Study J-1310 June 27, 2002

Memorandum 2002-32

Appellate and Writ Review Under Trial Court Unification: Review of Commissioner Decisions

BACKGROUND

The Commission has been concerned about the aftermath of trial court unification, in which a decision of a superior court judge may be subject to appellate and writ review by the judge's peers sitting in the superior court's appellate division.

The Commission has circulated for comment a tentative recommendation to change the scheme for appellate and writ review of superior court decisions. Under the tentative recommendation the court of appeal would review all superior court decisions. Each court of appeal would have a limited jurisdiction division to hear cases assigned to it by the court (generally limited civil cases and misdemeanor and infraction cases). The limited jurisdiction division would be staffed by superior court judges sitting by assignment, who ride circuit to superior courts within the court of appeal's district.

At the May 2002 meeting the Commission reviewed comments on the tentative recommendation. The Commission also decided at that time to explore an alternative approach to appellate and writ review of superior court decisions. Under the alternative approach, matters of a type determined by a court commissioner would be reviewable in the superior court's appellate division and matters of a type determined by a judge would be reviewable in the court of appeal.

This memorandum elaborates issues involved in the alternative approach, including:

(1) Should an interlocutory matter that is appealable be covered by this rule, or only final determination of a cause?

(2) Should the appeal path depend on whether the cause is the "type" that might be determined by a court commissioner, whether or not the matter is actually determined by a court commissioner or by a judge?

(3) Should the same principles that govern appeal from a court commissioner decision also apply to decisions of other types of subordinate judicial officers?

(4) Should the same principles that govern appeal from a court commissioner decision also apply to a decision by a court commissioner acting as a temporary judge? What about a decision of another person (e.g., an attorney) acting as a temporary judge?

(5) Should the principle of appeal from a court commissioner decision to the superior court's appellate division also apply to a small claims appeal?

(6) Should the principle of appeal from a court commissioner decision to the superior court's appellate division also apply to writ review of a court commissioner decision?

(7) How would this scheme impact the court of appeal's workload?

(8) What sorts of constitutional and legislative changes would be necessary to implement the scheme?

(9) Is this scheme better than that proposed in the Commission's tentative recommendation?

WHAT IS A COURT COMMISSIONER?

Subordinate Judicial Officers

A court commissioner is a judicial officer authorized by the California Constitution. Article VI, Section 22 provides:

> Sec. 22. The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.

Pursuant to the constitutional authority, the Legislature has acted to provide for appointment of commissioners and other "subordinate judicial officers" such as referees and hearing officers. Government Code Section 71601(i) includes a compendium of subordinate judicial officers. As amended by SB 1316 (Sen. Jud. Comm.) — the Commission's trial court restructuring cleanup bill — the statute would read:

> (i) "Subordinate judicial officer" means an officer appointed to perform subordinate judicial duties as authorized by Section 22 of Article VI of the California Constitution, including, but not limited to, a court commissioner, probate commissioner, child support commissioner, referee, traffic trial commissioner, traffic referee,

> traffic hearing officer, juvenile referee, juvenile hearing officer, and temporary judge.

Temporary Judges

Note that the Government Code Section 71601(i) definition of subordinate judicial officer includes a reference to a "temporary judge."

Notwithstanding that provision, a temporary judge is not the same as a subordinate judicial officer. The authority of a temporary judge is broader than that of a subordinate judicial officer, and is derived not from Article VI, Section 22 (subordinate judicial officers), but from Article VI, Section 21, of the Constitution:

> Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

The Commission has declined to correct the problematic implication in Government Code Section 71601(i) that a temporary judge is a subordinate judicial officer, due to complexities stemming from the way the defined term is used in the Trial Court Employment Protection and Governance Act.

It is important to note, though, that a subordinate judicial officer may act as a temporary judge, if so stipulated by the parties. Code of Civil Procedure Section 259 makes clear that a court commissioner may:

> (e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

In that case the commissioner is acting as a temporary judge, not as a commissioner. The distinction is important, since the authority of a temporary judge is greater than that of a court commissioner. There are a number of recent cases addressed to this issue where the distinction was critical.

The distinction between the role of court commissioner and temporary judge is also important for appeal purposes. The matter is addressed in some depth, below.

If we are to make court commissioner decisions reviewable in the superior court's appellate division and judge decisions reviewable in the court of appeal, just what sort of division of labor are we talking about?

