals, panels of superior court judges are still reviewing other superior court judges. So both attempt to cover the nakedness of their chimerical emperor by telling everyone that he has new clothes.

Third, both proposals contradict their ideological opposition to peer review by treating the Los Angeles County Superior Court Appellate Department as a unique case in which peer review will be allowed. Allowing this superior court to retain its appellate division because the county is so large shows that both the Task Force and the CLRC do not really oppose peer review on principle. Because peer review is not inherently wrong as a matter of principle, the issue of peer review simply resolves into the issue of whether under certain circumstances review by a judge's colleagues may appear inappropriate. As mentioned in my first point, no documented evidence has been presented by the Task Force or CLRC that litigants, lawyers, or judges consider the present appellate-department-review process inappropriate.

Finally, implied in both proposals is the necessity for clerical and managerial support for the proposed mobile, multiple-county appellate court. Neither proposal gives much thought as to where the clerical and managerial staff would be located and what kind of personnel, facilities, equipment, and supplies would be required. Whatever solutions may be proposed, one thing is clear—the people of the State of California are going to have to pay a lot more money for appellate review of misdemeanor and limited civil cases than they pay for the current superior court appellate departments. At least as to the Appellate Process Task Force, of which Justice Rylaarsdam's Task Force is a subcommittee, the proposal of measures that would cost the people of this state more money goes directly counter to the express charge given the Task Force, which was to find ways to increase appellate efficiency without the expenditure of additional resources. That charge has renewed importance in the current budget crisis and alone requires the rejection of both the Task Force's and the CLRC's proposals.

With these observations as a background, I address two specific issues: an alternative to the Task Force and CLRC proposals for small courts and an explanation of why appellate divisions will not fit within the District Courts of Appeal.

If review by judges from the same superior court in a small county is perceived to be inappropriate, the best solution is the one already in use to some extent—appoint as many judges from adjoining counties to a panel as is necessary to remove the perception. There are two possible versions of this solution. The one currently in existence is used regularly in the smallest counties that have three judges or less: one or more judges from an adjoining county or counties hear the appeal in addition to any non-conflicted judges in the county where the appeal originated. The originating county's facilities and staff are used. The other version is transfer of the case to an adjoining county, which then provides the judges, facilities, and staff as provided in the adjoining county's appellate department appeals. In both versions, the solution is applied on an ad hoc basis in an appeal only upon request by a judge or litigant. Both versions could be provided as solutions in a statewide rule limited to courts of a certain size. The agreement of the judge or judges of the adjoining county would have to be obtained for any appointment or transfer, and more or less permanent arrangements could be expected to be reached between counties so that no county is overburdened by neighboring counties' appeals, as has already occurred.

Neither form of this ad hoc solution has been considered by either the Task Force or the CLRC. However, in 1994 the CLRC did briefly consider and reject a non-ad hoc, permanent use of an adjoining county as the appellate division for the county where the appeal originated. (Trial Court Unification: Constitutional Revision (SCA 3) (Jan. 1994), 24 Cal. L. Revision Com. Rep. p. 30.) The full, two-

paragraph consideration of this less attractive alternative was quoted and readopted in the current study (at p. 3.) The Task Force also relies on the 1994 CLRC evaluation and rejection. (At p. 9.)

Respecting the permanent use of an adjoining county, the CLRC in 1994 noted the advantage that "This proposal would avoid the problem inherent in having peer review among colleagues of equal standing who serve on the same court." Nevertheless, the CLRC did not recommend this alternative for three reasons. First, the permanent use of an adjoining county "still involves a judge or panel of judges overruling the decision of a judge of equal rank." Second, using an adjoining county "inconveniences the parties" when a reason for having appellate departments was "easy accessibility of review within the county." Third, "cross-county appeals undoubtedly would create management problems, particularly where the workload and staffing of adjoining counties differ substantially."

Preliminarily, note that, according to these criteria, even this flawed use of adjoining counties' judges fairs better than the current appellate-court-districtwide proposals of the Task Force and CLRC. First, both proposals "still involve[] a judge or panel of judges overruling the decision of a judge of equal rank." (As pointed out above, calling a panel of superior court judges a lower division of the Court of Appeal does not change the fact that they are still superior court judges.)

