Study J-1310 August 7, 2003

Memorandum 2003-15

Appellate and Writ Review Under Trial Court Unification: Survey of Attorney Perceptions

BACKGROUND

Historical Context

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.

After reviewing the appeal and writ situation, the Commission tentatively 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.

2001 Tentative Recommendation

The solution proposed by the Commission in its tentative recommendation on *Appellate and Writ Review Under Trial Court Unification* (November 2001) was 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.

Comments on Tentative Recommendation

The comments received on the Commission's tentative recommendation revealed 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 generally opposed the proposal to shift review of misdemeanor, infraction, and limited civil cases to a limited jurisdiction division of the court of appeal. The commentators questioned whether the peer review problem is sufficiently serious that it warrants a restructuring of the appellate court system, and they pointed out logistical problems with the tentative recommendation. They suggested that if in fact peer review is a serious issue, there are other simpler and more effective means of addressing it.

Attorneys, on the other hand, generally believed the peer review problem is serious. They indicated that the proposed shift in appellate structure would be an improvement over existing law. If anything, they believed the proposal did 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.

Commission Action

The Commission reviewed the comments on the tentative recommendation at its May 2002 meeting. The Commission decided to continue work on this matter in an effort to move it forward.

Before addressing issues raised concerning the tentative recommendation, the Commission first explored another approach not previously considered — matters of a type determined by court commissioners would be reviewable in the superior court's appellate division, and matters of a type determined by judges would be reviewable in the court of appeal.

If this alternative proved not to be feasible or was otherwise rejected by the Commission, the staff was to prepare for a future meeting a revised version of the tentative recommendation that sought to address the issues that have been raised concerning it.

Review of Commissioner Decisions

At its July 2002 meeting the Commission explored the concept of having superior court commissioner decisions reviewed in the superior court appellate division and superior court judge decisions reviewed in the court of appeal.

Discussion at the meeting suggested that, in terms of formulating this proposal, the most practical approach would be to have misdemeanor appeals and limited civil appeals go to the court of appeal (these are cases most typically heard by judges), while infraction appeals and small claims appeals would remain in the superior court.

One concern with this structure was that the court of appeals caseload would increase significantly. However, an increase in the court of appeals caseload would not necessarily translate into an equivalent increase in workload. That is because many of the smaller cases are routine and can be readily dispensed with.

Another concern was the potential loss of access to local justice for review of misdemeanor and limited civil cases. However, those most in need of local justice — pro per cases — tend to be infraction and small claims cases, which would remain in the superior court. Also, most filings and other appeal procedures can be done at a distance; typically there is only one personal appearance for oral argument, if that.

An issue was also raised concerning cost implications for smaller cases in the court of appeal, including court-appointed attorneys in misdemeanor cases.

The Commission decided to suspend work on this matter pending the AOC survey of attorney perceptions of impropriety in the existing system and to revisit the matter when the survey results become available.

SURVEY OF ATTORNEY PERCEPTIONS

The AOC survey was carried out in summer of 2002, but the results were not compiled and released to us until summer of 2003. The major task in the study was to identify practitioners who maintain an active appellate practice involving small civil and criminal cases whose experience would be instructive. The identification was done primarily through attorney directories.

Approximately 30 practitioners participated in the survey, though not all practitioners answered all questions. Respondents were evenly divided between north and south, and rural as well as urban counties were represented. A variety of practices were represented, although no criminal prosecutors participated.

The survey results are compiled at Exhibit pp. 1-2. Among other matters, practitioners were asked to rate the independence of the judges in the appellate departments they were familiar with. Of the 19 responses to this question, six rated judicial independence as poor to very poor, three rated it as average, and ten as good to very good. We cannot tell from the data presented how these responses were distributed. Were the good to very good ratings primarily from Los Angeles County, or were these also distributed among smaller counties?

Notwithstanding the generally favorable perception of judicial independence, a significant majority of the practitioners (by a 2 to 1 margin) felt it was either important or essential to the integrity of the appellate process that decisions be reviewed by an independent panel of judges **not** from the court whose decision is being reviewed.

By a similar margin respondents agreed with the proposal of the Ad Hoc Task Force to create district-wide appellate divisions.

These results reinforce the staff's initial impression of the divide between bench and bar on this issue. The bench doesn't see a problem; the bar does.

NEXT STEP

Where do we go from here? The last time the Commission considered this matter (July 2002) the staff presented three options:

> (1) Continue to develop the concept of having judge decisions appealed to the court of appeal and commissioner decisions appealed to the superior court appellate division,
>
> (2) Go back and fine-tune the approach of the 2001 tentative recommendation — create a lower division in the court of appeal that hears limited civil and misdemeanor appeals.
>
> (3) Hold the matter in abeyance pending the results of the Administrative Office of the Courts survey on attorney perceptions of impropriety in the current appellate scheme.