Subordinate Judicial Duties

General Provisions

At the outset, we must remember the constitutional limitation on the authority of a court commissioner — performance of "subordinate judicial duties." A key statute prescribing the authority of a court commissioner is Code of Civil Procedure Section 259. It is noteworthy that most of the duties authorized by Section 259 do not involve final disposition of a matter, although some of the actions taken may be appealable orders:

> 259. Subject to the supervision of the court, every court commissioner shall have power to do all of the following:
>
> (a) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.
>
> (b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.
>
> (c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.
>
> (d) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.
>
> (e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party. While acting as temporary judge the

commissioner shall receive no compensation therefor other than compensation as commissioner.

(f) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation.

(g) Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

(h) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (e).

(i) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This subdivision does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

(j) Provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which the commissioner resides.

(k) Authenticate with the official seal the commissioner's official acts.

Fees

The Commission has not recommended revision of subdivision (i) relating to payment of fees to the county treasurer for deposit in the county general fund. This matter is unresolved between the courts and counties.

Of course, it might well be asked just what sort of official acts a court commissioner may be collecting fees for. We understand from court commissioners that as a matter of practice, they do not perform notarial functions.

Seal

The clause in subdivision (j), requiring that the seal of the court commissioner be engraved with the name of the county in which the commissioner resides, is also problematic. It apparently dates from an era when there was a residency requirement for judges. That requirement has been held unconstitutional and has been repealed. It would be more logical for the seal to include (whether by

engraving or some other technique) the name of the court in which the commissioner is appointed.

A more fundamental question is the purpose to which the seal is put. Subdivision (j) indicates it is used to authenticate the commissioner's official acts. But a commissioner's official act in performing a subordinate judicial duty is an act of the court; it should not be authenticated by a personal seal. More likely, the seal would be used to authenticate a notarial act performed by the commissioner, such as one provided in subdivision (d) of Section 259 — administering oaths and affirmations, taking affidavits and depositions, or taking acknowledgments and proof of deeds, mortgages, and other instruments. But again, we have information that court commissioners as a matter of practice do not perform notarial acts (nor, apparently, do they keep a seal).

The staff thinks that, as long as we are dealing with Section 259, **we should at least fix the residency requirement on the court commissioner's seal**.

While we're at it, we could also eliminate the seal itself, along with the notarial duties the seal is apparently intended for, as well as the associated fees. This could be achieved by repeal of subdivisions (d), (i), (j), and (k). But see Civil Code Section 1181, listing various officers authorized to take proof or acknowledgment of an instrument, including court clerks, court commissioners, judges, district attorneys, county counsels, etc. Does it make any sense to delete court commissioners from this list?

If the Commission is interested in pursuing this, **we would circulate a draft to court commissioners and other interested persons for review and comment**.

Infraction and Small Claims Actions

Additional authority of a court commissioner is found in Government Code Section 72190. As it would be amended by SB 1316, that statute provides in relevant part:

> 72190. Within the jurisdiction of the court and under the direction of the judges, commissioners shall exercise all the powers and perform all of the duties prescribed by law. At the direction of the judges, commissioners may have the same jurisdiction and exercise the same powers and duties as the judges of the court with respect to any infraction or small claims action. They shall be ex officio deputy clerks.

The authority to exercise the same powers and duties as a judge with respect to an infraction or small claims action is interesting. The Constitution permits the

Legislature to provide for performance of "subordinate" judicial duties. Query whether having the same jurisdiction and exercising the same powers and duties as a judge is a subordinate function within the meaning of the Constitution. (Note, though, that this is all performed "at the direction of the judges".) The validity of this statute has been upheld in the courts, which have found that rendering decisions in small, routine cases falls within the ambit of subordinate judicial duties. See, e.g., *People v. Lucas*, 82 Cal. App. 3d 47, 147 Cal. Rptr. 235 (1978).

Other Functions

Other statutorily authorized functions of a court commissioner include :

- Conducting arraignments and issuing bench warrants. Gov't Code §§ 72190.2, 72190.2.
- Judicial duties under the attachment law, the claim and delivery law, and the innkeepeers lien law. Code Civ. Proc. §§ 482.060, 516.040; Civ. Code 1861.28.

Some of these functions could generate appealable orders.

APPEALABLE ORDERS

It is beyond the scope of this memorandum to attempt to catalogue appealable orders. Whether or not a particular order is appealable is determined by statute. There are general statutes governing appealable orders in an unlimited civil case (Code Civ. Proc. § 904.1), in a limited civil case (Code Civ. Proc. § 904.2), in a felony case (Penal Code § 1235 et seq.), and in a misdemeanor or infraction case (Penal Code § 1466). In addition, there are numerous special statutes governing appeals in specific types of proceedings. See, e.g., Prob. Code § 7240 (appealable orders in estate administration).

