Study J-505 September 27, 2005

First Supplement to Memorandum 2005-33

Civil Discovery: Calendar Preference for Writ Review of a Discovery Ruling on an Issue Common to Consolidated Cases

At the July meeting, the Commission considered whether to propose a calendar preference for writ review of a discovery ruling on an issue common to consolidated cases. This issue was brought to the Commission's attention by Senator Joseph Dunn, Chair of the Senate Judiciary Committee. As an initial approach to the issue, the Commission decided to explore the possibility of creating a calendar preference that

(1) Applies when a writ petition challenges a ruling that is common to several consolidated cases (as opposed to a ruling on an issue that is unique to one of several consolidated cases);
(2) Applies regardless of whether the ruling challenged in the writ petition is a discovery ruling or another type of pretrial ruling;
(3) Is mandatory rather than discretionary; and
(4) Directs the reviewing court to give the matter preference over "all other civil actions."

The Commission asked the staff to take steps to prepare a draft of a tentative recommendation implementing these ideas. The Commission also made clear that the staff should continue its efforts to obtain information about how the appellate courts currently handle writ petitions and calendar preferences.

Since the July meeting, the Commission has received the following input on behalf of the appellate courts:

As explained in greater detail below, all of this input is negative, including the personal view of the Chief Justice of the California Supreme Court. In light of

this negative input, the staff has not yet prepared a draft tentative recommendation along the lines discussed in July. We will proceed with that if the Commission so directs. Before deciding what to do, however, the Commission should consider the new input and a possible alternative approach suggested by the staff.

COMMENTS DIRECTLY FROM PRESIDING JUSTICES

The Commission received letters from three presiding justices: (1) Judith McConnell (Fourth Appellate District, Division One), (2) Manuel Ramirez (Fourth Appellate District, Division Two), and (3) Paul Turner (Second Appellate District, Division Five). Each presiding justice indicates that enacting a calendar preference for writ review of a discovery ruling in consolidated cases would have little impact on his or her division of the court of appeal because writ petitions are already handled expeditiously.

Justice McConnell writes:

> The practice of the Fourth District, Division One, is to docket writ petitions in all cases — civil, criminal and juvenile — as high priority proceedings. The briefing schedule on writs is expedited (set on shorter time frames than appeal and not subject to rule time) and cases are placed on the first available calendar after they are fully briefed. We also specially set argument between regularly scheduled calendars when a hearing is required and the matter is unusually urgent.
>
> As such, *the proposal under study should have little or no effect on our review of petitions challenging generic rulings in consolidated cases because our procedures already afford priority to these kinds of proceedings.*

Exhibit p. 1 (emphasis added).

Similarly, Justice Ramirez explains:

> [T]his court already gives writ petitions the highest priority, deciding approximately 80 percent of them within 10 days. My colleagues and I rule by peremptory writ in the first instance *whenever appropriate*, thereby avoiding the delay inherent in the formal issuance of an order to show cause or alternative writ. Matters that require formal treatment, however, are specially set by order and in between our regularly scheduled monthly oral argument dates whenever justified. The clerk assigns justices to writ duty according to a monthly rotation, evenly distributing the burden of promptly attending to original proceedings on a daily basis. In addition to normal staffing, I have a cross-trained staff and

> I have taken the added step of assigning an extra central staff attorney to help with any surges in writ filings. In addition, experienced supervisory attorneys are also available in emergency situations.

Exhibit p. 5 (emphasis in original). Consequently, Justice Ramirez concludes that the "creation of a preference for petitions about discovery rulings in consolidated cases would have little, if any, effect in our court because of this court's prompt handling of original proceedings." *Id*.

Justice Turner provides the following description of what happens in his division:

> Typically, a case as described by Senator Joe Dunn would be handled as follows. The petition is delivered to the Division Five writs attorneys the day it is filed. If there is an immediate stay request, the stay request is granted or denied the day the petition is filed. If it appears the petitioner is correct, the stay is issued the day the petition is filed. This ruling is made by me in my capacity as the Presiding Justice. For example, if the trial court has ordered the disclosure of privileged documents, I would issue a stay of the disclosure order on the day the petition is filed.
>
> Generally, regardless of whether a stay issues, within 10 days, a 3 justice panel will decide to: issue an alternative writ of mandate; issue an order to show cause; or summarily deny the petition. Most writ petitions are summarily denied. If an alternative writ or order to show cause issues, within the next 30 to 40 days, oral argument is held and the opinion is filed within the next 10 to 30 days.

