Study J-1402 May 18, 2006

Memorandum 2006-21

Statutes Made Obsolete By Trial Court Restructuring: Appellate and Writ Jurisdiction in a Civil Case

The Commission recently reactivated its study of statutes made obsolete by trial court restructuring, which was directed by the Legislature (Gov't Code § 71674). An important unfinished project within that study concerns appellate jurisdiction in a civil case. This memorandum discusses that topic and suggests a possible set of reforms. The memorandum also discusses issues relating to writ jurisdiction, particularly writ jurisdiction in a small claims case. The Commission needs to decide how to proceed for purposes of a tentative recommendation.

The memorandum is organized as follows:

CONTENTS

Appellate Jurisdiction in a Civil Case

Code of Civil Procedure Sections 904.1 and 904.2 are the key provisions governing appellate jurisdiction in a civil case. Section 904.1(a)(1)(C) still refers to the municipal court in several places:

> 904.1. (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:
>
> (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt that is made final and conclusive by Section 1222, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a *municipal court* or the superior court in a county in which there is no *municipal court* or the judge or judges thereof that relates to a matter pending in the *municipal* or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.
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> ....

(Emphasis added.) The Commission deliberately refrained from revising this provision in its 2002 recommendation on trial court restructuring. The proper treatment of Section 904.1(a)(1)(C) is complicated and the Commission did not want to propose a revision without adequately researching and analyzing the matter. See Memorandum 2002-17, pp. 16-17; Minutes (March 2002), pp. 9-10.

The staff has since examined the provision and its history. The discussion below (1) describes the history of the provision, (2) explains how to revise the codes to preserve its effect now that all of the municipal and superior courts have unified, (3) explores whether preserving the effect of the provision is sound policy, (4) suggests how to handle the provision, and (5) discusses necessary conforming revisions.

History of Section 904.1(A)(1)(C)

The provision that is now Section 904.1(a)(1)(C) was added by the Legislature in slightly different form in 1982, in response to a perceived problem. At the time, there were three different kinds of trial courts: superior courts, municipal courts, and justice courts. The perceived problem related to juridical review of a pretrial ruling made by a municipal or justice court.

Judicial Review of a Pretrial Ruling Made By a Municipal or Justice Court

Before the 1982 amendment of Section 904.1, if a civil litigant disagreed with a pretrial ruling made by a municipal or justice court, the litigant could seek an extraordinary writ from the appellate department of the superior court. Depending on the circumstances, the litigant could seek a writ of certiorari (also known as a writ of review), a writ of mandamus (also known as a writ of mandate), a writ of prohibition, or some combination of these writs.

The appellate department of the superior court would rule on the writ petition in much the same manner that courts handle writs today. Regardless of whether the appellate department granted or denied the writ, its decision was appealable to the appropriate court of appeal. In effect, there were two opportunities, not just one opportunity, for judicial review of the pretrial ruling made by the municipal or justice court.

Criticism of the Review Process

The review process just described was criticized. In *Burrus v. Municipal Court*, 36 Cal. App. 3d 233, 111 Cal. Rptr. 539 (1973), a litigant appealed from a superior court decision summarily denying a petition for a writ of mandamus to review a municipal court's ruling on a pleading issue. The court of appeal not only affirmed the superior court decision, but questioned the wisdom of permitting an appeal from that decision:

> The policy expressed in the Constitution ... is that litigation arising in municipal and justice courts will not go beyond the superior court except under very limited circumstances. This is desirable both to relieve the burden on the higher courts and to spare litigants the delay and expense which would result from successive appeals through all levels of review.
>
> Nevertheless it is possible for any litigant in the municipal or justice court to apply at any time to the superior court for the issuance of a prerogative writ .... Such petitions are commonly denied out of hand, without a hearing, if in the opinion of the superior court the petition fails to state grounds for extraordinary

> relief. The denial of relief is a judgment of the superior court, and as such is appealable to the Court of Appeal under Code of Civil Procedure, section 904.1, subdivision (a). No matter how frivolous the petition, or how trivial the issue which it raises, the petitioner is entitled, as a matter of right, to go through the entire appellate procedure, with preparation of record, briefs, calendaring and written opinion in the Court of Appeal.
>
> Neither the filing of a petition for an extraordinary writ in the superior court nor the taking of an appeal from the order of denial operates as a stay of the underlying proceeding in the inferior court. Nevertheless it often happens that the inferior court does postpone the trial of the case in order to learn what the appellate court ultimately will do. The case at bench, in which the parties are talking about a pleading question more than a year after their case was to have been tried in the municipal court, is illustrative of the awkwardness of the procedure and its potential for abuse.
>
> The existence of a right of appeal seems unnecessary when the purpose of the petition is to review a ruling of an inferior court, and the superior court has denied it without a trial of an issue of fact. If the aggrieved litigant has an issue of such gravity or significance as to justify the use of a prerogative writ, he may file an original petition in the Court of Appeal or the Supreme Court after denial in the superior court. Such new petitions are far less burdensome than appeals, since those petitions which lack merit on their faces can be screened out by summary denial.

Id. at 238-39 (footnotes omitted).

Soon after *Burrus* was decided, the Judicial Council issued a report recommending that Section 904.1 be amended to preclude an appeal from a superior court decision granting or denying a petition for a writ of mandamus or a writ of prohibition. *See Gilbert v. Municipal Court*, 73 Cal. App. 3d 723, 730 & n.2, 140 Cal. Rptr. 897 (1977). A bill along those lines was introduced in the Legislature in 1976, but the bill died in committee. *Id*. at 730.

The following year, another court of appeal urged the Legislature to take action. In *Gilbert*, the court of appeal contrasted the right of a municipal or justice court litigant to obtain review with the comparable right of a superior court litigant:

> Simply put, the justice court and municipal court ... litigants are *entitled* to far greater review protection than the superior court litigant with the identical legal problem. The yellow brick road goes like this: The inferior court litigant receives a pretrial ruling of the justice or municipal court which makes him unhappy. The ruling may or may not be appealable. The litigant files a petition for writ of mandate or prohibition in the superior court contesting that

> ruling. The superior court has *original jurisdiction* to entertain such writ petitions ... and there is no rule of law that precludes the filing of such a petition.
>
> The inferior court litigant, discovering that he has lost in his superior court writ effort then files his notice of appeal. The appellate jurisdiction of the Court of Appeal is in those cases in which the superior court has original jurisdiction. ... Now the unhappy inferior court litigant is *entitled* to a written decision of the Court of Appeal on his pretrial ruling of the inferior court. ... Thereafter, if still unhappy, he can petition for hearing with the Supreme Court.
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> ....
>
> Now to compare our superior court litigant unhappy with a pretrial ruling of the superior court. His recourse is simple — petition to the Court of Appeal for a writ and then on to the Supreme Court for hearing. There is nothing automatic about a writ petition, the court retaining discretion as to whether or not the petition will be entertained on the merits. There is no *right to a written decision by the Court of Appeal*.

Id. at 728-29 (citations omitted; emphasis in original). The court of appeal found the difference in treatment "puzzling, to say the least." *Id*. Because more is at stake in a superior court case than in a municipal or justice court case, the court maintained that a superior court litigant ought to have a greater, or at least equal, opportunity for review as compared to a municipal or justice court litigant. *Id*.

The court of appeal also cautioned that the existing system could cause difficult procedural problems. In particular, a municipal or justice court case might proceed to judgment while an appeal from a superior court writ decision was pending before a court of appeal. Under those circumstances, an appeal from the municipal or justice court judgment could "be taken, as of right, to the appellate department of the superior court." *Id*. at 731. But the interrelationship between the two appeals would be problematic:

> Does the appellate department have jurisdiction to entertain on appeal the same issue as simultaneously pends before the Court of Appeal? If the answer is in the affirmative, which may well be the case, then which reviewing court's decision will be binding? The first to render its decision or the higher court in the judicial scheme? ....
>
> It is no answer to the dilemma to merely find that on the issue that has been appealed to the Court of Appeal, the issue does not properly lie before the appellate department. Such a position does not solve all the problems noted in the above paragraph but does add a new and again troublesome dimension. The issue before the Court of Appeal is a limited one which is not necessarily the

> situation faced by the appellate department. ... [W]hat happens to questions interrelated with the matter on appeal to the Court of Appeal where the interrelated items are not before the higher court? If the appellate department is to render an opinion, must its opinion be conditioned on whatever result is later contained in the opinion of the Court of Appeal? Our questions are not exhaustive of potential problems but rather only examples to highlight the serious nature of the general subject under discussion.