Second, if using an adjoining county inconveniences the parties, how much more are the parties inconvenienced by the Task Force's proposal of having their appeal handled in what will likely be a *non*-adjoining county, forcing litigants and counsel in many cases to travel hundreds of miles? The CLRC proposal escapes this criticism by requiring "the lower division of the court of appeal to hold session in the county in which the case originates." However, that requirement means judges will be traveling—also a costly proposition. Both the CLRC and the Task Force reply with the panacea of "teleconferencing," but this is also an expensive proposition. And, in the same way teleconferencing would avoid the inconvenience of traveling to a *non*-adjoining county, teleconferencing would also avoid the inconvenience of traveling to an adjoining county. Thus, the permanent use of adjoining counties is at least no worse than the CLRC and Task Force proposals on this score.

Third, if "cross-county appeals undoubtedly would create management problems," how much more would appellate-court-districtwide appeals create management problems? Where would the appellate files be kept? If initially in the county of origin, when and where would the case files ultimately be sent? Who would rule on motions for augmentation and extension? If the judges are on circuit, who would move and care for the files as they traveled with the judge, or made sure

that the files arrived in the originating county? And that is only a short list of problems.

After this preliminary comparison of the less attractive permanent use of adjoining counties to the CLRC and Task Force proposals has shown the adjoining-counties alternative to be either better than or equal to the appellate-court-districtwide alternatives, I now turn to the stronger ad hoc use of adjoining-county judges. The obvious advantage is the ad hoc character—only appoint judges from adjoining counties or transfer to an adjoining county upon request. The ad hoc character of this alternative reduces the difficulties involved in sending cases to, or bringing a judge or judges from, adjoining counties. This reduction is due to the strong likelihood that a small minority of litigants or judges will request an alternative to the current appellate division review process. This alternative, already in regular use to the extent of bringing judges from other counties to decide appeals in the smallest counties, is very inexpensive compared to the elaborate character of the CLRC and Task Force proposals.

Addressing the second issue, the superior court appellate departments will not function well as a part of their Court of Appeal districts. Both proposals are unclear as to how the proposed lower division of the Court of Appeal would be designed and created, housed, staffed, and supervised.

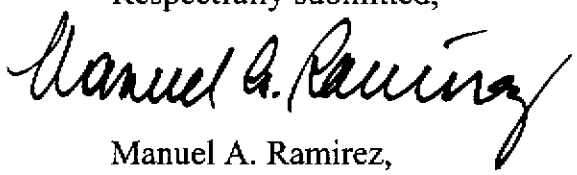
If the lower divisions are centralized in District Court of Appeal courthouses, with the superior court judges and newly hired and equipped clerical staff in the same building, the cost of starting and operating the new lower divisions will be like that for adding on the new Division Eight of the Second District Court of Appeal. The lives of the superior court judges appointed to the new lower divisions would be disrupted, and litigants and lawyers inconvenienced, depending on how far their county is from the city in which the lower division is located.

If the lower divisions are dispersed (all judges and staff remaining where they are now located), the new lower division will create administrative difficulties. Widely dispersed judges will have difficulties obtaining files, conferring with each other, and coordinating with the as many as 23 different clerical staffs in their respective county superior court locations, for example the Third District Court of Appeal. The CLRC proposal is caught between the Scylla of expense and inconvenience disproportionate to the importance of the cases and the Charybdis of an unwieldy administration.

Therefore, to avoid exacerbating an already difficult budget situation by an untried proposal for which there is no demonstrated need, I strongly urge the Commission to reject the tentative recommendation, and retain the present appellate-department-review system or, at most, propose a rule permitting cross-

county judicial appointments and case transfers upon request. Thank you for your consideration of my views, and if you have any questions, please do not hesitate to call me at (909) 248-0302.