Exhibit p. 7. Justice Turner therefore believes that "in Division Five in Los Angeles, a priority rule would probably serve no purpose." *Id*. at 8. In his view, the cases "are calendared for argument as quickly as they can be scheduled." *Id*.

Justice Turner acknowledges, however, that although most appellate cases are decided promptly, there are some cases that the courts of appeal do not decide as quickly as is desirable. *Id*. He comments that if the Law Revision Commission "can recommend laws that will speed up appellate review in this comparatively narrow area or more broadly, then the commissioners are doing their job." *Id*. He notes that Senator Dunn is both an experienced litigator and legislator and if Senator Dunn perceives a problem, "legislative intervention may be in order." *Id*.

COMMENTS FROM THE JUDICIAL COUNCIL

The Commission also received comments from Daniel Pone (Senior Attorney, Office of Governmental Affairs) on behalf of the Judicial Council. Exhibit pp. 2-4. Mr. Pone's comments "reflect input and recommendations from the Judicial Council's Administrative Presiding Justices Advisory Committee and Appellate Advisory Committee." *Id*. at 2. Mr. Pone's comments are directed at two main topics: (1) current treatment of writ petitions and the potential impact of the proposed new calendar preference, and (2) current treatment of appellate calendar preferences and the Judicial Council's position on creation of additional calendar preferences.

Current Treatment of Writ Petitions and the Potential Impact of the Proposed New Calendar Preference

Mr. Pone states that "[a]lthough practice may vary slightly among the appellate districts, all six districts of the California Court of Appeal treat writ petitions as high-priority proceedings." *Id*. Specifically, these matters

> are calendared for quick consideration, with determinations of whether to issue an order to show cause (OSC) made in the vast majority of cases within 10 days of filing. In those cases in which an OSC issues, briefing and oral argument then generally proceed at an accelerated pace. This allows the appellate districts to set the cases for oral argument quickly, usually between one and four months after issuance of the OSC.

Id. at 2-3. Thus, according to Mr. Pone, "the Courts of Appeal are already handling such matters as expeditiously as possible." *Id.* at 3.

In addition, Mr. Pone explains that under Rule 19 of the California Rules of Court, "any party in litigation may apply to the appellate court for preferential treatment in the handling of a particular case," regardless of whether a statutory preference exists. *Id*. "The Judicial Council believes that this approach appropriately allows the courts to grant preference in individual cases when the circumstances warrant such treatment and *the procedures already in place make unnecessary the across-the-board statutory calendar preference approach proposed in the CLRC staff memo*." *Id*. (emphasis added). "[T]he attorney members of the council's Appellate Advisory Committee who specialize in appellate practice *also believe that a statutory calendar preference is not necessary* ...." *Id*. (emphasis added).

Current Treatment of Appellate Calendar Preferences and the Judicial Council's Position on Creation of Additional Calendar Preferences

Mr. Pone writes that "although practice may vary slightly among the appellate districts, appeals entitled to calendar preference by statute (e.g., criminal, juvenile, probate) are designated by all six appellate districts as high priority in their case management systems and, upon completion (or near completion) of briefing, are assigned to the next available calendar." *Id*. at 3. He reports that "the appellate courts have not established formal processes to address competing appellate-level calendar preferences ...." *Id*. He explains that "[i]n practice, conflicts among cases with competing appellate-level preferences would seem to occur relatively rarely since courts already place priority appeals on the first open oral argument calendar as soon as they are fully briefed." *Id*. at 2-3.

Mr. Pone warns that if more calendar preferences were added, "the result effectively would be to have no preferences at all because everything would be placed at the head of the line." *Id*. Thus, "the Judicial Council has a long history of opposing proposals to impose additional calendar preferences." *Id*.

In particular, "*the Judicial Council would be opposed* to legislation mandating a calendar preference for writ review of a discovery ruling in consolidated cases." *Id*. (emphasis added). In fact, Mr. Pone states that "Chief Justice Ronald M. George individually has stated his concurrence with the Judicial Council's views on this question, observing that he opposes this proposal as a matter of policy." *Id*.

Mr. Pone adds, however, that the Judicial Council "would be willing to explore further, with the commission, Senator Dunn, and other interested persons, possible alternative methods for addressing discovery writs and any other issues involving consolidated cases in order to improve the practice in this area and make handling of these cases as effective and efficient as possible for both the litigants and the courts." *Id*.

ANALYSIS AND RECOMMENDATION

Judicial opposition to the proposed new statutory calendar preference is not surprising, because any statutory calendar preference reduces judicial discretion. But the comments from the three presiding justices and the Judicial Council also indicate that due to the expeditious manner in which the appellate courts already

handle writ petitions, the proposed new statutory calendar preference would have no impact. It is especially noteworthy that the attorney members of the Judicial Council's Appellate Advisory Committee concur in this assessment.