Id. at 731-32.

The court of appeal in *Gilbert* acknowledged that such problems could be avoided by requiring the municipal or justice court to stay its proceedings during the pendency of the appeal from the superior court writ decision. *Id*. at 732. The *Gilbert* court pointed out, however, that such a position would "len[d] the involuntary aid of the Court of Appeal to judicial delay even though otherwise a stay in aid of jurisdiction is discretionary." *Id*.

The *Gilbert* court went on to characterize the situation as a "loophole." *Id*. at 733. The court urged the Legislature to close the loophole to help relieve the heavy workload of the courts of appeal:

> In our search for perfect justice we have become review happy. Still there must be realistic limitations. Currently, the justices of the Courts of Appeal, together with their attorneys and other staff, are grinding out over six thousand opinions a year. The judicial fabric is stretched thin. It would appear only reasonable that the Courts of Appeal should not be called upon to automatically review pretrial orders from justice and municipal courts. This, of course, is a matter which should be addressed by the Legislature.

Id. at 733-34.

1982 Amendment of Section 904.1

In 1982, the Legislature amended Section 904.1 to preclude an appeal from a superior court order granting or denying a writ of mandamus or prohibition directed to a municipal or justice court. As amended, the statute read:

> 904.1. An appeal may be taken from a superior court in the following cases:
>
> (a) From a judgment, except ... (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for

> issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.
>
> ....

1982 Cal. Stat. ch. 1198, § 63.2.

1989 Amendment of Section 904.1

In 1989, Section 904.1 was amended to add subdivision (k), which allowed an appeal from a superior court order requiring payment of sanctions exceeding $750. This new subdivision expressly stated that "[l]esser sanction judgments against a party or an attorney for a party may be reviewed on appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." See 1989 Cal. Stat. ch. 1416, § 25. Presumably to underscore the availability of an extraordinary writ as a means of reviewing a sanctions order, the provision plugging the jurisdictional "loophole" for a writ of mandamus or prohibition was also amended:

> 904.1. An appeal may be taken from a superior court in the following cases:
>
> (a) From a judgment, except ... (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.
>
> ....

Id.

Application of Section 904.1 to a Petition for a Writ of Certiorari

In 1992, the California Supreme Court examined whether Section 904.1(a)(4) applied to a superior court order on a petition for a writ of *certiorari* directed to a municipal or justice court. Was the provision limited to a writ of mandamus and writ of prohibition, the only writs expressly mentioned in it? Or did the provision also extend to a writ of certiorari, notwithstanding the lack of an express reference to such a writ?

The Court determined that the provision did not apply to a writ of certiorari. *Bermudez v. Municipal Court*, 1 Cal. 4th 855, 823 P.2d 1210, 4 Cal. Rptr. 2d 609

(1992). The Court explained that "the express mention of mandamus and prohibition in this context implies exclusion of all other types of writs." *Id*. at 864. Thus, although a superior court order on a petition for a writ of mandamus or prohibition directed to a municipal or justice court could no longer be appealed, a superior court order on a comparable petition for a writ of certiorari remained appealable. *Id*.

The typical context in which this would occur was an appeal from a superior court ruling on a petition for a writ of certiorari challenging a contempt order issued by a municipal or justice court. A writ of certiorari was unavailable to review most other types of rulings because those rulings were subject to review on appeal. See Code Civ. Proc. § 1068; see also 8 B. Witkin, California Procedure *Extraordinary Writs* §§ 11, 33 (4th ed. 1997 & 2005 Supp.).

The California Supreme Court made clear that it was not endorsing this result as a matter of policy. The Court explained that its hands were tied: "Whether or not we believe this is a wise result in terms of policy, we are bound to construe the statute as we find it." *Bermudez*, 1 Cal. 4th at 864 (footnote omitted). The Court noted, however, that it was "difficult to imagine why the Legislature might have intended a scheme that effectively allows appeal in municipal court contempt matters but not in superior court contempt matters ...." *Id*. at 864 n.7. The Court "invite[d] the Legislature to consider this anomaly." *Id*. To the best of the staff's knowledge, the Legislature has not taken any action in response.

Recent Events

In 1993, Section 904.1(a)(4) was relabeled as Section 904.1(a)(1)(D). See 1993 Cal. Stat. ch. 456, § 12. Soon afterwards, justice courts were eliminated. See 1994 Cal. Stat. res. ch. 113 (Prop. 191, approved Nov. 8, 1994).

In 1998, the voters approved a measure authorizing the superior and municipal courts in a county to unify on a vote of a majority of the superior court judges and a majority of the municipal court judges in that county. On recommendation of the Law Revision Commission, Section 904.1 was amended to accommodate such unification and reflect the elimination of the justice courts:

> 904.1. (a) ~~An appeal may be taken from a superior court in the following cases~~ An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:
>
> (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt which is made final and conclusive by

Section 1222, or (C) ~~a judgment on appeal from a municipal court or a justice court or a small claims court, or (D)~~ a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or ~~a justice court~~ the superior court in a county in which there is no municipal court or the judge or judges thereof which relates to a matter pending in the municipal or ~~justice~~ superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

....

Comment. Section 904.1 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e).

Subdivision (a) implements California Constitution Article VI, Section 11(a), as it applies in civil cases (courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within appellate jurisdiction of courts of appeal on June 30, 1995, and in other causes prescribed by statute).

Paragraph (a)(1)(C), which made nonreviewable "a judgment on appeal from municipal court or a justice court or a small claims court," is deleted as unnecessary, because the introductory clause of Section 904.1 as amended already excludes those matters from its coverage.

Section 904.1 is also amended to reflect elimination of the justice court. Cal. Const. art. VI, §§ 1, 5(b).

Instead of specifying when an appeal can be taken from a superior court, the statute now states when an appeal can be taken "other than in a limited civil case." The statute also makes clear that "[a]n appeal, other than in a limited civil case, is to the court of appeal." The substance of former Section 904.1(a)(1)(D) , as revised to accommodate unification, became what is now Section 904.1(a)(1)(C).

How to Preserve the Effect of Section 904.1(A)(1)(C) After Unification of the Trial Courts in All Counties

By early 2001, the municipal and superior courts had unified in all 58 California counties. The municipal court references in Section 904.1(a)(1)(C) are thus obsolete. To preserve the intended effect of the provision, a number of statutory revisions would be necessary.

Possible Amendment of Section 904.1

First, subdivision (a)(1)(C) should be deleted from Section 904.1. The provision no longer fits there because it pertains to issuance of a writ in what is now a limited civil case (formerly a municipal court case), while Section 904.1 applies to an appeal "other than in a limited civil case." Section 904.1 could be amended as follows:

Code Civ. Proc. § 904.1 (amended). Taking appeal in unlimited civil case

SEC. ____. Section 904.1 of the Code of Civil Procedure is amended to read:

904.1. (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222~~, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or the superior court in a county in which there is no municipal court or the judge or judges thereof that relates to a matter pending in the municipal or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ~~.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000).

(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000).

(13) From an order granting or denying a special motion to strike under Section 425.16.

(b) Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

Comment. Subdivision (a) of Section 904.1 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. Former Section 904.1(a)(1)(C) is continued in Section 904.3, with revisions to reflect unification.

Addition of New Section 904.3

Second, it would be necessary to add a new provision preserving the intended effect of what is now Section 904.1(a)(1)(C). As interpreted by the California Supreme Court, the purpose of that statutory material was to:

- Preclude an appeal of a superior court order granting or denying a petition for a writ of *mandamus or prohibition* directed to a municipal or justice court.
- Continue to allow an appeal, in the court of appeal, from a superior court order granting or denying a petition for a writ of *certiorari* directed to a municipal or justice court.