Respectfully submitted,



Manuel A. Ramirez,
Presiding Justice

cc: Hon. Daniel J. Kremer, Administrative Presiding Justice, 4DCA1
Hon. David G. Sills, Presiding Justice, 4DCA3
Hon. Roger W. Boren, Presiding Justice, 2DCA
Hon. Arthur G. Scotland, Presiding Justice 3DCA
Hon. James A. Ardaiz,, Presiding Justice, 5DCA
Hon. Connie M. Callahan, Associate Justice, 3DCA
Hon. George W. Nicholson, Associate Justice, 3DCA
Hon. Alex C. McDonald, Associate Justice 4DCA1
Hon. Betty A. Richli, Associate Justice, 4DCA2
Hon. William F. Rylaarsdam, Associate Justice, 4DCA3
Hon. Herbert I. Levy, Associate Justice, 5DCA
Hon. William M. Wunderlich, Associate Justice 6DCA
Prof. John Clark Kelso, McGeorge School of Law
Mr. Ray LeBov, Director, Office of Governmental Affairs, AOC

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

March 14, 2002

ROGER W. BOREN
PRESIDING JUSTICE

TELEPHONE
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MAR 18 2002

Joyce G. Cook
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: California Law Revision proposal number J-1310

Dear Honorable Chairperson:

I am chairperson of the Appellate Courts Committee of the California Judges Association (CJA). I have been authorized by the CJA Executive Board to comment on California Law Revision (CLRC) proposal number J-1310.

This proposal, if enacted, would create new divisions at the Court of Appeal district level to replace the superior court appellate divisions that currently decide limited jurisdiction appeals. The CJA Executive Board approved the recommendation of the CJA Appellate Courts Committee to oppose CLRC Proposal Number J-1310.

The principal reasons CJA opposes the CLRC proposal are the following:

1. The problems of peer review most often cited in support of the proposal are not widespread and are mostly ones of perception. For most counties, peer review is not a problem.

2. It also claimed that the proposal would remedy a lack of resources for appellate review in many counties. The proposal does not provide for resources, and, in any event, the resources can be enhanced without structural change.

3. The consolidation of appellate divisions within Court of Appeal districts runs counter to and will frustrate the Judicial Council goal of insuring fair and easy access to justice. In other words, the proposal removes appellate

review from local judicial authorities to a multi-county agency housed remotely. (Even with circuit riding, this is true.)

4. The proposal requires the creation of another bureaucratic layer of staffing, administration, etc. and additional budgetary expense.

5. The proposal does not address or consider the infrastructure and budgetary problems that implementation of the proposal will foster (i.e., office/chambers space, clerks, records, etc.)

6. The costs and problems of circuit riding are not anticipated or addressed.

7. The proposal as drafted will require the Court of Appeal to decide jurisdictional issues not presently implicated.

8. The proposal, if enacted, will preempt other less costly and likely more helpful programs to address the perceived problems of peer review and resources. The Judicial Council has already established a Task Force to evaluate possible solutions. These solutions are presently under discussion. The CLRC proposal would prevent the Judicial Council from implementing various pilot programs to determine the most economical and effective means of solving the difficulties at which Proposal Number J-1310 is aimed.

Our opposition to the CLRC proposal does not mean that we oppose regional collaborations that might be implemented through the Judicial Council to address particular appellate review needs of smaller counties or regions. It does mean that we consider the CLRC proposal to be overkill.

Thank you for considering the comments of CJA.

Very truly yours,

• SAN DIEGO •
COUNTY BAR
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March 20, 2002

California Law Revision Commission
Attention: Nathaniel Sterling, Esq.
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Re: Comments to Tentative Recommendation #J-1310

Dear Mr. Sterling:

The Appellate Court Committee of the San Diego County Bar Association respectfully submits to the California Law Revision Commission the following comments on Tentative Recommendation #J-1310, entitled "Appellate and Writ Review Under Trial Court Unification" and dated November 2001. As a group, we did not reach consensus on many of the specific proposed constitutional and statutory amendments and legislation, but had a number of concerns and suggestions regarding the framework of the tentative recommendation as a whole. We hope these comments will be helpful to the Commission in its further consideration of the recommendation.

At the outset, we believe that the Commission's recommendation of a limited jurisdiction division of the Court of Appeal to review appeals currently handled by the appellate divisions of the superior courts is preferable to both the existing system and the structure proposed in the Report of Ad Hoc Task Force on Superior Court Appellate Divisions. Having said this, however, we do not believe the Commission recommendation adequately addresses the peer review problem that was created by the unification of the superior and municipal courts, because in many instances superior court judges sitting by assignment to the limited jurisdiction division will continue to be reviewing the decisions of their superior court peers.

