Study M-1330 October 27, 2003

Memorandum 2003-16

Criminal Procedure Under Trial Court Unification: Survey of Attorney Perceptions

In November 2002 the Commission approved circulation of a tentative recommendation relating to *Criminal Procedure Under Trial Court Unification*. Public comments regarding that tentative recommendation were discussed in Memorandum 2003-13. The comments we received did not support the tentative recommendation. After discussing the opposition to the tentative recommendation, the staff recommended that it be set aside or, alternatively, that a final decision on the proposed law be deferred until after the release of the results of a Judicial Council survey of attorney perceptions of peer review in the appellate division of the superior court. The Commission decided to postpone its final decision. The survey results are now available and are attached as an Exhibit to this memorandum.

SUMMARY OF THE PROPOSED LAW

In 1998, the voters approved Proposition 220, permitting the unification of California's trial courts. The trial courts in all 58 counties have since unified. Some court procedures that made sense under a two-tiered trial court system may not be suited to a unified court system. The Commission is charged with studying whether basic court procedures should be changed in light of trial court unification.

The Commission contracted with Professor Gerald Uelmen, of Santa Clara University School of Law, to prepare a Background Study on criminal procedure after trial court unification: *California Criminal Procedure and Trial Court Unification* (March 2002) ("Background Study"). The Background Study focused on the preliminary examination of felony cases.

A preliminary examination is held to determine whether there is probable cause to believe that the defendant has committed a felony. A magistrate's decisions in the preliminary examination are subject to review by a judge of the superior court as follows:

(1) Under Penal Code Section 871.5, the prosecution may challenge a magistrate's decision to dismiss a complaint. If the superior court judge determines that the magistrate's decision was erroneous as a matter of law, it may reinstate the complaint.

(2) Under Penal Code Section 995(a)(2)(A), a defendant may seek superior court review of a magistrate's decision not to dismiss a complaint. If the superior court finds that the magistrate's decision was erroneous, it may set aside the information on the grounds that the defendant was not "legally committed by a magistrate."

Before trial court unification, a magistrate was typically a judge of the municipal court. After unification, a magistrate is invariably a superior court judge. What used to be a two-tiered system, with the decision of a municipal court judge reviewed by a superior court judge, is now a peer review system. The initial decision of a superior court judge is subject to review by another judge of the same court.

Review of legal rulings of one superior court judge by another judge of the same court could create an appearance of impropriety and an actual risk of bias. Furthermore, having two judges of equal rank hear and decide the same issue separately is duplicative and could undermine the principal purpose of trial court unification — judicial efficiency and economy.

The Background Study differentiates between two different types of magistrate decisions: a probable cause determination and a decision on a noticed motion to dismiss or a demurrer. The Background Study recommends that superior court review of probable cause determinations be preserved, because

> preliminary hearings are processed quickly on an assembly line basis, with minimal preparation by the lawyers. The deputy public defenders and deputy district attorneys handling the calendar of preliminary hearings do not anticipate trying the case themselves, and rarely research the elements with respect to each discrete count of a multi-count complaint. The judge presiding at the preliminary hearing as magistrate is frequently called upon to make snap decisions, with little time for thoughtful reflection or research.

Background Study at 6.

If superior court review of probable cause decisions were eliminated, greater time and effort would need to be invested in the preliminary examination. This would be inefficient, as it would require a greater commitment of resources to *all* cases, including those that ultimately never proceed to trial (e.g., a case settled by plea bargain). The existing system conserves resources by requiring a significant commitment of resources only in the minority of cases that warrant it.

Rulings on noticed motions to dismiss and demurrers are "fundamentally different":

> The arguments with respect to efficient "assembly-line" processing of probable cause determinations, and the low risk of bias or resentment in peer review of those determinations, do not seem applicable to motions to dismiss the complaint on these other grounds. There is no reason to assume that the superior court judge presiding as magistrate at the preliminary hearing is any less thoughtful or reflective in ruling than another superior court judge might be at a later stage, and counsel preparing and arguing these motions would apparently have the same motivation and skill regardless of the stage at which the motion was decided. Thus, even if we permit a magistrate's probable cause determinations to be reviewed pursuant to Penal Code Section 995(a)(2)(B) and Section 871.5, it may be desirable to preclude rehearing in the trial court of other motions to dismiss determined by the preliminary hearing judge. All of the considerations relating to peer review and judicial efficiency strongly support such a change. Rulings on noticed motions are fundamentally different than routine determinations of probable cause.

Background Study at 7.

The Background Study recommends that superior court review of a magistrate's decision on a noticed motion to dismiss or demurrer be eliminated. Review of such a decision would be in the court of appeal. Superior court review of a probable cause determination would be preserved. See Background Study at 13.

Under Penal Code Section 871.6, either party may seek a writ to compel a magistrate to proceed with a preliminary examination that has been delayed. Before trial court unification the writ was issued by a superior court judge to a municipal court judge. Since unification, the writ is issued by a superior court judge to another judge of the same court. This raises the same peer review concern discussed above. The Background Study recommends that Section 871.6 be amended to shift jurisdiction to the court of appeal. See Background Study at 11, 13.

The recommendations made in the Background Study were included in the Commission's tentative recommendation.

RESPONSE TO TENTATIVE RECOMMENDATION

In response to the tentative recommendation, we received comments from three defense attorneys, the District Attorney of San Diego County, and the

Appellate Courts Committee of the California Judges Association. See Memorandum 2003-13. The commentators represent a good cross-section of the different interests that would be affected by the proposed law. All of them oppose the proposed law. Their principal objections are summarized below.