See Bermudez, 1 Cal. 4th at 863-64.

In a unified court system, cases that used to be adjudicated in the municipal and justice courts are now classified as limited civil cases and adjudicated in the superior court. If a litigant disagrees with a ruling made by the superior court before entry of judgment in a limited civil case, the litigant can seek a writ from the appellate division of the superior court. See Cal. Const. art. VI, § 10; Code Civ. Proc. §§ 1068(b), 1085(b), 1103(b) & Comments. Consequently, to preserve the intended effect of Section 904.1(a)(1)(C), the codes should be revised to:

- Preclude an appeal from a judgment of the appellate division of a superior court granting or denying a petition for a writ of *mandamus or prohibition* in a limited civil case.
- Allow an appeal, in the court of appeal, from a judgment of the appellate division of a superior court granting or denying a petition for a writ of *certiorari* in a limited civil case.

That could be accomplished by adding a new provision to the Code of Civil Procedure, along the following lines:

> **Code Civ. Proc. § 904.3 (added). Taking appeal from judgment of appellate division on writ petition in limited civil case**
>
> SEC. ____. Section 904.3 is added to the Code of Civil Procedure, to read:
>
> 904.3. (a) An appeal may be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of certiorari directed to the superior court**, or a judge thereof,** in a limited civil case. The appeal is to the court of appeal.
>
> (b) An appeal may not be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court**, or a judge thereof,** in a limited civil case. An appellate court may, in its discretion, review the judgment upon petition for extraordinary writ.
>
> **Comment.** Section 904.3 continues the substance of former Section 904.1(a)(1)(C), with revisions to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.
>
> Before 1982, if a litigant disagreed with a prejudgment ruling of a municipal or justice court, the litigant could seek an extraordinary writ from the appellate department of the superior court. A judgment on the writ petition could be appealed to the appropriate court of appeal. See Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977); Burrus v. Municipal Court, 36 Cal. App. 3d 233, 111 Cal. Rptr. 539 (1973).
>
> In 1982, the Legislature amended Section 904.1 to preclude an appeal from a superior court judgment on a petition for a writ of mandamus or prohibition directed to a municipal or justice court. See 1982 Cal. Stat. ch. 1198, § 63.2. The amendment did not preclude an appeal from a superior court judgment on a petition for a writ of certiorari directed to a municipal or justice court. See Bermudez v. Municipal Court, 1 Cal. 4th 855, 823 P.2d 1210, 4 Cal. Rptr. 2d 609 (1992). The language added in 1982, with some modifications, later became former Section 904.1(a)(1)(C).
>
> In a unified court system, cases that used to be adjudicated in the municipal and justice courts are classified as limited civil cases

and adjudicated in the superior court. See Section 85 & Comment; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 64-65 (1998). If a litigant disagrees with a prejudgment ruling in a limited civil case, the litigant can seek an extraordinary writ from the appellate division of the superior court. See Cal. Const. art. VI, § 10; see also Sections 1068(b), 1085(b), 1103(b) & Comments.

By authorizing an appeal from a judgment of the appellate division on a petition for a writ of certiorari directed to the superior court in a limited civil case, subdivision (a) preserves the intent of former Section 904.1(a)(1)(C) with respect to a petition for a writ of certiorari.

Similarly, by precluding an appeal from a judgment of the appellate division on a petition for a writ of mandamus or prohibition directed to the superior court in a limited civil case, subdivision (b) preserves the intent of former Section 904.1(a)(1)(C) with respect to a petition for a writ of mandamus or prohibition. Like former Section 904.1(a)(1)(C), subdivision (b) makes clear that although such a judgment of the appellate division cannot be appealed, a litigant may seek review of the judgment by extraordinary writ.

The clause in former Section 904.1(a)(1)(C) permitting an appellate court to review a sanction order upon petition for an extraordinary writ is not continued. That clause was unnecessary and redundant. See Section 904.1(b) (sanction order of $5,000 or less against party or attorney for party may be reviewed on appeal after entry of final judgment in main action, or, at discretion of court of appeal, reviewed upon petition for extraordinary writ); see also Section 904.1(a)(12) (sanction order exceeding $5,000 is appealable).

The staff is not sure whether the boldface language in the proposed new provision ("or a judge thereof") is necessary. We will research this and report what we find.

Possible Clarification of Section 904.2

Third, if Section 904.1 is amended and Section 904.3 is added as described above, it would also be advisable to amend Section 904.2 to clarify its application. In particular, it should be made clear that Section 904.2 governs the appealability of a ruling *by a superior court judge or other judicial officer* in a limited civil case. In contrast, proposed Section 904.3 would govern the appealability of a judgment *by the appellate division of the superior court on a writ petition* in a limited civil case.

That difference in coverage could be emphasized by amending Section 904.2 along the following lines:

Code Civ. Proc. § 904.2 (amended). Taking appeal from ruling by superior court judge or other judicial officer in limited civil case

SEC. ____. Section 904.2 of the Code of Civil Procedure is amended to read:

904.2. An appeal of a ruling by a superior court judge or other judicial officer in a limited civil case is to the appellate division of the superior court. An appeal of a ruling by a superior court judge or other judicial officer in a limited civil case may be taken from any of the following:

(a) From a judgment, except (1) an interlocutory judgment, or (2) a judgment of contempt that is made final and conclusive by Section 1222.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order changing or refusing to change the place of trial.

(d) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(e) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(f) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(g) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(h) From an order appointing a receiver.

Comment. Section 904.2 is amended to make clear that it governs the appealability of a ruling by a superior court judge or other judicial officer in a limited civil case. For the appealability of a judgment by the appellate division of the superior court on a writ petition in a limited civil case, see Section 904.3.

Effect of These Possible Reforms

Together, the three reforms shown above would faithfully preserve the original intent of the provision that is now Section 904.1(a)(1)(C). Before incorporating those reforms into a tentative recommendation, however, the Commission should consider whether preserving the original intent is a good idea.

Have conditions changed so that the approach the Legislature adopted in 1982 no longer makes sense? Did that approach represent good policy in the first place? Those issues are discussed below.

Policy Analysis and Related Considerations

In assessing the merits of preserving the original intent of Section 904.1(a)(1)(C), a number of considerations are relevant. The staff has identified the following:

Constitutional Constraint

Article VI, Section 11, of the California Constitution provides:

> 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 appellate division of the superior court has 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.

(Emphasis added.) By the express terms of this provision, the 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." Consequently, if (1) a cause is of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and (2) the superior courts have original jurisdiction in the cause, then (3) the Constitution mandates that the courts of appeal have appellate jurisdiction.

Here, a petition for a writ of certiorari directed to a municipal court was clearly within the appellate jurisdiction of the courts of appeal on June 30, 1995. See *Bermudez*, 1 Cal. 4th at 864. Quite probably, a petition for a writ of certiorari in a limited civil case would be considered a cause "of a type" within the appellate jurisdiction of the courts of appeal on June 30, 1995.

What is less clear is whether it would be proper to say that "*superior courts* have original jurisdiction" in such a cause (emphasis added). Technically, original jurisdiction of the writ petition rests in *the appellate division of the superior court*. The Constitution differentiates between the superior court and the appellate division of the superior court in assigning original jurisdiction:

> 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.
>
> The court may make any 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.

(Emphasis added.) Although Article VI, Section 11, of the California Constitution generally precludes contraction of court of appeal jurisdiction as it existed on June 30, 1995, one could argue that the provision *would not* preclude elimination of an appeal in a cause within the original jurisdiction *of the appellate division of the superior court*.

Whether that argument would succeed is not clear. We have not researched the legislative history of Article VI, Section 11. We suspect that there might be some statements indicating that the court of appeal jurisdiction existing on June 30, 1995 should be preserved intact, without any modification whatever.

Thus, there is a risk that Article VI, Section 11, might be interpreted to preclude elimination of an appeal from an appellate division's ruling on a petition for a writ of certiorari in a limited civil case. The Commission should take that risk into account in deciding whether to propose the elimination of such an appeal.