Working within the framework of the recommendation, we offer the following suggestions to minimize the peer review problem. First, we believe that it is desirable to have the assigned judges work exclusively on limited jurisdiction division appeals during the terms of their assignments, rather than rotating between handling those appeals and superior court work. Second, we feel that the longer the term of the superior court judge's assignment to the limited jurisdiction division of the Court of Appeal, the less of a problem there will be with perceptions that peer review remains. Accordingly, we respectfully suggest that the recommendation include the requirement that such an appointment would be at least a year in duration.

In addition, we believe that some peer review situations will be avoided if limited jurisdiction divisions are created on a district-wide basis, rather than on a division-wide basis, within those courts that have divisions within their districts. For example, if one limited jurisdiction division is created within the Fourth Appellate District, there is less likelihood that the assigned judges will be reviewing decisions of the superior court judges with whom they regularly work than if three separate limited jurisdiction divisions are created for that same area. Although there is language in the recommendation suggesting that the Commission intends to create only district-wide limited jurisdiction divisions, we respectfully suggest that the recommendation be made specific in that regard.

We very much support the recommendation's proposal for centralized filings from all appeals in the Court of Appeal. However, we have serious concerns regarding the Commission's recommendation that the Court of Appeal will have unfettered discretion to determine which cases will be assigned to the limited jurisdiction division. In the absence of any standards governing the exercise of such discretion, we are concerned that courts of appeal may designate for review by limited jurisdiction divisions classes of cases that have traditionally been reviewed in the Court of Appeal. Moreover, allowing for such discretion could easily result in the same types of appeals being handled differently in the different limited jurisdiction divisions across the state, a result we oppose.

Finally, we note that the Commission's recommendation is silent on the issue of what procedural rules would apply to proceedings in the limited jurisdiction division of the Court of Appeal and on whether limited jurisdiction division decisions are subject to discretionary review in the Court of Appeal or the Supreme Court. Some of our committee members feel that a single set of rules should apply to all appeals from rulings of the superior court, to eliminate confusion and resulting prejudice to the parties to an appeal. Others believe that the application of uniform rules to limited jurisdiction division cases would be unworkable. Although we did not reach consensus on this point, we agree that the Commission's recommendation should specify its intent on these issues.

In conclusion, considering our continued concern over the issues related to peer review even under the Commission's recommendation, we take this opportunity to respectfully suggest our preference for a separate division of the Court of Appeal comprised of judicial officers that are neither justices of the Court of Appeal nor judges of the superior court. Whether they are called "appellate commissioners," "appellate magistrates" or something altogether different, the concept is that they will not be reviewing decisions of their colleagues on the superior court; yet, at the same time, they will not have the authority to hear or decide matters currently reserved for the Court of Appeal.

The San Diego County Bar Association Appellate Court Committee highly commends the members of the California Law Revision Commission for their work and dedication. Further, we appreciate the opportunity to comment on Tentative Recommendation #J-1310. Please direct any questions regarding our comments to the undersigned c/o Court of Appeal, Fourth Appellate

District, Division One, 750 B Street, Suite 300, San Diego, California 92101; telephone (619) 645-2857.

Very truly yours,

Kimberly Stewart
Chair, Appellate Court Committee of the
San Diego County Bar Association

cc: Monty A. McIntyre, President
Sheree L. Sweetin, Executive Director

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March 27, 2002

California Law Revision Commission
Attention: Nathaniel Sterling, Esq.
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Re: Comments to Tentative Recommendation #J-1310

Dear Mr. Sterling:

I respectfully submit my comments to the California Law Revision Commission on Tentative Recommendation #J-1310, "Appellate and Writ Review Under Trial Court Unification" dated November 2001. I am a staff attorney at Appellate Defenders, Inc. ("ADI"); a certified specialist, appellate law, the State Bar of California Board of Legal Specialization; a member (and past chairperson) of the Appellate Court Committee ("ACC") of the San Diego County Bar Association; and, in my capacity as a naval reservist, an appellate judge of the Navy-Marine Corps Court of Criminal Appeals (Washington, D.C.). My comments are solely personal and do not represent the position of ADI, the ACC, or any other entity.