Efficiency

One of the main premises of the proposed law is that superior court review of a decision of a magistrate on a noticed motion or demurrer is needlessly duplicative. As noted on page 2 of the Background Study:

> There is no reason to assume that the superior court judge presiding as magistrate at the preliminary hearing is any less thoughtful or reflective in ruling than another superior court judge might be at a later stage, and counsel preparing and arguing these motions would apparently have the same motivation and skill regardless of the stage at which the motion was decided.

If that is correct, what purpose is served by having the same motion decided twice by judges of the same rank and the same court? If the magistrate makes an error, the aggrieved litigant can appeal. The Commission had tentatively concluded that elimination of this duplicative review would increase procedural efficiency in a unified court.

The comments that we received dispute the notion that a magistrate's decision is as reliable as the decision of a reviewing judge. The comments suggest that courts routinely assign preliminary examinations to judges with little experience in trying felony cases, with their decisions subject to review by more experienced judges. If this is so, then the courts are replicating the two-tiered model that existed before trial court unification, but within the unified superior court. Such an approach might well be seen by courts as an efficient way to divide responsibilities between judges with different levels of experience.

We also received a number of comments suggesting that review of a magistrate's error in the superior court is considerably more efficient than review in the court of appeal would be:

> Both Sections 871.5 and 995 provide a low-cost, speedy, and efficient means of identifying and correcting judicial error during the normal course of ongoing felony prosecution.
>
> Section 871.5 provides a speedier remedy than review by the Court of Appeal. Resolution of an 871.5 motion takes weeks or months as opposed to years for an appeal. And while the motion is pending, the case continues to wend towards trial. But an appeal deprives the superior court of jurisdiction and thus halts trial

> proceedings until the appeal is resolved. Full briefing in the Court of Appeal commonly takes more than 90 days, and that is after the record is prepared and certified. Next a case is calendared for oral argument and then decided within 90 days of being submitted after argument. Finally, 60 days must pass after an opinion is filed before the case is remitted back to the superior court. A petition for writ of mandate or prohibition is not much speedier and has the added disadvantage to the parties of being heard only at the court's discretion.
>
> Your proposal will shift the cost of review from the superior court to the Court of Appeal and will likely [increase] the cost. Most 871.5 motion issues never reach the Court of Appeal. A filtering process occurs as a criminal case [progresses] from complaint, to information, and to resolution. Many of the issues arising early in the prosecution go away over time. Thus, not every section 871.5 order is reviewed by an appellate court. Curtailing the section 871.5 motion process will increase Court of Appeal workload by increasing the number of 871.5 issues that court must resolve. And each 871.5 issue on appeal will be considered by three justices who must decide the issue by a written opinion rather than by a single judge who can decide the motion orally.

Memorandum 2003-13 at 13.

Resolution in the superior court is obviously more efficient than resolution in the court of appeal. Does this mean that all superior court decisions should be subject to review by a second judge of the superior court, in order to avoid costly appeals? Obviously not. The cost of rehearing all decisions would far outweigh any savings resulting from the detection and resolution of a relatively small number of errors at the trial court level. Unless magistrate decisions are subject to a significantly higher rate of error than other superior court decisions, the staff does not see why they should be treated differently.

However, the comments we received suggest that magistrate decisions *are* less reliable than other superior court decisions — because of the relative inexperience of magistrates and the expedited nature of the preliminary examination process. To the extent that this is correct, a comparison between the cost of resolution in the superior court and resolution in the court of appeal is appropriate, and existing law would be more efficient than the proposed law.

The commentators' remarks on efficiency are persuasive. It may be that the proposed law would not improve, and could perhaps even degrade, procedural efficiency. However, the proposed law was not premised on efficiency alone. Even if the proposed law is less efficient than existing law, it could perhaps be justified if the problems associated with peer review are serious enough.

Peer Review

The commentators dispute that peer review is generally perceived to be a significant problem. The attached survey sheds some light on that proposition.

The major task in the survey 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.

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.

Despite the survey results, none of those commenting on the proposed law believe that peer review of a magistrate's decision is a serious enough problem to justify the changes proposed by the Commission. This may be because, as one commentator observed:

> The present process gives litigants two bites of the apple in the trial court and still allows appellate review. We believe that litigants and counsel would much rather have the two bites than eliminate one of the bites for the mere sake of erasing a perception in a narrow area or a claimed inefficiency.

See Memorandum 2003-13 at 6. That may well be true. Individual litigants disappointed by a decision on review might complain of bias in a particular case, but litigants as a class are probably glad to have a second chance at dismissal or reinstatement of a complaint. If the second bite produces results, you are better

off than you were without it; if it fails to produce results you are no worse off than before.

CONCLUSION

The attached survey results suggest that a significant number of practitioners believe that peer review undermines the integrity of the process in the appellate division. While that suggests that practitioners might also be skeptical of peer review in other contexts, the comments we received do not indicate dissatisfaction with peer review of a magistrate's decisions. This may be because peer review of a magistrate's decision provides a second bite at the apple, with no real disadvantage to the party seeking reversal of the magistrate's decision.

The staff does not believe that the survey data provides strong enough support for the proposed law to overcome the objections raised by commentators focusing specifically on review of magistrate decisions. The staff recommends that the proposed law be set aside.

Respectfully submitted,

Brian Hebert
Assistant 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