The staff would not abandon this project solely on the basis of the input received thus far. The views of the appellate courts are of great importance in deciding how to proceed, but practitioners may also have valuable insights on this matter. The Commission has not yet received much attorney input on the handling of writ petitions in consolidated cases and whether there is a need for reform.

In seeking such input, one approach would be to prepare a tentative recommendation as discussed in July, specifically proposing and explaining the need for a provision along the following lines:

> **Code Civ. Proc. § 1048.1 (added). Calendar preference for writ review of pretrial ruling on issue common to consolidated cases**
>
> 1048.1. When several cases are consolidated for some but not all purposes pursuant to Section 1048, a party to one of those cases petitions for an extraordinary writ on an issue common to all of the cases, and the reviewing court issues an alternative writ or an order to show cause, the reviewing court, in setting the case for hearing and hearing the matter, shall give the writ petition precedence over all other civil actions.

Minutes (July 2005), p. 6.

An alternative approach would be to simply solicit input from attorneys and other interested persons on (1) their experiences in dealing with writ review of a pretrial ruling on an issue common to consolidated cases, (2) any problems they may have encountered in that context and suggestions for reform, and (3) any information they have on approaches used in other jurisdictions that might help to improve California law in this area. A request for such input could easily be incorporated into the draft tentative recommendation that is attached to Memorandum 2005-33.

As compared to circulating a specific proposal as previously discussed, this alternative approach might be better for generating input that helps the Commission fully understand any problems that need to be addressed. If no one reports problems, that would help to confirm the courts' view that reform is not necessary.

The alternative approach might also be a superior means of prompting creative suggestions and alerting the Commission to effective approaches used

elsewhere. Perhaps a new calendar preference is not the best means of addressing whatever problems exist.

In addition, the Commission might obtain information through this alternative approach that it could use in justifying a reform along the lines discussed in July. After obtaining such information, the Commission could perhaps circulate a more persuasive tentative recommendation proposing such a reform than the staff could prepare now.

Would the Commission like to follow this alternative approach, stick with its original approach, or take some other action?

Respectfully submitted,

Barbara Gaal
Staff Counsel

Court of Appeal

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CHAMBERS OF
JUDITH McCONNELL
PRESIDING JUSTICE

July 26, 2005

Barbara S. Gaal
Staff Counsel
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Writ Petitions

Dear Ms. Gaal:

I am writing in response to your request for input on the proposal to create a calendar preference for writ petitions that seek review of discovery rulings common to civil cases that have been consolidated for trial. As I understand it, the Commission is studying the idea of giving priority to these cases to reduce the time to a final decision on the merits and minimize possible deleterious effects of any delay.

The practice of the Fourth District, Division One, is to docket writ petitions in all cases—civil, criminal and juvenile—as high priority proceedings. The briefing schedule on writs is expedited (set on shorter time frames than appeal and not subject to rule time) and cases are placed on the first available calendar after they are fully briefed. We also specially set argument between regularly scheduled calendars when a hearing is required and the matter is unusually urgent.

As such, the proposal under study should have little or no effect on our review of petitions challenging generic rulings in consolidated civil cases because our procedures already afford priority to these kinds of proceedings.

Please keep me apprised of the results of your study.

Very truly yours,

Judith McConnell

JUDITH McCONNELL
Presiding Justice

JM/jp
cc: W. (Buzz) Kinnaird
Cheryl Shensa
Marcia Taylor

Judicial Council of California
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September 21, 2005

Ms. Barbara Gaal
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Re: Calendar Preference for Writ Review of a Discovery Ruling on an Issue Common to Consolidated Cases

Dear Ms. Gaal:

I am responding on behalf of the Judicial Council to your recent inquiry in connection with the portion of the California Law Revision Commission's (CLRC) civil discovery study that relates to calendar preference for writ review of a discovery ruling on an issue common to consolidated cases (Staff Memorandum 2005-27 [June 28, 2005], hereafter "CLRC staff memo"). The specific questions you asked are set out below, followed by our responses, which reflect input and recommendations from the Judicial Council's Administrative Presiding Justices Advisory Committee and Appellate Advisory Committee.

How does each appellate court currently handle calendaring and hearing of a writ petition? Would there be any impact if the Legislature created a calendar preference for writ review of a pretrial ruling on an issue that is common to a number of partially consolidated cases?