Like the ACC, I believe the Commission's recommendation is preferable to either the current appellate divisions of the superior courts or the proposal of the Ad Hoc Task Force on Superior Court Appellate Divisions, but I also have some concerns or reservations as to unstated or ambiguous details.

Like the ACC, I respectfully submit that the length of assignments be specifically delineated. I would go further than the ACC, though, and recommend a period longer than one year. If a superior court judge has had no previous appellate experience, given the learning curve required to become familiar with the process of appellate review, just when the new appellate jurist has attained a true expertise, his or her tenure could very

well be ending if it was a year or less.

I also concur with the ACC in submitting that appointments be made on a district-wide basis. Still, such assignments may not alleviate some perceived peer review problems, at least in much of the present Fourth Appellate District *if* the contemplated division of the district into separate districts vice divisions does occur. If the suggested division does occur, Orange County would be its own district, and the overwhelming limited jurisdiction appeals and appointments to the court in the present Division One would be from San Diego County, given San Diego County's disproportionate population in comparison to its division/district mate, Imperial County. (Similarly, the number of appeals and appellate jurists from Los Angeles County would predominate over the combined numbers from Ventura, Santa Barbara, and San Luis Obispo Counties.)

I also have concerns with giving each individual district of the Court of Appeal unfettered discretion as to what type of cases should be given to the superior court appointees. Before addressing this concern, however, it would be useful to consider other systemic questions which arise from creating Court of Appeal appellate review of limited jurisdiction cases. The systemic questions stem from the presumption that the proposed constitutional and statutory amendments would impose certain requirements upon the limited jurisdiction appeals once they would be within the ambit of the Court of Appeal. For instance, written, reasoned opinions would ostensibly be required as would the right to oral argument. Similarly, exhaustion of state remedies – as a prerequisite to federal review of federal criminal issues after appeal to the Court of Appeal – would require petitioning the California Supreme Court to review the cause. Does the Commission's proposed Court of Appeal limited jurisdiction appeal regime truly anticipate these requirements and additional consumption of time by the courts? If not, other constitutional and statutory amendments would have to be drafted to remedy any oversight.

Returning to the question of discretion as to what the limited jurisdiction appellate division may be assigned, some courts may assign all misdemeanor conviction appeals while other courts may only assign those in which the prosecution was initiated by misdemeanor complaint, retaining for the unlimited Court of Appeal those appeals from prosecutions arising from indictment or information (regardless whether the ultimate

convictions was solely for misdemeanor(s)) as is presently constitutionally required. Disparate appellate treatment would arguably be a denial of equal protection. Similarly, some courts could choose to assign "less weighty" cases to the limited jurisdiction panel, but that discretion could foster a self-fulfilling prophecy, i.e., handling a case as if it were not entitled to great weight could breed a mindset that a case was not as weighty than what may be truly in issue.

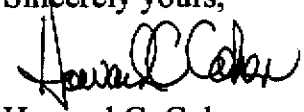
Another question which emerges is the impact of limited jurisdiction appellate review on stare decisis. Under *Auto Equity Sales Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, a conflict-free decision of the Court of Appeal is binding on all superior courts. It has not been clear what the *Auto Equity* impact of the current superior court appellate divisions is. Formerly, when municipal courts existed, a superior court appellate division decision would be binding on all municipal courts in the same county. Now, since there are only superior courts, it is not clear whether a superior court appellate division decision binds all the superior court departments in the same county. Presumably, if the Commission's Recommendation is approved, a Court of Appeal limited jurisdiction conflict-free appellate decision will bind all superior courts. Is that the Commission's intent? Further, more published decisions may emanate from the limited jurisdiction Court of Appeal divisions than do now from the superior court appellate divisions. A greater publication rate (and a proportional greater number of requests for depublication) may be either better or worse.

Adoption of the Recommendation will also have concomitant repercussions. While there may not be a need for additional judges (and, hence, additional judicial salaries), there may likely be a move of clerical assistance from the superior courts to the Courts of Appeal, i.e., additional state vice county expenditures, as well as the need for more space at each Court of Appeal, which will most likely affect previous planning for the need of appellate courts' infrastructures. Also, prosecutorial agencies may need to reorient their respective representations, i.e., who will now be responsible for representing the People in limited jurisdiction appeals, the Attorney General or the local District Attorney or City Attorney? Who may represent the People may, in turn, be a function of each district's or division's discretion on what cases will be assigned to the limited jurisdiction panel. Similarly, appellate representation of indigent defendants may change dramatically if the various appellate projects throughout the state contract to represent defendants in the Court of Appeal limited jurisdiction division.