Peer Review Problem

A major change effected by trial court unification relates to the nature of review afforded to the types of cases formerly adjudicated in municipal court — misdemeanor and infraction cases and what are now known as limited civil cases.

Before unification, a municipal court judgment was appealed to the appellate department of the superior court for the county in which the municipal court was located. Similarly, writ review of a municipal court ruling could be sought in the appellate department of the local superior court. In both situations, the judges reviewing the municipal court decision were from *a court other than the one that rendered the decision*.

In a unified court system, however, a judgment rendered by the superior court in a limited civil case (other than a small claims judgment), or in a misdemeanor or infraction case, is appealable to the appellate division of the same court. Likewise, when a petition for an extraordinary writ is directed to a superior court in a limited civil case or a misdemeanor or infraction case, the appellate division of the same court has original jurisdiction of the writ petition. Cal. Const. art. VI, § 10; Code Civ. Proc. §§ 1068, 1085, 1103.

"Each judge assigned to the appellate division of a superior court shall be a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state." Code Civ. Proc. § 77. Thus, the panel reviewing a decision in a limited civil case or a misdemeanor or infraction case may include, or even consist entirely of, judges from *the same court that rendered the decision*.

The Commission perceived this as a potential problem when it assisted the Legislature in determining how to revise the Constitution to accommodate trial court unification. At that time, the Commission stated:

> The primary concern with appellate jurisdiction within the unified court is the problem of conflicts of interest arising in peer review. A judge should not be in a position of having to reverse a judge of equal rank. There may be collegiality or deference on the court that will destroy the independent judgment necessary for a fair review.

Trial Court Unification: Constitutional Revision (SCA 3), 24 Cal. L. Revision Comm'n Reports 1, 30 (1994).

The Commission sought to mitigate that problem in a number of ways. Before unification, the appellate department of the superior court was merely a creature of statute. It was converted to the constitutionally established appellate division, creating a constitutional hierarchy. The Chief Justice was given authority to make the appointments to the appellate division, and those appointments are for a fixed term rather than ad hoc. The Judicial Council was directed to promulgate rules, not inconsistent with statute, to promote the independence of the appellate division. See Cal. Const. art. VI, § 4.

Nonetheless, concern about peer review of decisions in a unified superior court persists. The Commission examined this problem in its study of Appellate and Writ Review Under Trial Court Unification (Study J-1310). The Commission issued a tentative recommendation proposing to abolish the superior court

appellate division and relocate its functions to a lower division of the Court of Appeal. After considering the comments on the tentative recommendation and studying the matter further, the Commission decided to table its study due to state budgetary constraints on court operations. The Commission directed the staff to continue to monitor the situation and to alert the Commission if it appears appropriate to reactivate the study. Minutes (Nov. 2003), p. 8 (available from the Commission, www.clrc.ca.gov).

The peer review problem is a significant factor to consider in deciding whether it is good policy to allow a litigant to appeal from an appellate division decision on a petition for an extraordinary writ in a limited civil case. If such an appeal is precluded, the writ proceeding in the appellate division is the only means of review available. Yet that review may be by judges who sit on the same court as the judge who made the decision under review. They are put in the difficult situation of potentially having to overturn a decision made by a colleague of equal rank. Even if they think they are able to maintain objectivity, there is at least an appearance of impropriety. In contrast, if a litigant can appeal from an appellate division's ruling on a petition for an extraordinary writ, then the superior court's decision will not only receive writ review in the appellate division, but will also be subjected to truly independent review by a panel of court of appeal justices.

Unequal Treatment of Similarly Situated Litigants

Another important consideration is essentially a matter of fairness. As the California Supreme Court pointed out in *Bermudez*, the statutory scheme then in effect essentially permitted an appeal in a municipal court contempt matter but not in a superior court contempt matter. 1 Cal. 4th at 864 n.7. In today's unified court system, this means a litigant in what is now a limited civil case has greater opportunity for appellate review of a contempt order than a litigant in what is now an unlimited civil case. The first litigant can seek a writ of certiorari from the appellate division of the superior court; if the ruling is unfavorable, the litigant can appeal to the appropriate court of appeal. In contrast, a litigant in an unlimited civil case can seek a writ of certiorari from the appropriate court of appeal, but has no opportunity to appeal to the court of appeal.

Is this difference in treatment justifiable? When the California Supreme Court decided *Bermudez*, there appeared to be no rational basis for distinction: In both a municipal and a superior court contempt matter, the initial level of review was

by writ directed to a panel of judges from a higher court. It was inexplicable why a further opportunity for review was provided in one type of matter but not the other.

Today, however, the difference in treatment could be rationalized as a means of dealing with the peer review problem. As previously discussed, a superior court appellate division may include judges from the same court as the judge whose ruling is under review. One could say that review by the appellate division is not truly independent, making it appropriate to allow an appeal from its decision on a petition for a writ of certiorari in a limited civil case.

The problem with this analysis is that it proves too much. If appellate division review is problematic, does it make sense to take that into account only in this limited context? It would seem that the problem should be addressed more globally, as the Commission attempted to do in its study of Appellate and Writ Review Under Trial Court Unification.

Potential Procedural Complications

The *Gilbert* court posed the specter of procedural complications arising from allowing a litigant to appeal from a decision of the superior court appellate department on a writ petition directed to a municipal court. 73 Cal. App. 3d at 731-32. As previously discussed, the concern was that there might be two appeals from the same case involving similar issues: (1) an appeal to the court of appeal from the appellate department's writ ruling, and (2) an appeal to the appellate department from the municipal court's final judgment. This could lead to difficult questions regarding the interrelationship between the appeals. Although those questions could be avoided by staying one of the appeals pending resolution of the other, that solution would necessarily entail delay and perhaps resultant injustice.

Similar procedural problems seemingly could occur in today's unified court system. Suppose, for example, that a litigant is held in contempt for refusing to produce a document in a limited civil case. The litigant petitions for a writ of certiorari in the appellate division, contending that the contempt order was beyond the jurisdiction of the superior court because the requested document was privileged and the court lacked authority to order its disclosure. The appellate division denies the writ and the litigant appeals to the court of appeal. Meanwhile, the superior court tries the underlying case, the litigant who was held in contempt loses, and that litigant takes an appeal to the appellate division

on the ground that the disputed document was privileged and improperly admitted into evidence at trial. Which appeal has precedence, the appeal before the court of appeal or the one before the appellate division? Suppose the appellate division decides that the disputed document was properly admitted. Does that mean that the court of appeal must uphold the contempt order?

The staff is not certain this hypothetical is realistic; we invite interested persons to point out any flaws or provide other relevant hypotheticals. As best we can tell at present, the specter of procedural complications is a legitimate concern, which the Commission should take into account in evaluating whether it makes sense to allow a litigant to appeal from a decision of the superior court appellate division on a writ petition in a limited civil case.

Court of Appeal Workload

A further consideration relates to the workload of the courts of appeal. We do not know how many appeals are taken each year from an appellate division decision on a petition for a writ of certiorari in a limited civil case. We suspect that the number is small and has no significant impact on the workload of the courts of appeal. We are attempting to obtain information on this point from the Administrative Office of the Courts.

It is clear, however, that the courts of appeal have a heavy workload. A recent article by Daniel Kolkey (a former court of appeal justice and member of the Law Revision Commission) reported that "California state justices in the third and fourth appellate districts participated in 354 written opinions annually — nearly one a calendar day!" *Lawyers Can Reap Results With Judge's Method*, S.F. Daily J., March 22, 2006, at 8.

With respect to an appeal from a superior court appellate department ruling on a petition for a writ of mandamus or prohibition directed to a municipal court, both the *Burrus* and the *Gilbert* opinions expressed concern about the impact on the workload of the courts of appeal. See *Burrus*, 36 Cal. App. 3d at 238-39; *Gilbert*, 73 Cal. App. 3d at 733-34. It seems likely that similar concern would arise from any attempt to allow an appeal from an appellate division ruling on a petition for a writ of mandamus or prohibition in a limited civil case.