Suffice it to say that, while a judgment or final determination of a matter is generally appealable, many of the subordinate judicial duties that could be performed by a court commissioner would also result in an appealable order. This raises a number of questions.

Suppose the judgment in a particular matter (e.g., an unlimited civil case) is appealable to the court of appeal. If a subordinate judicial duty is performed in connection with that case and results in an appealable order, should the appeal of that order likewise be to the court of appeal, or should it be to the appellate division of the superior court (because it is rendered by a commissioner)? Does it

make a difference if a judge, rather than a court commissioner, performs the subordinate judicial duty? Does the appeal path in the matter depend on the particular issue being raised on appeal? Suppose the appeal raises several issues, including both a subordinate judicial matter and an ultimate legal issue — would review be fragmented among appellate courts?

The staff thinks that in order to answer these and other questions raised by the concept of having a "commissioner decision" reviewed in the superior court's appellate division and a "judge decision" reviewed in the court of appeal, the Commission must determine a fundamental policy that it has not yet confronted. Is the purpose of this scheme to distinguish between more a important and less important type of decision, or is it to distinguish among personnel making the decision, regardless of its importance?

POLICY CONSIDERATIONS

Historically, a decision in a superior court matter, whether a subordinate judicial matter or the judgment in the case, and whether performed by a judge or a court commissioner, was appealable to the court of appeal. A decision of any type in a matter within the municipal court's jurisdiction was appealable to the superior court's appellate department.

If the purpose of distinguishing between commissioner work and judge work is to ensure that a more important matter goes to the court of appeal and a less important one goes to the superior court, there is no need to disrupt the historical system. After all, we have converted the system to one that works in the context of trial court unification, sending an unlimited civil case or a felony appeal to the court of appeal and a lesser matter to the appellate division of the superior court.

Presumably, the purpose of distinguishing between commissioner work and judge work is to eliminate peer review among superior court judges. A judge decision would be reviewed by the court of appeal, a commissioner decision by the superior court. But this means that the same matter could go to one court or the other for review, depending on what personnel happened to be involved in the particular case. A commissioner decision in an infraction case would be reviewable in the superior court, but a judge decision in an infraction case would be reviewable in the court of appeal. That could have a dramatic impact both on the court of appeal's workload and on its historical jurisdiction.

Or, the policy here may be something of a hybrid — to distinguish among cases on the basis of an amalgam of factors, including both the importance of the case and the personnel involved. The argument would be that the historical division between court of appeal and superior court appellate jurisdiction is still basically sound, except that the peer review problem necessitates a further realignment. Thus matters often handled by a commissioner — small claims and infraction cases — would be reviewable in superior court. Review of matters often handled by a judge — limited civil cases and misdemeanors — would be shifted from superior court to the court of appeal. This shift would occur regardless of whether a judge or commissioner presided in a particular case.

If the hybrid policy is adopted, that would argue for not distinguishing among types of judicial duties, subordinate or otherwise, within a particular case. If the case falls in a specified class, all matters that arise in connection with the case would be reviewable in the same court. Likewise, it wouldn't matter whether a court commissioner or judge is the decisionmaker; it is the class of case that determines the review path. This policy would also influence the determination, discussed below, concerning treatment of a decision by another type of subordinate judicial officer, as well as by a temporary judge.

The hybrid approach would have a fairly significant impact on the court of appeal workload, since it would shift superior court appellate division work to the court of appeal without an offsetting shift the other direction. Workload statistics are examined immediately below.

STATISTICAL ANALYSIS

A critical factor in any scheme to realign writ and appeal paths for a limited civil case or a misdemeanor or infraction case is the likely workload shift. Sending a writ or appeal currently in the appellate division of the superior court to the court of appeal would necessitate a concomitant shift of resources from the superior court to the court of appeal.

Appeals

The most recent statistics available from the Administrative Office of the Courts are for fiscal year 2000-2001. During that year there were about 12,000 civil appeals to the superior court and 2,600 criminal appeals.

The staff finds these numbers difficult to credit; the only logical explanation is that the civil appeal number includes small claims appeals. AOC does not have a

breakdown of the numbers between limited civil appeals and small claims appeals, and between misdemeanor appeals and infraction appeals.