The staff noted at the time that 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.

Having elected option (3), we are now back at the same fork in the road, with slightly more information than we had before. We have confirmation that

attorneys feel fairly strongly about the impropriety of peer review, although their actual experience under that system does not appear to have been disastrous.

Circumstances have also changed over the past year with respect to resources available to the courts. The annual budget of the courts of appeal is about $171 million. The newly adopted budget for fiscal 2003-04 provides an unallocated reduction to the Supreme Court, courts of appeal, Judicial Council, and Habeas Corpus Resource Center of $8.5 million, to be allocated among them by the Judicial Council. We don't know how much of this reduction will be assigned to the courts of appeal, but if allocated proportionately, the courts of appeal would suffer a $4.9 million reduction.

Offsetting the general fund reductions are filing fee increases of $220 for a notice of appeal, plus an additional $170 for each notice of appeal or petition for a writ. According to our rough calculations, those increases should yield increased revenues from appellate court filings (assuming the increased fees don't cause a reduction in the number of filings), that more than offset the budget reductions.

The situation in the trial courts is more complex. We do not yet have a complete analysis of the impact of budget reductions and fee increases, but our general impression is that the trial courts are now in a more difficult situation than they were before the budget crisis.

To the options listed above, the staff would now add three more:

> (4) Embrace the Ad Hoc Task Force proposal administratively to create district-wide appellate divisions, possibly on a pilot project basis.
>
> (5) Put all appeals from and writs directed to the superior court in the courts of appeal and eliminate the superior court appellate divisions altogether.
>
> (6) Back off until the fiscal situation stabilizes.

Option 4. District-wide Superior Court Appellate Divisions

Option 4 is to adopt the Ad Hoc Task Force proposal to create a district-wide superior court appellate division that serves all courts in the district. The argument for this option is that it is more easily accomplished than any of the others, and though not perfect, would still make a substantial improvement in the administration of justice.

Option (4) can be implemented inexpensively, and in fact could save money. The Ad Hoc Task Force observes that:

> [T]here will be significant economies of scale with a district-wide appellate division since the division is more likely to operate on a full-time or half-time basis whereas most of the existing appellate divisions operate only intermittently. A full-time or half-time appellate division is more likely to develop efficient, cost-savings processes because the work of the division will be brought into greater focus. Under the current system, most judges assigned to an appellate division spend less than 5 hours per month on appellate division business. With such a small commitment of time to the appellate division, there is little incentive or opportunity for either judges or staff to become experts in appellate work.

Ad Hoc Task Force on the Superior Court Appellate Divisions, *Report to the Appellate Process Task Force on the Superior Court Appellate Divisions* 18 (May 2001).

The staff views this as a way to gain experience on an interim basis before plunging into the full-fledged restructuring that probably needs ultimately to be done. Since we view this as an interim step, it could also be accomplished as a pilot project in one or two appellate districts.

A not insignificant benefit of this approach is that it can be implemented relatively quickly without the need for a constitutional or statutory revision. This is now a more significant consideration to the staff than it was previously. Between last year and this we have gained first-had experience with constitutional revision, in connection with our Proposition 48 cleanup of Article VI (judicial). Even that routine technical ballot measure consumed a substantial amount of staff resources. This is an increasingly significant factor, as staff resources dwindle.

However, implementation of this approach would still require adoption of appropriate court rules by the Judicial Council. We understand informally that the proposal has generated sufficient opposition within the judicial community, that it would be difficult for the Judicial Council to implement. It may be that any change will have to come from outside, rather than from within.

Option 5. All Appeals to Court of Appeal; Abolish Superior Court Appellate Division

The concept of putting all appeals in the Court of Appeal has, well, appeal. Not only is it a clean way to accomplish reform of the appellate structure, but it may make fiscal sense in the current budget climate. Because trial courts are suffering budget reductions, whereas appellate courts apparently will be more

adequately funded, it may be cost effective to remove that expense from the trial courts and shift it to the courts of appeal.

A major drawback with this approach is that it will increase the court of appeal workload (which is already heavy) and necessitate expansion of the court. We will need to get cost projections from the Judicial Council, although it is clear that the infusion of funds from the higher filing fee schedule will be significant. The filing fees can help substantially offset the costs of court of appeal expansion, particularly since the cases being shifted to the court of appeal will tend to be less resource consuming than the court's core caseload.