Adequacy of Writ Review of Contempt Order

Yet another consideration relates to review of a contempt order, a common context for seeking a writ of certiorari in a limited civil case. Code of Civil Procedure Section 1222 states that "[t]he judgment and orders of the court or

judge, made in cases of contempt, are final and conclusive." Courts have interpreted this to mean that a contempt order is nonappealable. *See, e.g.*, *Bermudez*, 1 Cal. 4th at 861 n.5; *Moffat v. Moffat*, 27 Cal. 3d 645, 656, 612 P.2d 967, 165 Cal. Rptr. 877 (1980); *Davidson v. Superior Court*, 70 Cal. App. 4th 514, 522, 82 Cal. Rptr. 2d 739 (1999).

Witkin characterizes this approach as "archaic" and notes that "in most jurisdictions, an appeal lies from an adjudication of either civil or criminal contempt." 8 B. Witkin, *supra*, *Extraordinary Writs* § 33. Long ago, it was argued that an appeal from a contempt order should be permitted in California:

> Th[e] extensive use of the writs to review contempt proceedings evidently springs from a strong feeling that review is necessary if arbitrary and capricious punishment is to be avoided. However, the method of securing review could be improved. If it is necessary at all, *it should be allowed as a matter of right* and not made dependent upon the vague and frequently inarticulate concept of jurisdiction. When contempt is actually committed in court, since introduction of evidence is unnecessary and generally only a question of law is in issue, a speedy summary review would amply protect the court's dignity and the interests of the contemner. The California courts have utilized the writs to avoid the undesirable rule that contempt judgments are not subject to review. *It remains for the legislature, however, expressly to abandon the harsh rule of nonreviewability by providing for appeal as a matter of right*.

Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal. L. Rev. __, 98 (1948) (emphasis added; footnotes omitted). The same source states:

> When contempt is involved, the basis for granting a writ is very broad. The effect is to allow review tantamount to an appeal as a matter of right. *Present uncertainties could be cleared by recognizing this fact and permitting an appeal for a contempt order as is allowed for any final judgment*. No significant social policy militates against this change. No particular advantage is vested in the writ process. Preparing a record for appeal should involve no more time or expense than preparing one for a writ proceeding. The immediate relief afforded by the alternative writ could be provided by allowing a stay of the contempt order when appeal is taken.

Id. at 112 (emphasis added).

It is not clear, however, whether anything much would be gained by permitting an appeal from a contempt order. The scope of review presently available on a writ of certiorari or habeas corpus "is about as broad as that on an ordinary appeal; i.e., the 'jurisdiction' to punish for contempt is lacking if the

statutory procedure is not followed or the grounds not clearly established." 8 B. Witkin, *supra*, *Extraordinary Writs* § 33; *see also* Broaddus, Note, *Contempt: Scope of Review of Contempt Orders in California*, 37 Cal. L. Rev. 301, 305 (1949).

Further, writ review is more thorough when a ruling is nonappealable than when a litigant seeks interim review of a ruling that will later be subject to review on appeal. As the California Supreme Court explained in *Powers v. City of Richmond*, 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995),

> Although appellate review by extraordinary writ petition is said to be discretionary, a court must exercise its discretion "within reasonable bounds and for a proper reason."... The discretionary aspect of writ review comes into play primarily when the petitioner has another remedy by appeal and the issue is whether the alternative remedy is adequate....
>
> When an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted. ... [A]n appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.

(Citations & footnotes omitted.) It is perhaps not surprising, then, that we have found no modern authority other than Witkin suggesting that a contempt order be made appealable.

Analysis and Suggested Approach

Where does this leave us?

First, **the Commission should not attempt to change the rule that a contempt order is nonappealable.** There does not seem to be any compelling reason for making such a change. Further, the Commission is only authorized to study revisions necessary to accomplish trial court unification or remove material made obsolete by trial court restructuring. The Commission does not have broad authority to substantively overhaul every provision that requires adjustment to reflect trial court restructuring, much less a provision such as Code of Civil Procedure Section 1222 (contempt order nonappealable), which merely relates in content to one that requires adjustment to reflect trial court restructuring.

Second, it is a closer question but it also seems advisable to **essentially preserve existing law on the appealability of a ruling on a petition for a writ of certiorari in what is now a limited civil case.** Attempting to preclude an appeal

from an appellate division decision in such a case might be unconstitutional. If the Legislature precluded an appeal in such circumstances, it would exacerbate the peer review problem that arose from trial court unification, albeit in a narrow context. Precluding an appeal probably would not significantly alleviate the workload of the courts of appeal; it seems unlikely that many cases fall into this category. Although unequal treatment of similarly situated litigants used to be a valid concern in allowing such an appeal, the differential treatment of litigants in limited and unlimited civil cases is now to some extent justifiable due to the peer review problem. Procedural complications stemming from the potential for multiple appeals probably will not occur often and will not be insurmountable. It seems best just to stick with the existing policy choice of allowing an appeal. A different conclusion might be appropriate were it not for the constitutional constraint on reducing appellate jurisdiction.

Third, it also seems best to **stick with current policy precluding an appeal from a ruling on a petition for mandamus or prohibition in what is now a limited civil case.** That policy choice was adopted in response to judicial concerns about the consequences of permitting an appeal, which were voiced in *Burrus*, *Gilbert*, and a report of the Judicial Council. The concerns relating to the workload of the courts of appeal and the potential for procedural complications appear as valid today as in the past. The concern about unequal treatment of similarly situated litigants is less valid now than in the past, due to the peer review problem created by trial court unification. It would be misguided, however, to try to address that problem piecemeal, by allowing an appeal in this situation. A more global solution would be preferable.

The Commission should therefore **proceed with the proposed amendments of Code of Civil Procedure Sections 904.1 and 904.2 shown above, and the proposed addition of Code of Civil Procedure Section 904.3.** In addition to preserving the pre-unification status quo, this approach would best accommodate the relevant policy considerations and the critical constitutional constraint on appellate jurisdiction.

Conforming Revisions

The staff searched the codes for provisions that would need to be conformed if the Commission decides to proceed with the three reforms discussed above. We found three provisions that refer to Code of Civil Procedure Section 904.3 even though no such section presently exists. These provisions need to be fixed

regardless of what the Commission decides to do about the appellate jurisdiction issues.

Code of Civil Procedure Section 904

One of the three provisions (Code Civ. Proc. § 904) is already incorporated into the Commission's tentative recommendation on *Technical and Minor Substantive Statutory Corrections* (April 2006) (available from the Commission, www.clrc.ca.gov). The Commission has proposed to delete the obsolete cross-reference to former Code of Civil Procedure Section 904.3. That amendment will require adjustment if a new Section 904.3 is added as discussed above. The staff will take appropriate steps to coordinate the two Commission proposals if needed.

Code of Civil Procedure Section 399

Code of Civil Procedure Section 399 is another provision with an obsolete cross-reference to former Section 904.3, which pertained to now-nonexistent justice courts. Section 399 is a lengthy provision that could use extensive nonsubstantive clean-up. Although it is tempting to propose such clean-up, that might prompt disputes unrelated to trial court restructuring and perhaps impede the Commission's efforts to make statutory revisions necessitated by trial court restructuring.