Finally, on a macro level, whatever final proposition may be placed before the electorate, there should be an effective date sufficiently far enough in advance to permit the promulgation of new rules to provide specific, relevant procedures for limited jurisdiction appellate review.

On a micro level, as far as the specific language of the proposed amendments or enactments, in proposed Government Code section 69162, subdivision (c), the language at page 20, line 40-page 21, line 1, is verbose. Why not say a "a superior court judge of any county or a judge retired . . . ."? Similarly, the language in proposed Government Code section 69165 need only say "in the county in which the case before it originates, ..."

Sincerely yours,



Howard C. Cohen
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RAY LEBOV
Director
Office of Governmental Affairs

March 28, 2002

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

Re: Appellate and Writ Review Under Trial Court Unification
(Tentative Recommendation #J-1310)

Dear Commissioners:

The Judicial Council is opposed to the Appellate and Writ Review Under Trial Court Unification proposal (Tentative Recommendation #J-1310) because the council is currently examining the issue of appellate review of limited jurisdiction cases. The proposal is, at a minimum, premature.

In addition, the proposal raises a number of concerns: (1) There is much uncertainty at this time about the existence of a "peer review" problem with the current system, under which superior court judges assigned to the appellate division review the decisions of other superior court judges; (2) If a peer review problem exists, the proposal does not solve it; (3) The proposal fails to recognize the importance of maintaining a convenient, local forum for appeals in misdemeanor, infraction, and limited civil cases; and (4) The proposal does not clearly delineate a path for further review after completion of proceedings in the limited jurisdiction division.

Uncertainty about existence of "Peer Review" Problem
The Judicial Council is in the process of surveying practitioners in an effort to determine whether there is even a perception of a peer review problem. Until that review is complete, the council believes this change would be premature.

The Proposal Does Not Eliminate "Peer Review"
If it is shown that there is a perception of a peer review problem, this proposal does not solve it. Cases in the proposed "limited jurisdiction divisions" would still be heard and decided by superior court judges serving in temporary assignments in the court of appeal. Since judges of equal rank would still be reviewing their peers, the proposal does not eliminate peer review.

Providing a Local Forum for Review Benefits the Parties
Appeals in misdemeanor, infraction, and limited civil cases should remain in the county of origin, in the local superior court in which they were filed-both for the convenience of the parties and to provide the local "flavor" of a decision by members of their own community. Generally, these appeals are not as complex as felony and unlimited civil cases, and the parties' resources to pursue them are more limited. Review by the courts of appeal is by necessity more expensive given the travel, filings in remote locations, more burdensome record preparation procedures, and more in-depth briefing involved in such appeals. Containing appellate costs and retaining local decision-making are likely to be viewed as beneficial to the litigants. For these reasons, the committee concluded it is best to keep appeals in misdemeanor and limited civil cases "closer to home" for the litigants.

The Proposal Does Not Delineate a Path for Further Review
Finally, the proposal is deficient in that it does not explain whether, where, or to what extent further review of decisions by the "limited jurisdiction division" may be available. Presumably, such decisions would be treated as any other court of appeal decision and would be subject to review by the Supreme Court upon a grant of a petition for review. However, given the tradition of appellate division review of municipal (now superior court) judgments, with a limited opportunity for transfer to the court of appeal (see Cal. Rules of Court, rule 61 et seq.), it is possible to interpret the proposal as suggesting an intermediate step of review by the limited jurisdiction division, with further review by another division or by a panel of associate justices of the court of appeal, before the case may be taken up by the Supreme Court. If the proposal contemplates such a procedure, it will not provide a shorter, simpler path to finality. It will simply increase the total workload on the reviewing courts without any significant improvement in the quality of available review, and will call upon the courts of appeal to bear the full brunt of that increased workload.

For the reasons stated above the Judicial Council opposes the Appellate and Writ Review Under Trial Court Unification proposal.