Although practice may vary slightly among the appellate districts, all six districts of the California Court of Appeal treat writ petitions as high-priority proceedings. These matters are calendared for quick consideration, with determinations of whether to issue an order to show cause (OSC) made in the vast majority of the cases within 10 days of filing. In those cases in which an OSC issues, briefing and oral argument then generally proceed at an accelerated pace. This allows the appellate districts to set the cases for oral argument quickly, usually between one

and four months after issuance of the OSC. Thus, the Courts of Appeal are already handling such matters as expeditiously as possible.

Each appellate district also has dedicated writ attorneys who look at these matters as they come in to assist the courts in responding in an appropriate and expeditious time frame. In addition to the speedy treatment already afforded these cases as a matter of course in the Courts of Appeal, any party in litigation already may apply to the appellate court for preferential treatment in the handling of a particular case. (See Cal. Rules of Court, rule 19.) It is also worth noting that the attorney members of the council's Appellate Advisory Committee who specialize in appellate practice also believe that a statutory calendar preference is not necessary and have indicated that they have successfully used rule 19 to obtain calendar preferences when cases they were litigating warranted expedited treatment. As the CLRC staff memo notes, a Court of Appeal may exercise its discretion to grant a calendar preference on nonstatutory grounds. (CLRC staff memo at p. 4, *citing* Advisory Committee comment, Cal. Rules of Court, rule 19.) The Judicial Council believes that this approach appropriately allows the courts to grant preference in individual cases when the circumstances warrant such treatment and that the procedures already in place make unnecessary the across-the-board statutory calendar preference approach proposed in the CLRC staff memo. (See proposed Code Civ. Proc., § 1048.1, CLRC staff memo at p. 14.)

How is each appellate court currently implementing the existing statutes that create appellate-level calendar preferences?

As previously described, writs already are handled in an expeditious manner. Again, although practice may vary slightly among the appellate districts, appeals entitled to calendar preference by statute (e.g., criminal, juvenile, probate) are designated by all six appellate districts as high priority in their case management systems and, upon completion (or near completion) of briefing, are assigned to the next available calendar. In other cases, the Courts of Appeal rely on the parties to bring a specific calendar preference to the court's attention. (See Cal. Rules of Court, rule 19 ["A party claiming calendar preference must promptly serve and file a motion for preference in the reviewing court"].)

Parties appropriately have the burden of notifying appellate courts when a case is entitled to preference because the parties are most familiar with the nature of their cases and, thus, whether these cases qualify for preference under a statute or rule of court. Placing the burden on the parties is also appropriate because the factors warranting preference may not be apparent on the face of the documents initiating an appeal. If a timely motion for preference is filed and granted, the matter will be processed as expeditiously as warranted by the application. Moreover, the appellate court may order preference on its own motion when the ground is apparent on the face of the appeal.

Although the appellate courts have not established formal processes to address competing appellate-level calendar preferences, the Judicial Council does not believe statutory direction in this area is warranted. In practice, conflicts among cases with competing appellate-level

preferences would seem to occur relatively rarely since courts already place priority appeals on the first open oral argument calendar as soon as they are fully briefed. The addition of more preferences would only further complicate the task by placing additional administrative burdens on the courts. The appellate courts have done a good job of balancing these competing interests, and the council believes that such conflicts, when they do exist, should be left to the discretion of the appellate courts to manage, based on both the facts and circumstances presented by the specific cases at issue and the resources at hand, rather than imposing an inflexible, across-the-board statutory approach.

For all of the preceding reasons, the Judicial Council would be opposed to legislation mandating a calendar preference for writ review of a discovery ruling in consolidated cases. Proposals are frequently made to add preferences for particular classes of appeals or writs. If all of these were granted, the result effectively would be to have no preferences at all because everything would be placed at the head of the line. Accordingly, the Judicial Council has a long history of opposing proposals to impose additional calendar preferences. Courts generally have done an exemplary job managing their caseloads and have demonstrated their attentiveness to the existing preferences. Adding further preferences without a clear showing of demonstrated and substantial need would seem unwarranted and potentially detrimental to the effective and efficient processing of cases by the Courts of Appeal. Chief Justice Ronald M. George individually has stated his concurrence with the Judicial Council's views on this question, observing that he opposes this proposal as a matter of policy.

Nevertheless, we certainly would be willing to explore further, with the commission, Senator Dunn, and other interested persons, possible alternative methods for addressing discovery writs and any other issues involving consolidated cases in order to improve the practice in this area and make the handling of these cases as effective and efficient as possible for both the litigants and the courts. If you have any questions, please feel free to contact me at 916-323-3121.