The staff therefore suggests using a relatively light touch. To prevent confusion, especially if a new Section 904.3 is added, **the cross-reference to former Section 904.3 should be deleted.** The Commission should also **fix some other incorrect cross-references, insert subdivision labels, make revisions to account for entities of neutral gender, and eliminate or replace the term "such,"** which Legislative Counsel would otherwise do of its own accord in preparing a bill draft to implement the Commission's proposal**:**

> **Code Civ. Proc. § 399 (amended). Transfer of action or proceeding**
>
> SEC. ____. Section 399 of the Code of Civil Procedure is amended to read:
>
> 399. (a) When an order is made transferring an action or proceeding under any of the provisions of this title, the clerk shall, after expiration of the time within which a petition for writ of mandate could have been filed pursuant to Section 400, or if ~~such~~ a writ petition is filed after judgment denying the writ becomes final, and upon payment of the costs and fees, transmit the pleadings and papers therein (or if the pleadings be oral a transcript of the same) to the clerk of the court to which the same is transferred. When the

transfer is sought on any ground specified in subdivisions ~~2, 3, 4 and 5~~ (b), (c), (d), and (e) of Section 397, the costs and fees thereof, and of filing the papers in the court to which the transfer is ordered, shall be paid at the time the notice of motion is filed, by the party making the motion for the transfer. When the transfer is sought solely, or is ordered, because the action or proceeding was commenced in a court other than that designated as proper by this title, ~~such~~ those costs and fees (including any expenses and attorney's fees awarded defendant pursuant to Section 396b) shall be paid by the plaintiff before ~~such~~ the transfer is made; and ~~if, in any such case,~~ if the defendant has paid ~~such~~ those costs and fees at the time of filing ~~his or her~~ a notice of motion, the same shall be repaid to the defendant, upon the making of ~~such~~ the transfer order. If ~~such~~ those costs and fees have not been so paid by the plaintiff within five days after service of notice of ~~such~~ the transfer order, then any other party interested therein, whether named in the complaint as a party or not, may pay ~~such~~ those costs and fees, and the clerk shall thereupon transmit the papers and pleadings therein as if ~~such~~ those costs and fees had been originally paid by the plaintiff, and the same shall be a proper item of costs of the party so paying the same, recoverable by ~~such~~ that party in the event ~~he or she~~ that party prevails in the action; otherwise, the same shall be offset against and deducted from the amount, if any, awarded the plaintiff in the event the plaintiff prevails against ~~such~~ that party in ~~such~~ the action. The cause of action shall not be further prosecuted in any court until ~~such~~ those costs and fees are paid. If ~~such~~ those costs and fees are not paid within 30 days after service of notice of ~~such~~ the transfer order, or if a copy of a petition for writ of mandate pursuant to Section 400 is filed in the trial court, or if an appeal is taken pursuant to Section 904.2 ~~or 904.3~~, then within 30 days after notice of finality of the order of transfer, the court on a duly noticed motion by any party may dismiss the action without prejudice to the cause on the condition that no other action on the cause may be commenced in another court prior to satisfaction of the court's order for costs and fees. When a petition for writ of mandate or appeal does not result in a stay of proceedings, the time for payment of ~~such~~ those costs shall be 60 days after service of the notice of the order.

(b) At the time of transmittal of the papers and pleadings, the clerk shall mail notice to all parties who have appeared in the action or special proceeding, stating the date on which ~~such~~ transmittal occurred. Promptly upon receipt of ~~such~~ the papers and pleadings, the clerk of the court to which the action or proceeding is transferred shall mail notice to all parties who have appeared in the action or special proceeding, stating the date of the filing of the case and number assigned to the case in ~~such~~ the court.

(c) The court to which an action or proceeding is transferred under this title shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, all prior

proceedings being saved, and ~~such~~ the court may require ~~such~~ amendment of the pleadings, the filing and service of ~~such~~ amended, additional, or supplemental pleadings, and the giving of ~~such~~ notice, as may be necessary for the proper presentation and determination of the action or proceeding in ~~such~~ the court.

Comment. Section 399 is amended to delete an obsolete cross-reference to former Section 904.3, relating to appeals from justice courts. The justice courts no longer exist and former Section 904.3 was repealed. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994); 1976 Cal. Stat. ch. 1288, § 13.

Section 399 is also amended to correct the cross-references to subdivisions of Section 397. Former subdivisions (2)-(5) were relabeled as subdivisions (b)-(e). See 1992 Cal. Stat. ch. 163, § 19. Section 399 is revised to reflect that change.

Section 399 is further amended to insert subdivisions and make stylistic revisions.

Code of Civil Procedure Section 586

Code of Civil Procedure Section 586 is the third provision with an obsolete cross-reference to former Section 904.3. **It should be amended along the following lines:**

Code Civ. Proc. § 586 (amended). Judgment as if defendant failed to answer

SEC. ____. Section 586 of the Code of Civil Procedure is amended to read:

586. (a) In the following cases the same proceedings shall be had, and judgment shall be rendered in the same manner, as if the defendant had failed to answer:

(1) If the complaint has been amended, and the defendant fails to answer it, as amended, or demur thereto, or file a notice of motion to strike, of the character specified in Section 585, within 30 days after service thereof or within the time allowed by the court.

(2) If the demurrer to the complaint is overruled and a motion to strike, of the character specified in Section 585, is denied, or where only one thereof is filed, if the demurrer is overruled or the motion to strike is denied, and the defendant fails to answer the complaint within the time allowed by the court.

(3) If a motion to strike, of the character specified in Section 585, is granted in whole or in part, and the defendant fails to answer the unstricken portion of the complaint within the time allowed by the court, no demurrer having been sustained or being then pending.

(4) If a motion to quash service of summons or to stay or ~~dismiss,~~ dismiss the action has been filed, or writ of mandate sought and notice thereof given, as provided in Section 418.10, and upon denial of ~~such~~ the motion or writ, defendant fails to respond

to the ~~complaint,~~ complaint within the time provided in ~~such~~ that section or as otherwise provided by law.

(5) If the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court.

(6)(A) If a motion to transfer pursuant to Section 396b is denied and the defendant fails to respond to the complaint within the time allowed by the court pursuant to subdivision (e) of Section 396b or within the time provided in subparagraph (C).

(B) If a motion to transfer pursuant to Section 396b is granted and the defendant fails to respond to the complaint within 30 days of the mailing of notice of the filing and case number by the clerk of the court to which the action or proceeding is transferred or within the time provided in subparagraph (C).

(C) If the order granting or denying a motion to transfer pursuant to Section 396a or 396b is the subject of an appeal pursuant to Section 904.2 ~~or 904.3~~ in which a stay is granted or of a mandate proceeding pursuant to Section 400, the court having jurisdiction over the trial, upon application or on its own motion after ~~such~~ the appeal or mandate proceeding becomes final or upon earlier termination of a stay, shall allow the defendant a reasonable time to respond to the complaint. Notice of the order allowing the defendant further time to respond to the complaint shall be promptly served by the party who obtained ~~such~~ the order or by the clerk if the order is made on the court's own motion.

(7) If a motion to strike the answer in whole, of the character specified in Section 585, is granted without leave to amend, or if a motion to strike the answer in whole or in part, of the character specified in Section 585, is granted with leave to amend and the defendant fails to amend the answer within the time allowed by the court.

(8) If a motion to dismiss pursuant to Section 583.250 is denied and the defendant fails to respond within the time allowed by the court.

(b) For the purposes of this section, "respond" means to answer, to demur, or to move to strike.

Comment. Subdivision (a)(6)(C) of Section 586 is amended to delete an obsolete cross-reference to former Section 904.3, relating to appeals from justice courts. The justice courts no longer exist and former Section 904.3 was repealed. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994); 1976 Cal. Stat. ch. 1288, § 13.

Section 586 is further amended to make stylistic revisions.

WRIT JURISDICTION

In researching how to amend Section 904.1, the staff spotted an issue relating to writ jurisdiction in a small claims case after trial court unification.

Writ Jurisdiction After Trial Court Unification

Code of Civil Procedure Section 1068 authorizes a court, in specified circumstances, to issue a writ of certiorari to an "inferior tribunal, board, or officer." Code of Civil Procedure Sections 1085 and 1103 are similar provisions relating to a writ of mandamus and a writ of prohibition.

All three of these sections were amended on Commission recommendation in 1998 and 1999, so as to accommodate trial court unification. Section 1068 was amended to add subdivision (b), concerning issuance of a writ of certiorari by the appellate division of the superior court:

> (b) The appellate division of the superior court may grant a writ of review directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

This provision implements Article VI, Section 10, of the California Constitution, which 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.*
>
> ....

(Emphasis added.) The changes to Sections 1085 and 1103 were similar.