Sincerely,

June Clark
Senior Attorney

cc: Hon. Joyce L. Kennard
Rob Waring, California Judges Association
Heather Anderson
Joshua Weinstein

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To: California Law Revision Commission

From: Board of Directors, Appellate Defenders, Inc.

Date: April 2, 2002

Re: Comments on Tentative Recommendation # J-1310, Appellate and Writ Review Under Trial Court Unification

The Board of Directors of Appellate Defenders, Inc. (ADI), submits the following observations on the Law Revision Commission's Tentative Recommendation # J-1310. ADI is a non-profit corporation founded in 1972 by the San Diego County Bar Association; since 1983 it has administered the system of appointed counsel for the entire Fourth Appellate District. It recommends appointments from its panel of about 400 private attorneys, oversees and assists the attorneys, proposes their compensation, provides resource support (such as a briefbank, Web site, and seminars), and directly represents a number of clients. The 13-member board consists of attorneys from criminal and civil practice and faculty representatives of the major law schools in San Diego.

The Tentative Recommendation Only Partially Addresses the Problem of Peer Review in Limited Appeals

The ADI board sees peer review as one of the most serious deficiencies in the current system of appeals from what used to be judgments and orders of municipal courts (called "limited appeals" here, for ease of reference).[1] From the viewpoint of litigants, lawyers, and the public, review by judges from the same court as the judges whose rulings are under challenge creates, at the very least, the appearance of lack of disinterested objectivity. It may even set the conditions for improper considerations *actually* to enter the decision-making process, despite every good-faith effort on the part of the reviewing judges to maintain distance from their colleagues under review. The reality is that they are and will continue to be peers, social friends, confidants, and

[1]Small claims and traffic cases are not covered by these comments.

advisors; and the temporarily assigned appellate judges know the judges they review today may in turn be reviewing them in the future.

The Law Revision Commission's Tentative Recommendation does alleviate some peer review problems in the existing system (more so than does the report of the Judicial Council's Ad Hoc Task Force on Superior Court Appellate Divisions, which would keep the appellate divisions at the superior court level). Moving limited appeals to the Court of Appeal and taking them from the entire district, rather than a single county, gives the reviewing judges a status superior in both title and scope of authority to the judges they review and also increases their distance from those judges.

A difficulty under the Tentative Recommendation, however, is that the superior status is only temporary, since assignments to the lower division would be for specific terms. Eventually many of the reviewing judges would again become peers of the judges reviewed and would again have day-to-day contact with at least some. They also would be aware their own cases will be reviewed by the very same colleagues in the future. Thus the perception inevitably will remain that they are informally answerable to those under review.

Furthermore, appellate decision-making is improved by knowledge of appellate law, which develops with experience. When superior court judges return to the trial court, the taxpayers would lose the benefit of the expertise in appellate law they developed sitting temporarily in the lower division.

An alternative that would completely address the issues of peer review and lost expertise would be to modify the Tentative Recommendation to provide for permanent assignments to the lower division of the Court of Appeal – perhaps "appellate judges" named through the usual system of gubernatorial appointments . However, this arrangement, like the Tentative Recommendation, would pose further difficulties, addressed in the next section.

A Lower Division of the Court of Appeal Would Create Practical Difficulties and Leave Unspecified Numbers and Types of Cases in a Second-Class Status.

A practical issue with the lower division system would be whether the volume of appeals in smaller districts (e.g., the Sixth) would be sufficient to justify the minimum of three full-time appellate judges needed to constitute a lower division appellate bench.

Another problem with a lower division would be its inconsistency with the philosophy behind trial court unification, which supposedly made all cases of equal stature at the trial level. In part this change reflected the profound reality that to litigants their own case, even though involving "only" misdemeanor charges (sometimes with a potential sentence of one year of incarceration) or relatively small amounts of money, is of enormous importance. The same is true of appeals from those cases. Yet under the lower division approach, some appeals would be treated as a second-class family of cases, with a lower-status bench and quite possibly fewer resources and lesser procedural protections.

