Study J-1402 November 21, 2006

Memorandum 2006-44

Statutes Made Obsolete By Trial Court Restructuring: Part 3 (Comments on Tentative Recommendation)

The comment period has ended for the tentative recommendation on *Statutes Made Obsolete By Trial Court Restructuring: Part 3* (Aug. 2006). The Commission received the following comments:

Exhibit p.

- State Bar of California — Committee on Appellate Courts (10/26/06).....1
- State Board of Equalization, Margaret Shedd (10/10/06).....4
- Superior Court of San Diego County, Mike Roddy (10/30/06).....5
- Superior Court of Santa Clara County, Alex Cerul (10/5/06).....6

We are still expecting comments from the Administrative Office of the Courts ("AOC") relating to writ jurisdiction in a small claims case. Those comments will be presented in a supplement to this memorandum. The comments on hand are discussed below. The Commission needs to consider the comments and determine whether to approve the proposal as a final recommendation, with or without revisions.

The proposal addresses four topics: (1) court appearance by two-way electronic audiovideo communication, (2) appellate jurisdiction, (3) writ jurisdiction in a small claims case, and (4) concurrent jurisdiction. The comments on each topic are discussed in the same order that they appear in the tentative recommendation.

COURT APPEARANCE BY TWO-WAY ELECTRONIC AUDIOVIDEO COMMUNICATION

Under specified circumstances, Penal Code Sections 977 and 977.2 permit a court to conduct certain proceedings in a criminal case by two-way audiovideo communication. The tentative recommendation proposes to amend those provisions to substitute more precise language for the phrase "initial hearing in

superior court in a felony case," which became ambiguous due to trial court unification.

Despite efforts to broadly circulate the tentative recommendation, there was only one comment on the amendments of Penal Code Sections 977 and 977.2. The Superior Court of San Diego County "agrees with the revisions to Penal Code Sections 977 and 977.2." Exhibit p. 5. In light of this input and the lack of any objection, the Commission should **proceed with the proposed revisions of Penal Code Sections 977 and 977.2.**

The amendment of Section 977.2 needs to be adjusted, however, to account for legislation enacted in 2006. The changes made in 2006 are unrelated to and have no impact on the revisions proposed by the Commission. A revised version of the amendment is attached at Exhibit pages 13-15. The Commission should **substitute this version for the corresponding amendment in the tentative recommendation.**

APPELLATE JURISDICTION

Code of Civil Procedure Section 904.1(a)(1)(C) was enacted 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. The provision was amended in 1998 to accommodate trial court unification and reflect the elimination of the justice courts. Since then, the municipal courts have been eliminated. Further revisions are necessary to reflect this development.

The tentative recommendation proposes three reforms to preserve the intended effect of Section 904.1(a)(1)(C) after elimination of the municipal courts:

(1) **Delete the provision from Section 904.1.** The provision no longer fits in Section 904.1 because it was meant to apply to issuance of a writ in the types of cases that used to be adjudicated in the municipal and justice courts. In contrast, Section 904.1 now applies to the types of cases that were adjudicated in the superior courts before unification (a case "other than a limited civil case").

(2) **Add a new provision to preserve the intended effect of Section 904.1(a)(1)(C) in a system without municipal courts.** Proposed new Code of Civil Procedure Section 904.3 would 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 or a misdemeanor or infraction case.

(3) **Amend Code of Civil Procedure Section 904.2 to clarify its applicability.** The proposed amendment would make 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 new 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.

The comments on these proposed revisions were generally supportive. They touched on a number of different points.

General Reaction

The San Diego County Superior Court "agrees with the addition of Code of Civil Procedure Section 904.3 ...." Exhibit p. 5. Likewise, the State Bar Committee on Appellate Courts "generally supports" the proposed revisions relating to appellate jurisdiction. Exhibit p. 1. The committee says that the revisions "would not change the law but would delete obsolete references to the municipal court." *Id*. That was the Commission's objective in proposing the revisions.