Sections 1068(b), 1085(b), and 1103(b) state that the appellate division of the superior court may grant a writ of certiorari, mandamus, or prohibition directed to the superior court in a limited civil case. Although this is correct as a general rule, the provisions might create some confusion with regard to a small claims case.

Writ Jurisdiction in a Small Claims Case

"A small claims case is a limited civil case." *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court of Los Angeles County*, 88 Cal. App. 4th 136, 138, 105 Cal. Rptr. 2d 552 (2001). "Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the statute or rule applicable to a small claims case governs

the small claims case and the statute or rule applicable to a limited civil case does not." Code Civ. Proc. § 87.

A small claims plaintiff has no right to appeal an adverse judgment. Code Civ. Proc. § 116.710. A small claims defendant does have a right to appeal an adverse judgment. But the appeal is not to the appellate division of the superior court. Rather, "[t]he appeal to the superior court shall consist of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division." Code Civ. Proc. § 116.770(a).

Thus, the appellate division of the superior court does not have jurisdiction of a small claims appeal. Under Article VI, Section 10, of the California Constitution, it follows that the appellate division does not have original jurisdiction of a petition for an extraordinary writ seeking to overturn a judgment or prejudgment ruling entered by the small claims court.

Clarification of Code of Civil Procedure Sections 1068, 1085, and 1103

This limitation on the jurisdiction of the appellate division is implicit in Code of Civil Procedure Sections 1068, 1085, and 1103, which must be harmonized with constitutional constraints. To prevent confusion in small claims cases, however, **those provisions should be revised to make explicit that the appellate division only has jurisdiction of a writ petition in a cause that is subject to its appellate jurisdiction**:

> **Code Civ. Proc. § 1068 (amended). Courts authorized to grant writ of review**
>
> SEC. ____. Section 1068 of the Code of Civil Procedure is amended to read:
>
> 1068. (a) A writ of review may be granted by any court when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of ~~such~~ that tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.
>
> (b) The appellate division of the superior court may grant a writ of review directed to the superior court in a limited civil case subject to its appellate jurisdiction or in a misdemeanor or infraction case subject to its appellate jurisdiction. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.
>
> **Comment.** Subdivision (b) of Section 1068 is amended to more closely track the language of Article VI, Section 10, of the California Constitution. This is not a substantive change.

The amendment helps clarify the treatment of a small claims case. An appeal from a judgment in a small claims case is not within the jurisdiction of the appellate division. Rather, such an appeal consists of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division. See Section 116.770(a). Because the appellate division lacks jurisdiction of a small claims appeal, the appellate division also lacks authority to review a judgment or a prejudgment ruling in a small claims case by way of extraordinary writ. See Cal. Const. art. VI, § 10. For further guidance on seeking a writ of review in a small claims case, see Section 1068.5.

Section 1068 is also amended to make a stylistic revision.

Code Civ. Proc. § 1085 (amended). Courts authorized to grant writ of mandate

SEC. ____. Section 1085 of the Code of Civil Procedure is amended to read:

1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by ~~such~~ that inferior tribunal, corporation, board, or person.

(b) The appellate division of the superior court may grant a writ of mandate directed to the superior court in a limited civil case subject to its appellate jurisdiction or in a misdemeanor or infraction case subject to its appellate jurisdiction. Where the appellate division grants a writ of ~~review~~ mandate directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

Comment. The first sentence of subdivision (b) of Section 1085 is amended to more closely track the language of Article VI, Section 10, of the California Constitution. This is not a substantive change.

The amendment helps clarify the treatment of a small claims case. An appeal from a judgment in a small claims case is not within the jurisdiction of the appellate division. Rather, such an appeal consists of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division. See Section 116.770(a). Because the appellate division lacks jurisdiction of a small claims appeal, the appellate division also lacks authority to review a judgment or a prejudgment ruling in a small claims case by way of extraordinary writ. See Cal. Const. art. VI, § 10. For further guidance on seeking a writ of mandate in a small claims case, see Section 1085.3.

The second sentence of subdivision (b) is amended to refer to a writ of mandate instead of a writ of review.

Section 1085 is also amended to make a stylistic revision.

Code Civ. Proc. § 1103 (amended). Courts authorized to grant writ of prohibition

SEC. ____. Section 1103 of the Code of Civil Procedure is amended to read:

1103. (a) A writ of prohibition may be issued by any court to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested.

(b) The appellate division of the superior court may grant a writ of prohibition directed to the superior court in a limited civil case subject to its appellate jurisdiction or in a misdemeanor or infraction case subject to its appellate jurisdiction. Where the appellate division grants a writ of ~~review~~ prohibition directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

Comment. The first sentence of subdivision (b) of Section 1103 is amended to more closely track the language of Article VI, Section 10, of the California Constitution. This is not a substantive change.

The amendment helps clarify the treatment of a small claims case. An appeal from a judgment in a small claims case is not within the jurisdiction of the appellate division. Rather, such an appeal consists of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division. See Section 116.770(a). Because the appellate division lacks jurisdiction of a small claims appeal, the appellate division also lacks authority to review a judgment or a prejudgment ruling in a small claims case by way of extraordinary writ. See Cal. Const. art. VI, § 10. For further guidance on seeking a writ of prohibition in a small claims case, see Section 1103.5.

The second sentence of subdivision (b) is amended to refer to a writ of prohibition instead of a writ of review.

Further Clarification of Writ Jurisdiction in a Small Claims Case

The Commission should also take several other steps to clarify the treatment of a writ petition in a small claims case.

First, it would be helpful to **specify where to direct a writ petition challenging a judgment or prejudgment ruling in a small claims case.** Before unification, a small claims litigant could seek such a writ from a judge of the superior court (not the appellate department of the superior court). *See, e.g., City & County of San Francisco v. Small Claims Court for the Northern Judicial District of San Mateo County,* 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983); *Gardiana v. Small Claims Court for the San Leandro Hayward Judicial District of Alameda County*,

59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976). Such a writ could also be sought in the courts of appeal or the California Supreme Court, where necessary to "secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them." *Davis v. Superior Court*, 102 Cal. App. 3d 164, 162 Cal. Rptr. 167 (1980); *see also Houghtaling v. Superior Court*, 17 Cal. App. 4th 1128, 1131, 21 Cal. Rptr. 2d 855 (1993).

In a unified court system, it seems clear that the superior court, courts of appeal, and the California Supreme Court continue to have original jurisdiction of a writ petition challenging a judgment or prejudgment ruling in a small claims case. See Cal. Const. art. VI, § 10. But a superior court judge should not review the judge's own decisions. The transitional provision implementing trial court unification (Cal. Const. art. VI, § 23) recognizes this: It provides that upon unification, "[m]atters of a type previously subject to rehearing by a superior court judge remain subject to rehearing by a superior court judge, *other than the judge who originally heard the matter*. (Emphasis added.) Similarly, Code of Civil Procedure Section 116.770 accommodates trial court unification by providing that a small claims appeal "shall consist of a new hearing before a judicial officer *other than the judicial officer who heard the action in the small claims division*." (Emphasis added.) **Similar statutory language should be added to make clear that a writ petition challenging a judgment or prejudgment ruling in a small claims case can only be considered by a judicial officer other than the one who made the challenged ruling.**

Further, a postjudgment enforcement order of a small claims court warrants different treatment than a judgment or prejudgment ruling of the small claims court. A small claims judgment is to be enforced in the same manner as other judgments. Code Civ. Proc. § 116.820. "Since there are no small claims statutes or rules concerning the appeal of postjudgment enforcement orders, the limited civil case statutes and rules are applicable." *General Electric Capital*, 88 Cal. App. 4th at 144; see Code Civ. Proc. § 87. "Those statutes explicitly provide for *appellate division* jurisdiction of limited civil case postjudgment order review." *General Electric Capital*, 88 Cal. App. 4th at 144 (emphasis added); see Code Civ. Proc. § 904.2. Thus, "the *appellate division* of the superior court ... has extraordinary writ jurisdiction of postjudgment enforcement orders in small claims actions." *General Electric Capital*, 88 Cal. App. 4th at 145 (emphasis added). This parallels the pre-unification situation, in which "small claims postjudgment enforcement orders were reviewed by the appellate department of the superior court ...." *Id*. **The**

codes should clearly reflect this distinction in treatment between a postjudgment enforcement order and a judgment or prejudgment ruling in a small claims case.