The problem of unequal dignity potentially would be exacerbated by the failure of the Tentative Recommendation to provide any standards whatever for the Court of Appeal's distribution of cases between the regular and lower divisions. Litigants could find themselves shunted onto the second-class track despite enormous stakes or complex issues, on the basis of the court's completely unguided and unreviewable discretion.

The ADI Board Recommends All Superior Court Appeals Be Heard by the Court of Appeal.

The ADI board urges that the optimal way of addressing these issues would be to provide for unification at the appellate level, like that at the trial level, so that all limited appeals would go to the Court of Appeal as it currently is constituted. The board recognizes that a number of practical problems would have to be dealt with under such a system. While time does not allow comprehensive analysis, the board offers these selected thoughts:

- The Court of Appeal would have to be expanded to accommodate the increased caseload. This change would have some fiscal implications, but for the most part the costs would be transferred ones, moving judicial and supporting positions from the current superior court appellate division to the Court of Appeal.

- The new system would require short- and long-term accommodation for changed facilities requirements. However, similar adjustments would be needed for the Tentative Recommendation and the Task Force's proposal.

- Given its mandate under article VI, section 14 of the California Constitution,[2] the Court of Appeal may find it necessary to issue written opinions that would not have to be written if cases were to remain in the superior court. That development would be desirable, to the extent it gives added dignity, thoughtfulness, and a sense of authentic justice to limited appeals. To address the practical problems, the constitutional amendments moving limited appeals to the Court of Appeal could include provision for added flexibility to the written opinion requirement. Alternatively, broader use of central staff to draft relatively short, but still constitutionally adequate opinions in simpler cases, for justices' approval, could alleviate the burden of an expanded volume of written opinions.

- It would be essential to have an adequate record on appeal in all cases, including needed documents and reporter's transcripts.

The board notes that having all superior court appeals go to the Court of Appeal would not only eliminate the problem of peer review but also would obviate some of the thorny issues created by the Tentative Recommendation and Task Force proposal. These issues include what provisions of the Rules of Court would apply; whether the Court of Appeal or California Supreme Court, if either, would have discretionary review over limited appeal decisions; and what precedential authority limited appeal decisions would have under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

In Any District-Wide System for Limited Appeals, Appointment of Private Appellate Counsel Should Be Administered by the Existing Appellate Projects

Complaints about the quality of appointed representation by private counsel in misdemeanor appeals (those not handled by public defenders or other institutional defenders) are serious and widespread. The board suggests that, upon adoption of any district-wide system of limited appeals, consideration be given to moving administration of the system of private counsel appointments to the existing appellate projects such as ADI.[3] It notes:

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[2]"Decisions of the . . . courts of appeal that determine causes shall be in writing with reasons stated."

[3]The other five appellate districts of California have appointed counsel organizations similar to and modeled after ADI.

- The projects are already equipped to handle such cases with little or no expansion of their own staff and costs.

- The project panels consist of experienced, highly trained appellate lawyers. These panels have sufficient depth at the current time to absorb the anticipated increase in appeals generated by adding misdemeanors to the Court of Appeal's appellate jurisdiction.[4]

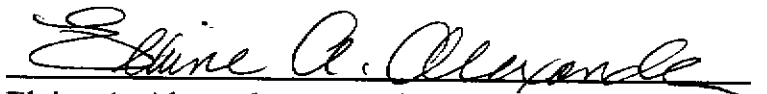
- The increased volume would allow the projects to address the increasingly acute need for training new appellate lawyers without taking an inordinate number of cases from the existing panel, which needs that work in order to maintain a viable indigent appellate practice.

- The compensation to panel attorneys would largely be a transferred cost, from the fees now paid to private appointed counsel in misdemeanor appeals.

The board believes this change would vastly improve the quality of representation in misdemeanor appeals and at the same time, by using existing structures of experienced professional administration, make the system far more efficient in delivering services.

The ADI board greatly appreciates this opportunity to comment on the very valuable proposals the Law Revision Commission has developed. It would be pleased to provide further input if requested.

Signed,



Elaine A. Alexander, Executive Director
Richard H. Benes, Board Member
Charles A. Bird, Board Member
Under Authority of the Board of Directors of Appellate Defenders, Inc.

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[4]Private attorneys now handling misdemeanor appeals could be admitted to one or more appellate panels if they wish to apply and if they meet the applicable criteria.