The Ad Hoc Task Force on the Superior Court Appellate Divisions gathered more detailed data by means of an independent survey of the courts. Joshua Weinstein of AOC, who staffed the task force, cautions that the statistics are not solid but may be indicative. The task force numbers are more useful than the official AOC numbers for our purposes, since the task force excludes small claims appeals and distinguishes among types of criminal appeals, and also includes writs. The task force chart is appended as Exhibit pp. 1-2.

The task force numbers are somewhat lower than the AOC official numbers, but they are generally of the same magnitude (except for the small claims factor). The task force data is particularly helpful to establish ratios, which then can be applied to the AOC numbers. For example, the task force survey shows that in the superior court appellate divisions, criminal appeals outnumber civil appeals by a factor of 2 to 1. Applying this factor to the AOC figure of 2,600 appellate division criminal appeals, we can conclude that there are probably about 1300 limited civil appeals exclusive of small claims. (The task force numbers are 2425 criminal and 1170 limited civil.) If all 1300 limited civil appeals were shifted to the courts of appeal, this would increase their civil workload by about 25%.

This type of analysis would also suggest that infraction appeals are a relatively significant portion of the superior court appellate division's criminal workload. The task force poll shows a wide range among counties. Infraction appeals are estimated to make up less than 10% of the appellate division's case load in some counties and greater than 60% of the case load in others. In the aggregate, infractions are estimated to be about 30% of the superior court appellate division workload. Since infractions fall within "commissioner" duties under Government Code Section 72190, this portion of the existing appellate division workload would remain with the appellate division under the current proposal. If the estimated 1,800 misdemeanor appeals were shifted to the courts of appeal, that would increase their criminal workload by about 25%.

The 25% number is consistent with the Commission's original estimate in its 1994 trial court unification report — "If the number of appeals from trial court judgments in the unified court roughly equals the combined number of existing superior court, municipal court, and justice court appeals, the court of appeals workload could increase by about 25%." *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 27 (1994).

Writs

The writ workload is, if possible, more speculative than the appeal workload. AOC no longer collects writ statistics, except for habeas corpus writs. In the case of habeas corpus writs in the superior court, AOC indicates a 40% increase over the past decade (from 4000 annually to 5,600 annually).

A decade ago approximately 1,000 writs were issued annually from the superior courts to the municipal and justice courts (primarily bail, discovery, and speedy trial matters). If we apply the 40% habeas corpus factor across the board to all writs, that would suggest a current writ workload in the superior court appellate divisions of 1,400. By contrast, the task force survey shows the appellate division writ workload as 510 annually.

Under the Constitution, writ review of a superior court proceeding in a limited civil case or a misdemeanor or infraction case is apparently vested in the appellate division of the superior court; writ review of a superior court proceeding in an unlimited civil case or felony case is apparently vested in the court of appeal. Article VI, Section 10 of the Constitution provides:

> SEC. 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.
>
> Superior courts have original jurisdiction in all other causes except those given by statute to other trial courts.
>
> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

However, a careful reading of the constitutional provision suggests that an argument could be made that writ review of a decision in an unlimited civil case or felony case could be vested in the superior court as well as in the court of appeal. Moreover, writ review of a decision in a limited civil case or a misdemeanor or infraction case could be vested in the court of appeal as well as in the superior court's appellate division. The ambiguous constitutional language was not drafted by the Commission but was inserted into the constitutional

amendment during the legislative process; the Commission's Comment to this provision is therefore not helpful in construing it.

Let us assume for the sake of argument that the constitutional provision will be construed to limit writ review of a decision in a limited civil case or misdemeanor or infraction case to the appellate division of the superior court, and to limit writ review of a decisions in an unlimited civil case or felony case to the court of appeal. *Cf.* In re Ramirez, 89 Cal. App. 4th 1312, 108 Cal. Rptr. 2d 229 (2001) (habeas corpus in misdemeanor case). What does this mean for an action in these cases taken by a commissioner?

A change in the appeal path of a matter would generate a concomitant change in writ review of the matter. If a limited civil case or misdemeanor case (as a "non-commissioner" matter) became reviewable in the court of appeal rather than the appellate division of the superior court, a writ in that case would likewise be in the court of appeal.

While our writ statistics are inadequate, the staff would guess that almost none of the estimated 1400 writs directed to the superior court concerning its limited civil case and non-felony criminal jurisdiction involve small claims or infractions. That is, the entire bulk of the estimated 1400 writ matters heard annually by the appellate division of the superior court and directed to the superior court would be shifted to the court of appeal. This would result in an increase of the court of appeal's writ workload of about 15%.

NUMBER OF COMMISSIONERS

Over the past decade there has been a steady rise in the number of commissioners employed in the courts. There are currently 377 commissioners, 40% more than a decade ago.