The objectives identified above could be achieved by **adding the following new provisions to the Code of Civil Procedure:**

Code Civ. Proc. § 1068.5 (added). Writ of review in small claims case

SEC. ____. Section 1068.5 is added to the Code of Civil Procedure, to read:

1068.5. (a) A writ of review directed to a superior court with respect to a judgment or a prejudgment ruling of the small claims division may be granted by an appellate court or by a judicial officer of the superior court, other than the judicial officer who heard the case in the small claims division. Where a judicial officer of a superior court grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

(b) A writ of review directed to the superior court with respect to a postjudgment enforcement order in a small claims case may be granted by an appellate court or by the appellate division of the superior court.

Comment. Section 1068.5 is added to clarify the proper treatment of a writ petition relating to a small claims case.

Subdivision (a) makes clear that if a writ of review is sought in superior court with respect to a judgment or prejudgment ruling of the small claims division, the writ proceeding is to be heard by a judicial officer of the superior court other than the one who heard the case in the small claims division. This parallels the treatment of a small claims appeal. See Section 116.770 (small claims appeal is to be heard by judicial officer of superior court other than officer who heard case in small claims division); see also Section 1068 Comment (200x) (appellate division lacks writ jurisdiction of judgment or prejudgment ruling in small claims case); City & County of San Francisco v. Small Claims Court for the Northern Judicial District of San Mateo County, 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983) (superior court judge has writ jurisdiction of judgment or prejudgment ruling in small claims case); Gardiana v. Small Claims Court for the San Leandro Hayward Judicial District of Alameda County, 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976) (same).

Subdivision (b) codifies *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court of Los Angeles County*, 88 Cal. App. 4th 136, 105 Cal. Rptr. 2d 552 (2001). A small claims case is a limited civil case. *Id.* at 138. Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the statute or rule applicable to a small claims case governs. Section 87.

A special statute governs a small claims appeal (Section 116.770), so the general rule giving the appellate division jurisdiction of an appeal in a limited civil case (Section 904.2) is inapplicable. But there is no special statute governing appeal of a postjudgment enforcement order in a small claims case. Consequently, the situation is governed by the general rule giving the appellate division jurisdiction of an appeal in a limited civil case. *General Electric Capital*, 88 Cal. App. 4th at 138, 144.

Because the appellate division has appellate jurisdiction of a postjudgment enforcement order in a small claims case, the appellate division also has extraordinary writ jurisdiction of a postjudgment enforcement order in a small claims case. *Id*. at 145; see Cal. Const. art. VI, § 10. Subdivision (b) thus states the rule of Section 1068(b) as applied in the specific context of a postjudgment enforcement order in a small claims case.

Code Civ. Proc. § 1085.3 (added). Writ of mandate in small claims case

SEC. ____. Section 1085.3 is added to the Code of Civil Procedure, to read:

1085.3. (a) A writ of mandate directed to a superior court with respect to a judgment or prejudgment ruling of the small claims division may be granted by an appellate court or by a judicial officer of the superior court, other than the judicial officer who heard the case in the small claims division. Where a judicial officer of a superior court grants a writ of mandate directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

(b) A writ of mandate directed to the superior court with respect to a postjudgment enforcement order in a small claims case may be granted by an appellate court or by the appellate division of the superior court.

Comment. Section 1085.3 is added to clarify the proper treatment of a writ petition relating to a small claims case.

Subdivision (a) makes clear that if a writ of mandate is sought in superior court with respect to a judgment or prejudgment ruling of the small claims division, the writ proceeding is to be heard by a judicial officer of the superior court other than the one who heard the case in the small claims division. This parallels the treatment of a small claims appeal. See Section 116.770 (small claims appeal is to be heard by judicial officer of superior court other than officer who heard case in small claims division); see also Section 1085 Comment (200x) (appellate division lacks writ jurisdiction of judgment or prejudgment ruling in small claims case); City & County of San Francisco v. Small Claims Court for the Northern Judicial District of San Mateo County, 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983) (superior court judge has writ jurisdiction of judgment or prejudgment ruling in small claims case); Gardiana v. Small Claims

Court for the San Leandro Hayward Judicial District of Alameda County, 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976) (same).

Subdivision (b) codifies *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court of Los Angeles County*, 88 Cal. App. 4th 136, 105 Cal. Rptr. 2d 552 (2001). A small claims case is a limited civil case. *Id.* at 138. Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the statute or rule applicable to a small claims case governs. Section 87.

A special statute governs a small claims appeal (Section 116.770), so the general rule giving the appellate division jurisdiction of an appeal in a limited civil case (Section 904.2) is inapplicable. But there is no special statute governing appeal of a postjudgment enforcement order in a small claims case. Consequently, the situation is governed by the general rule giving the appellate division jurisdiction of an appeal in a limited civil case. *General Electric Capital*, 88 Cal. App. 4th at 138, 144.

Because the appellate division has appellate jurisdiction of a postjudgment enforcement order in a small claims case, the appellate division also has extraordinary writ jurisdiction of a postjudgment enforcement order in a small claims case. *Id.* at 145; see Cal. Const. art. VI, § 10. Subdivision (b) thus states the rule of Section 1085(b) as applied in the specific context of a postjudgment enforcement order in a small claims case.

Code Civ. Proc. § 1103.5 (added). Writ of prohibition in small claims case

SEC. ____. Section 1103.5 is added to the Code of Civil Procedure, to read:

1103.5. (a) A writ of prohibition directed to a superior court with respect to a judgment or a prejudgment ruling of the small claims division may be granted by an appellate court or by a judicial officer of the superior court, other than the judicial officer who heard the case in the small claims division. Where a judicial officer of a superior court grants a writ of prohibition directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

(b) A writ of prohibition directed to the superior court with respect to a postjudgment enforcement order in a small claims case may be granted by an appellate court or by the appellate division of the superior court.

Comment. Section 1103.5 is added to clarify the proper treatment of a writ petition relating to a small claims case.

Subdivision (a) makes clear that if a writ of prohibition is sought in superior court with respect to a judgment or prejudgment ruling of the small claims division, the writ proceeding is to be heard by a judicial officer of the superior court other than the one who heard the case in the small claims division. This parallels the treatment of

a small claims appeal. See Section 116.770 (small claims appeal is to be heard by judicial officer of superior court other than officer who heard case in small claims division); see also Section 1085 Comment (200x) (appellate division lacks writ jurisdiction of judgment or prejudgment ruling in small claims case); City & County of San Francisco v. Small Claims Court for the Northern Judicial District of San Mateo County, 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983) (superior court judge has writ jurisdiction of judgment or prejudgment ruling in small claims case); Gardiana v. Small Claims Court for the San Leandro Hayward Judicial District of Alameda County, 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (1976) (same).

Subdivision (b) codifies *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court of Los Angeles County*, 88 Cal. App. 4th 136, 105 Cal. Rptr. 2d 552 (2001). A small claims case is a limited civil case. *Id.* at 138. Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the statute or rule applicable to a small claims case governs. Section 87.

A special statute governs a small claims appeal (Section 116.770), so the general rule giving the appellate division jurisdiction of an appeal in a limited civil case (Section 904.2) is inapplicable. But there is no special statute governing appeal of a postjudgment enforcement order in a small claims case. Consequently, the situation is governed by the general rule giving the appellate division jurisdiction of an appeal in a limited civil case. *General Electric Capital*, 88 Cal. App. 4th at 138, 144.

Because the appellate division has appellate jurisdiction of a postjudgment enforcement order in a small claims case, the appellate division also has extraordinary writ jurisdiction of a postjudgment enforcement order in a small claims case. *Id*. at 145; see Cal. Const. art. VI, § 10. Subdivision (b) thus states the rule of Section 1103(b) as applied in the specific context of a postjudgment enforcement order in a small claims case.

Respectfully submitted,

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