Criminal Cases

Proposed new Section 904.3 would expressly refer to a writ petition relating to a misdemeanor or infraction case, not just a writ petition relating to a limited civil case. In the tentative recommendation, the Commission specifically solicited input on whether this approach makes sense. The Commission also solicited input on whether there should be two new provisions instead of only one: a provision in the Code of Civil Procedure that pertains to a writ petition in a limited civil case, and a provision in the Penal Code that pertains to a writ petition in a misdemeanor or infraction case.

The San Diego County Superior Court recommends that the proposed revisions remain as drafted. According to the court, a "separate Penal Code section is neither necessary or advisable." Exhibit p. 5. The court explains:

> Existing Code of Civ. Proc. §§ 1068(b), 1085(b) and 1103(b), dealing with writ review, reference misdemeanor and infraction cases. This makes sense because writ petitions are civil in nature even when they pertain to proceedings in criminal cases. It would follow logically that provisions for appellate review of judgments on these civil proceedings would also be found in the Code of Civil Procedure. There are a number of provisions in the Penal Code pertaining to writ review. Nothing in the proposed amendments conflicts with or duplicates those provisions.

Id.

The State Bar Committee on Appellate Courts takes the same position. It "supports the current recommendation" and offers the following explanation:

> Pretrial writs are generally considered civil matters even when the underlying action is criminal in nature. Hence, they have always been discussed in the Code of Civil Procedure. Until now, there was no need to distinguish between underlying civil and criminal actions. A simple reference to the municipal court sufficed. Now the statute must refer to limited civil actions and misdemeanors and infractions. But doing so should cause no problem. Covering writ jurisdiction in one place, and in the Code of Civil Procedure, is preferable to dividing it into two codes, the Code of Civil Procedure and the Penal Code, when the rule will be the same as to both.

Exhibit p. 1. In light of these comments, the Commission should **stick with the approach in the tentative recommendation with respect to a writ in a misdemeanor or infraction case.**

Writ of Certiorari

Proposed Section 904.3 would preclude an appeal from a judgment of the appellate division on a petition for a writ of *mandamus or prohibition* in a limited civil case or a misdemeanor or infraction case. In drafting the provision, the Commission considered the possibility of also precluding an appeal from a judgment of the appellate division on a petition for a writ of *certiorari* in a limited civil case or a misdemeanor or infraction case.

The Commission rejected that approach because it "would go beyond merely adjusting the codes to reflect trial court unification ...." *Tentative Recommendation on Statutes Made Obsolete by Trial Court Restructuring: Part 3* (Aug. 2006), p. 8, n.39. The Commission also cautioned that the approach might "be challenged as unconstitutional under Article VI, Section 11, of the California Constitution (Except in death penalty cases, '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.')." *Id.*

The State Bar Committee on Appellate Courts invites the Commission to reconsider that decision. Exhibit pp. 1-3. The committee suggests that "proposed new Code of Civil Procedure section 904.3 should additionally preclude an appeal from a judgment of the appellate division of the superior court granting or denying a petition for a writ of certiorari in a limited civil case or a misdemeanor or infraction case." *Id.* at 1.

The committee explains that taking this step

> would finally close what the Supreme Court described as a "loophole" in the decision that recognized that the Legislature failed to close it in 1982. (*Bermudez v. Municipal Court* (1992) 1 Cal. 4th 855, 864.) The committee sees no reason to provide greater review of contempt matters in limited civil cases and misdemeanor and infraction cases than is available for contempt matters in major civil and felony cases. It agrees with the Supreme Court's observation "that it is 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, and we invite the Legislature to consider this anomaly." (*Id*. at p. 864, fn. 7.)

Exhibit pp. 1-2.

The committee "appreciates that the Commission is primarily interested in merely deleting obsolete references to municipal courts, rather than recommending substantive changes." *Id*. at 2. But the committee suggests that the Commission "seriously consider this one, as it can be easily done simply by adding 'or certiorari' to the list of petitions from which an appeal may not be taken in the proposed new Code of Civil Procedure section 904.3." *Id*.

The committee "also appreciates the constitutional concern the Commission expressed ...." *Id*. The committee believes, however, that "a strong plain-meaning argument exists that the constitution permits this particular change." *Id*. Under Article VI, Section 11, in non-capital cases "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." (Emphasis added.) The committee says that the change it recommends would not run afoul of this constitutional constraint because the recommended change would "not affect matters within the original jurisdiction of the *superior courts*, but rather of the *appellate division of the superior court*." Exhibit p. 2 (emphasis in original).