Other drawbacks of this approach include, from the appellant's perspective, higher filing fees and less accessible justice. But if appellants are to obtain an independent, unbiased review, that tradeoff may be necessary. The alternative would be cheap, local review that could be compromised in character.

Option 5 could be achieved, if necessary, with only a statutory revision. Under the Constitution, each superior court has an appellate division. Cal. Const. art. VI, § 4. The appellate jurisdiction of the appellate division is determined by statute, subject to the Supreme Court's appellate jurisdiction in capital cases and the court of appeal's appellate jurisdiction in causes of a type within their appellate jurisdiction on June 30, 1995. Cal. Const. art. VI, § 11. Thus by statute all appeals could be given to the court of appeal (except capital appeals) without constitutional impediment.

The writ jurisdiction of the superior court's appellate division is coterminous with its appellate jurisdiction. Cal. Const. art. VI, § 10. Thus if the superior court appellate division loses its appellate jurisdiction, it would also lose its original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court.

The staff's conclusion is that a constitutional revision would not be necessary to shift appellate and writ jurisdiction from the appellate divisions to the courts of appeal, except possibly by way of cleanup.

Option 6. Wait Until the Dust Settles

The fiscal situation of the courts is far from clear. The Judicial Council is preparing analyses of the various budget reductions, expenses, offsetting fee increases, etc., to the court. We do not know when the analyses will be available.

Since most of the proposals to realign the writ and appeal paths in the trial and appellate courts will involve some shifting of cost, it may be advisable to

wait until a clearer picture of the fiscal situation emerges before deciding which approach makes most sense.

CONCLUSION

Appellate and writ review is the most significant unfinished piece of business from trial court unification. The staff believes it is important to continue to move forward on this, but it is also important to make sure we make the best possible decision on any new review structure.

For this reason, the staff believes it is best to see how court finances shake out before moving ahead. At this point, fiscal factors are all-important. If better information is available by the time of the Commission meeting, we will supplement this memorandum with the information.

The staff believes that the concern about the perception of impropriety of peer review is real, notwithstanding the doubts of some members of the judicial branch. The main policy considerations are the quality and independence of review that can be obtained at the court of appeal level, versus the accessibility, convenience, and efficiency of review at the superior court appellate division level. Our decision ultimately will be determined by how these factors play themselves out in the context of the fiscal constraints confronting the system.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Appellate Division Practitioners Survey

Results

1) Please tell us a little bit about yourself:

In which Superior Court are you most familiar with the appellate department/division?	Butte	Marin – 2
	Contra Costa	Orange – 3
	El Dorado	Riverside
	Fresno – 2	San Bernardino
	Imperial	San Diego
	Inyo	San Francisco
	Kern	Woodland
	Kings	Yolo
	Los Angeles – 9	
Since January of 2001, about how many cases before the appellate department/division of this court have you handled?	0 – 3	4 – 3
	1 – 8	5
	2 – 2	10
	3 – 3	20 – 2

Please check the box that best describes you:

§ Plaintiffs Attorney – 4	§ Distric Attorney – 0	§ Other (Please Specify) Plaintiff's Defense Tax Attorney General Practice – 2 Criminal Defense Transactional Research Attorney
§ Defense Attorney – 14	§ Public Defender – 3	

2) Please rate each of the following aspects of the appellate department/division where most of your practice is located;
(Circle a number from 1 to 5)

	Very Poor	Poor	Average	Good	Very Good
A) The familiarity of judges with the issues before them:	0	2	5	8	5
B) The quality of the legal analysis and research:	1	5	7	6	3
C) The quality of the decision:	2	6	5	6	3
D) The independence of the judges:	3	3	3	6	4

3) Do you believe that an independent panel of judges *not from the court whose decisions are subject to review* is necessary to ensure the integrity of the appellate process? (Circle one)	Yes 16	No 5	Not Sure 3

	3A) If you answered "Yes" to the question above, please indicate on the following scale how important you believe this is: (Circle one)		
Somewhat important but not essential 1	Important 4	Very important 2	Essential to the process 9

4) How important is each of the following aspects of the appellate process to your sense of justice? (Circle a number from 1 to 4)					
	Entirely Irrelevant	Relevant but Not a High Priority	Somewhat Important	Very important	Essential to the process
A) A litigants has the right to make oral argument:	1	4	5	9	6
B) Written decisions are handed down with reasoning stated:	0	1	0	7	18
C) Rules of procedure are the same as those in the Courts of Appeal.	1	5	7	3	7

	Strongly Disagree	Disagree	Neither Agree Disagree	Agree	Strongly Agree
5) Do you agree with the Ad Hoc Task Force's proposal to create district-wide appellate divisions? (Circle one)	1	2	4	7	6