One of the concerns about trial court unification has been that it could accelerate use of court commissioners. With no lower division judges to handle routine cases, pressure could mount to employ subordinate judicial officers for that purpose.

Whether the increase in the number of court commissioners is attributable to that factor is not clear. It cannot be argued that the increase in the number of court commissioners is the result of an increase in the trial court's workload. The number of judicial positions has increased by 8% during the past decade, while the court's workload has decreased by 20% during the same period.

In any event, the number of court commissioners used in the trial courts becomes important if the determining factor of an appeal path is whether the decision at issue was rendered by a commissioner. The more commissioners active in the trial courts, the fewer cases would go to the court of appeal and the more to the superior court. (We will assume for the sake of discussion that the rate of appeal from commissioner decisions is the same as the rate of appeal from judge decisions. We have no data on this point.)

On the other hand, if the appeal path is determined by the type of matter a commissioner could decide, whether or not a commissioner actually decides it, the appeal path would be fixed. The number of commissioners employed by the courts would not affect the workload of the court of appeal.

SMALL CLAIMS JUDGMENTS

A significant number of the civil appeals currently handled by the superior court are small claims appeals. Our best estimate, based on available AOC and task force data, is that small claims appeals constitute 70% of the civil appellate workload of the superior court, or more than 10,000 cases annually.

A small claims appeal is different from other types of appeal. It is not an appeal on the record, but is a trial de novo in the superior court, with simplified procedures but a right to representation by counsel. Code Civ. Proc. § 116.770.

The initial small claims judgment is often rendered by a court commissioner or a temporary judge. Presumably on appeal the trial de novo would occur before a judge. This is not necessarily the case, however. Section 116.770 merely requires that the new hearing be before a "judicial officer" other than the judicial officer who heard the action in the small claims division. The term "judicial officer" is not defined. That could mean a trial before another court commissioner.

Government Code Section 72190 provides that a court commissioner "may have the same jurisdiction and exercise the same powers and duties as the judges of the court with respect to any infraction or small claims action." The statute does not distinguish a small claims trial from a small claims appeal, with respect to the authority of a court commissioner. (Note: Section 72190 originally applied only to municipal court commissioners and therefore did not directly authorize a court commissioner to hear a small claims appeal in superior court. Our

extension of this statute to the superior court apparently expands court commissioner authority to hear a small claims appeal.)

Is there any reason to shift small a claims appeal from the superior court to its appellate division? It could be provided that a small claims appeal is heard by a single appellate division judge, just as is a traffic infraction appeal. Code Civ. Proc. § 77(j). The staff can see no real benefit to doing this. Because a small claims appeal is a trial de novo, there is no peer review problem.

REVIEW OF DECISIONS OF TEMPORARY JUDGE

A court commissioner may act as a temporary judge, if otherwise qualified. Code Civ. Proc. § 259(e). The only qualification is that the temporary judge be a member of the State Bar. Cal. Const. art. VI, § 21. Other persons may also serve as a temporary judge, including a referee or an attorney. See, e.g., Code Civ. Proc. § 116.240 (attorney as temporary judge in small claims proceeding); Welf. & Inst. Code § 248 (juvenile court referee as temporary judge).

Some statutes prescribe the authority of a temporary judge. See, e.g., Code Civ. Proc. § 116.240 (small claims case); Prob. Code §§ 2405, 9620 (dispute between guardian, conservator, or personal representative and third person). Nonetheless, the constitutional authority of a temporary judge is self-executing and broad.

A decision of a temporary judge is treated as a decision by any other judge for appeal purposes. A decision in an unlimited civil case or a felony case is appealable to the court of appeal. A decision in a limited civil case or a misdemeanor or infraction case is appealable to the superior court's appellate division. This is true regardless of whether the temporary judge is a commissioner or another person.

Should the fact that a commissioner serves as a temporary judge in a particular case change its appeal path? Should a temprorary judge decision made by a commissioner go to the appellate division of the superior court, regardless of the type of case at issue?

The case law makes clear that when a commissioner serves as a temporary judge, none of the rules applicable to commissioners apply, and all of the rules applicable to judges apply. This would suggest that the only appeal that would go to the superior court's appellate division would be one in which a commissioner acts as commissioner, not as a temporary judge.

However, the Commission's policy may aim more to prevent peer review. In that case, there would be no problem with vesting review of the temporary judge's decision in the appellate division of the superior court. The fact that the temporary judge is not a member of the bench eliminates the collegiality concern.