Sincerely,

Daniel A. Pone
Senior Attorney

DP/ml
cc: Members of the Judicial Council
Members of the Appellate Advisory Committee
Members of the Administrative Presiding Justices Advisory Committee
William C. Vickrey, Administrative Director of the Courts

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CHAMBERS OF THE
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August 22, 2005

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Re: Calendar Preference for Writ Petitions

Dear Ms. Gaal:

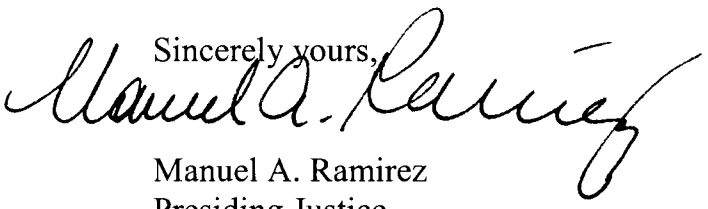
Thank you for the opportunity to respond to the proposal for calendar preference for writ petitions challenging discovery rulings in civil cases consolidated for trial. I understand the concern that the preference is needed to prevent delay in complex civil cases.

However, this court already gives writ petitions the highest priority, deciding approximately 80 percent of them within 10 days. My colleagues and I rule by peremptory writ in the first instance *whenever appropriate*, thereby avoiding the delay inherent in the formal issuance of an order to show cause or alternative writ. Matters that require formal treatment, however, are specially set by order and in between our regularly scheduled monthly oral argument dates whenever justified. The clerk assigns justices to writ duty according to a monthly rotation, evenly distributing the burden of promptly attending to original proceedings on a daily basis. In addition to normal staffing, I have cross-trained staff and I have taken the added step of assigning an extra central staff attorney to help with any surges in writ filings. In addition, experienced supervisory attorneys are also available in emergency situations. The creation of a preference for petitions about discovery rulings in consolidated cases would have little, if any, effect in our court because of this court's prompt handling of original proceedings.

I hope this description of our writ procedures affords you the background for evaluating the need for the proposed preference. If I can provide any further information, please do not hesitate to contact me at 951-248-0302.

With my continued best wishes and warmest regards, I am,

Sincerely yours,



Manuel A. Ramirez
Presiding Justice

MAR:mm

Cc: Hon. Judith D. McConnell, Administrative Presiding Justice, 4DCA1
Hon. David G. Sills, Presiding Justice, 4DCA2
Hon. Paul Turner, Presiding Justice, 2DCA5
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July 14, 2005

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Re: Law Revision Commission Study—Calendar preference for writ review of discovery ruling in consolidated cases.

Dear Ms. Gaal:

Thank you for your July 11, 2005 letter concerning calendar preference for writ review of discovery rulings in consolidated cases.

I can only speak with any authority on the way this type of issue plays out in Division Five of the Second Appellate District where I preside. Typically, a case as described by Senator Joe Dunn would be handled as follows. The petition is delivered to the Division Five writs attorneys the day it is filed. If there is an immediate stay request, the stay request is granted or denied the day the petition is filed. If it appears the petitioner is correct, the stay is issued the day the petition is filed. This ruling is made by me in my capacity as the Presiding Justice. For example, if the trial court has ordered the disclosure of privileged documents, I would issue a stay of the disclosure order on the day the petition is filed.

Generally, regardless of whether a stay issues, within 10 days, a 3 justice panel will decide to: issue an alternative writ of mandate; issue an order to show cause; or summarily deny the petition. Most writ petitions are summarily denied. If an alternative writ or order to show cause issues, within the next 30 to 40 days, oral argument is held and the opinion is filed within the next 10 to 30 days.

As can be noted, in Division Five in Los Angeles, a priority rule would probably serve no purpose. The cases are calendared for argument as quickly as they can be scheduled. I am confident Senator's Dunn's concerns probably relate to what he has observed elsewhere. As a general observation about the California Court of Appeal, and this includes the division where I sit, we take too long to decide too many cases. We do not take too long to decide *most* cases, but too long to decide *too many* of cases albeit they are a minority of litigation. If the Law Revision Commission can recommend laws that will speed up appellate review in this comparatively narrow area or more broadly, then the commissioners are doing their job. Regretfully, there is no external pressure on the justices to speed up the process (although most justices are deeply concerned about promptly deciding cases) and that may be why intervention by the legislature is appropriate if this is a real problem. Senator Dunn is both an experienced litigator and legislator and if he sees this as a problem, then legislative intervention may be in order.

If I can provide any other observations, please do not hesitate to write or call.

Very truly yours,

Paul Turner

Paul Turner
Presiding Justice

PT:tm