If a temporary judge's decision in an unlimited civil case or a felony case were to be reviewable in the superior court's appellate division, a constitutional amendment would be necessary:

> SEC. 11. (a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. ~~With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.~~
>
> (b) Except as provided in subdivision (a), the courts of appeal and the appellate division of the superior court ~~has~~ have appellate jurisdiction in causes prescribed by statute.
>
> (c) The Legislature may permit courts exercising appellate jurisdiction to take evidence and make findings of fact when jury trial is waived or not a matter of right.

OTHER SUBORDINATE JUDICIAL OFFICERS

There are other types of subordinate judicial officers besides court commissioners. Should a decision of one of these officers be treated in the same manner as a court commissioner decision for appeal and writ purposes? The duties of these officers are sketched below.

Referee

A referee may be appointed for a variety of determinations. If the appointment is made on agreement of the parties, the authority of the referee may be as broad as to hear and determine all of the issues in an action, whether of law or fact, and to report a statement of decision. Code Civ. Proc. § 638. The referee's decision in such a case is binding and judgment may be entered on the decision as if the action had been tried by the court. Code Civ. Proc. § 644(a). The judgment is reviewable in the same manner as a judgment of the court. Code Civ. Proc. § 645.

Absent agreement of the parties, the court may appoint a referee to take an account, determine a question of fact, or rule on a discovery dispute, among other matters. Code Civ. Proc. § 639. In that case, the referee's decision is advisory only, and may be adopted by the court after an independent review of it. Code Civ. Proc. § 644(b).

A referee also may be appointed for specified purposes in various types of proceedings. See, e.g., Code Civ. Proc. §§ 708.140 (enforcement of money judgments), 872.630 et seq. (partition).

A referee determination may result in an appealable order. In some cases the determination will be limited, similar to those made by a commissioner. In other cases the determination will be dispositive of the action, similar to those made by a temporary judge. The staff recommends that whatever approach is taken on a commissioner or temporary judge appeal should also be taken on a referee appeal.

Child Support Commissioner

A child support commissioner is a specialized form of court commissioner, appointed to deal with child support issues. Fam. Code § 4251. The commissioner acts as a temporary judge unless a party objects, in which case the commissioner acts as a subordinate judicial officer. When a child support commissioner acts as a subordinate judicial officer, the commissioner's decision is ratified by the court unless a party objects.

The authority of a child support commissioner parallels that of a court commissioner. However, a child support case, like other family law matters, has historically been within the exclusive jurisdiction of the superior court. Fam. Code § 200. That means that a family law case is appealable to the court of appeal pursuant to Article VI, Section 11(a), of the California Constitution — "courts of appeal have appellate jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995".

Because the child support commissioner's authority is similar to that of a court commissioner, the two should be treated alike for purposes of an appeal. Depending on the Commission's ultimate decision on appeal from a court commissioner decision, this may require revision of the constitutional jurisdiction of the court of appeal to enable superior court review of a child support commissioner decision.

(Note. A similar issue arises with respect to a commissioner action in other matters historically within the superior court's jurisdiction, including real property matters, probate matters, and juvenile matters.)

Traffic Trial Commissioner

A traffic trial commissioner handles appeal of parking and other local ordinance violations. Veh. Code § 40230; Gov't Code § 53069.4. These matters are classified as limited civil cases. They are currently appealable to the appellate division of the superior court.

If a court commissioner decision is assigned to the superior court's appellate division, a traffic trial commissioner decision should be treated the same. But if a court commissioner decision in a limited civil case is assigned to the court of appeal, the Commission needs to consider whether a traffic trial commissioner decision should likewise be shifted.

Traffic Referee

A traffic referee has extensive authority in dealing with Vehicle Code violations. With respect to an infraction, the referee has the same jurisdiction and exercises the same powers and duties as a judge. Veh. Code § 72401(c). With respect to a misdemeanor violation, the referee's authority includes such action as fixing bail, conducting an arraignment, and imposing a penalty in specified cases. Veh. Code §§ 72401(a)-(b), 72402, 72403.

Under current law, all of these matters are appealable to the appellate division of the superior court. Depending on the approach taken to appeal of a court commissioner decision, we may or may not want to conform the appeal path for a traffic referee decision.

Traffic Hearing Officer

A traffic hearing officer is authorized to hear and dispose of a traffic case involving a violation by a minor; the decision is reviewable by the juvenile court. See, e.g., Welf. & Inst. Code §§ 255, 258, 262, 654.1; Pen. Code § 853.6a; Veh. Code §§ 1816, 13105, 13352, 23521. In effect, the traffic hearing officer is a juvenile hearing officer with authority over traffic violations.

In fact, the name "traffic hearing officer" was changed to "juvenile hearing officer" by 1997 legislation. See 1997 Cal. Stat. ch. 679. However, it appears that this was not done consistently throughout the codes. **The staff suggests that the Commission propose further revisions to complete the nomenclature**

conversion process. If the Commission agrees, the staff will develop appropriate amendatory language for review by interested persons. There are about twenty sections of the codes that still use the term "traffic hearing officer". (The Commission's pending revision of Government Code Section 71601(i) employs the term "traffic hearing officer" because it is still used in a number of statutes; we would clean up that one at the same time we clean up the others.)

Juvenile Court Referee

A juvenile court referee is appointed by the presiding judge of the juvenile court. Welf. & Inst. Code § 247. A juvenile court referee has broad decisionmaking authority in juvenile matters. Welf. & Inst. Code § 249. The juvenile court referee's orders are generally effective immediately, with some qualifications, but are subject to judicial review by a juvenile court judge. Welf. & Inst. Code §§ 250-254. A judgment or order of a juvenile court referee is an appealable order. Welf. & Inst. Code § 300.

A juvenile court referee may also act as a temporary judge on stipulation of the parties. Welf. & Inst. Code § 248.

The juvenile court jurisdiction is exercised by the superior court. Appealable judgments and orders of the juvenile court are subject to the appellate jurisdiction of the court of appeal. Welf. & Inst. Code § 245.

A shift of review of a juvenile court referee decision from the court of appeal to the appellate division of the superior court would be problematic in the staff's opinion (besides requiring a constitutional revision). The staff recommends we go slow on this one. Depending on the Commission's decisions concerning appeals from subordinate judicial officers generally, we will further research the policy behind juvenile court appeals, and report back to the Commission with further advice.

In researching this matter we noticed that a juvenile court referee is erroneously referred to as a "juvenile referee" in Government Code Section 71601(i). Since that section appears in our pending trial court restructuring cleanup bill, **the staff plans to take steps to make the correction in the bill**.

Juvenile Hearing Officer

The presiding judge of the juvenile court may appoint a juvenile hearing officer to hear and dispose of a nonfelony Vehicle Code and other misdemeanor or infraction cases involving a minor, and impose an appropriate sanction. Welf.

& Inst. Code §§ 255, 256, 258. An order of a juvenile hearing officer is effective immediately, but its finality is subject to review by a juvenile court judge on motion. Welf. & Inst. Code §§ 261, 262.

A decision of a juvenile hearing officer is analogous to a decision of a juvenile court referee. Although no statute says expressly that the decision is reviewable in the court of appeal, that is the effect of the constitutional provision giving the court of appeal appellate jurisdiction in matters of a type within its appellate jurisdiction on June 30, 1995. The staff would treat this issue the same way we treat juvenile court referee appeal issues.

CONCLUSION

The Commission needs to focus on the policy underlying the concept of sending an appeal from a commissioner decision to the superior court's appellate division and an appeal from a judge decision to the court of appeal. Is it the policy to have a smaller matter reviewed in the superior court and a larger matter reviewed in the court of appeal, or is it the policy to review an action taken by a nonjudge in the superior court and an action taken by a judge in the court of appeal? Or is the policy a hybrid of these concepts?

Our answer to these questions will determine how we resolve the other issues raised in this memorandum. That resolution will also determine how we handle writ review, since writ review generally tracks appellate review.

Once the Commission resolves these questions, it must still face the overarching question of whether the proposed disposition of appellate jurisdiction is a good idea. In the past, major considerations that have influenced the Commission included:

- It is undesirable for review of a decision to be conducted by a peer of the person rendering the decision, due to the appearance, and perhaps actuality, of collegiality.
- It is important to keep a local review function for small cases, otherwise the promise of a fair judicial system will, as a practical matter, be illusory.
- The courts of appeal are currently overloaded. Any proposal that would increase that workload is undesirable.

Depending on the Commission's determination of the underlying policy, the appeal path analyzed in this memorandum would generally shift judge work

from the superior court to the court of appeal for review. That would satisfy the first policy outlined above, but would violate the remainder.

It is not clear to the staff that the new approach is an improvement over the approach of the Commission's tentative recommendation on this matter. The tentative recommendation's approach of creating a limited jurisdiction court of appeal division staffed by superior court judges sitting by assignment is perhaps weaker with respect to peer review, but is stronger with respect to local review and court of appeal workload.

Our options at this point are to continue to develop the new approach, to go back and fine-tune the tentative recommendation approach, or to hold the matter in abeyance pending the results of an Administrative Office of the Courts survey on attorney perceptions of impropriety in the current appellate scheme. In the past the Commission has felt it is important to continue to work on this matter in order to maintain pressure until a satisfactory resolution has been reached, whether by the Commission, the Judicial Council, or otherwise.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

County	Total of Decisions *(Quest. 9)*	Traffic Infraction *(10a)*	Other than Traffic Infraction *(10b)*	Misdemeanor Convictions *(10c)*	Civil Cases *(10d)*	Special Writs By 3-judge Panel *(10e)*	Other *(10f)*
Alpine	2	50% (1)		50% (1)			
Alameda	125 est.	40% (50)		40% (50)	20% (25)		
Amador	3	33% (1)		67% (2)			
Butte	29	14% (4)		48% (14)	38% (11)		
Colusa	2			100% (2)			
ConCos	16 est.	31% (5)		38% (6)	19% (3)	13% (2)	
El Dora	25 est.	4% (5)		72% (18)	8% (2)		
Glenn	0						
Humbol	25	4% (1)		60% (15)	28% (7)	8% (2)	
Imperial	22	36% (8)		45% (10)	14% (3)	5% (1)	
Inyo	8			75% (6)	25% (2)		
Kern	101	Info not	available				
Kings	18 est.	66% (12)		28% (5)	6% (1)		
Lassen	7	29% (2)		71% (5)			
L.A.	736 app. 263 writ	38%(275) ---	0% (3) ---	29% (215) ---	33% (243) ---	--- 13% (33)	--- 87%(230
Madera	12	50% (6)		33% (4)	17% (2)		
Marin	374	10% (36)	10%(36)	27% (104)	32% (121)		21%(77)
Maripos	8			75% (6)	25% (2)		
Mendoc	36	10% (4)	10% (4)	70% (24)	10% (4)		
Merced	48 est.	21% (10)		6% (3)	52% (25)	21% (10)	
Modoc	10 est.	20% (2)	20% (2)	20% (2)	20% (2)	20% (2)	
Mono	6 est.				17% (1)		83% (5)
Montery	39	44% (17)	15% (6)	28% (11)	10% (4)	3% (1)	
Napa	13	8% (1)		84% (11)	8% (1)		
Orange	350	35%(125)	4% (15)	29% (100)	29% (100)	3% (10)	
Plumas	5 pendin						
Riversid	75 est.	16% (12)		67% (50)	13% (10)	1% (1)	3%(2)
Sacto	63	25% (16)		42% (26)	27% (17)	6% (4)	
SnBerna	94	43% (40)	5% (5)	29% (27)	21% (20)	2% (2)	
SnDiego	977	25% (242		23% (227)	47% (454)	3% (32)	2% (22)
SnJoaq	36	29% (10)		55% (20)	14% (5)	2% (1)	
SLO	24	21% (5)		62% (15)	13% (3)	4% (1)	
SnMate	43	14% (5)		72% (32)	14% (6)		
Sbarbar	72	24% (17)	6% (4)	33% (24)	11% (8)	18% (13)	8% (6)
Sclara	100 est.	40% (40)		10% (10)	40% (40)	10% (10)	
Scruz	30 est.	50% (15)		50% (15)			

County	Total of Decisions *(Quest. 9)*	Traffic Infraction *(10a)*	Other than Traffic Infraction *(10b)*	Misdemeanor Convictions *(10c)*	Civil Cases *(10d)*	Special Writs By 3-judge Panel *(10e)*	Other *(10f)*
Shasta	65	69% (45)		23% (15)	3% (2)	5% (3)	
Siskiyo	7 est.	29% (2)		43% (3)	14% (1)	14% (1)	
Solano	52 est.	15% (8)		72% (37)	13% (7)		
Sonoma	33 est.	9% (3)	3% (1)	18% (6)	36% (12)	9% (3)	25% (8)
Stanis	16	38% (6)		56% (9)	6% (1)		
Sutter	6	34% (2)		33% (2)	33% (2)		
Tehama	5 est.	17% (1)		66% (4)	17% (1)		
Trinity	5 est.	60% (3)		40% (2)			
Tulare	24			100% (24)			
Ventura	162 est.	44% (71)	20%(32)	17% (28)	11% (18)	8% (13)	
Yolo	20	40% (8)		55% (11)	5% (1)		
Yuba	25	4% (1)		16% (4)	12% (3)	68% (17)	