The Commission previously considered all of these points. See CLRC Memorandum 2006-21, pp. 2-23. It decided to stick with the approach it has successfully used throughout its work on trial court restructuring: making the codes workable in the restructured court system, without attempting additional substantive reforms. See CLRC Minutes (June 2006, pp. 12-16). In many instances, it has been tempting to deviate from that approach. Instead, the Commission has left the substantive reforms for future legislation, either in the

context of a legislatively-authorized Commission study or as a matter to be pursued by others.

The staff recommends that the Commission continue to follow that approach. **Proposed new Code of Civil Procedure Section 904.3 should be left as in the tentative recommendation.** The Commission should also proceed with the other appellate jurisdiction reforms proposed in the tentative recommendation — the proposed amendments of Code of Civil Procedure Sections 904.1 and 904. Those amendments need to be adjusted, however, to account for legislation enacted in 2006. The changes made in 2006 are unrelated to and have no impact on the revisions proposed by the Commission. Revised versions of these amendments are attached at Exhibit pages 11-13. The Commission should **substitute these versions for the corresponding amendments in the tentative recommendation.**

This is not to say that the approach proposed by the State Bar Committee on Appellate Courts lacks merit. At some point, it may well be appropriate to preclude appeal from a judgment of the appellate division on a petition for a writ of certiorari in a limited civil case or a misdemeanor or infraction case. Perhaps the committee will want to pursue such a reform. As the committee acknowledges, however, "it may be appropriate to consider soliciting public comment" before proceeding on the matter in the Legislature. Exhibit p. 3.

Bail Forfeiture

The presiding judge of the Superior Court of Santa Clara County and the judges of that court's appellate division request that the Commission examine an issue relating to "appellate jurisdiction in certain instances of bail forfeiture." Exhibit p. 6. Due to the elimination of the municipal courts, it is no longer clear which appellate tribunal — the appellate division or the court of appeal — has jurisdiction over forfeiture of "(1) bail in misdemeanor cases over $25,000, (2) bail in felony cases under $25,000, and (3) bail, in any amount, forfeited in the pre information (magistrate) procedural posture." *Id*. at 9.

This is an important matter and it deserves prompt attention. The Commission **should study it in the coming year and attempt to develop clarifying legislation that can be introduced in 2008.** Because the issue was not covered in this year's tentative recommendation and is unrelated to the matters that were covered, the Commission **should not attempt to address it in the current package of reforms.**

The tentative recommendation proposes several reforms relating to writ jurisdiction in a small claims case.

- **Amend Code of Civil Procedure Sections 1068, 1085, and 1103.** The proposed amendments would make explicit that the appellate division of the superior court only has jurisdiction of a writ petition in a cause that is subject to its appellate jurisdiction. This would track the language of the corresponding constitutional provision (Cal. Const. art. VI, § 10).
- **Add new Code of Civil Procedure Sections 1068.5, 1085.3, and 1103.5.** These new provisions would pertain to a writ of certiorari, writ of mandamus, and writ of prohibition, respectively. They would:
  (1) Make clear that when a writ petition is brought in superior court challenging a ruling in a small claims case, the petition can only be considered by a judicial officer of the superior court other than the one who made the challenged ruling.
  (2) Make clear that the appellate division of the superior court has extraordinary writ jurisdiction of a postjudgment enforcement order in a small claims case.

The Commission received comments on these reforms from the State Bar Committee on Appellate Courts and the San Diego County Superior Court.

Comments of the State Bar Committee on Appellate Courts

The State Bar Committee on Appellate Courts "supports the recommendations in the section entitled 'Writ Jurisdiction in a Small Claims Case' and believes that all three recommended changes are sensible." Exhibit p. 3. The committee briefly explains each point:

> First, because the appellate division of the superior court does not have jurisdiction over small claims appeals, it also does not have jurisdiction over writs arising from small claims cases. (Cal. Const., Art. VI, section 10 [appellate division of superior court has writ jurisdiction "in causes subject to its appellate jurisdiction."].) The proposed amendments merely clarify what the Constitution already requires.
>
> Second, it is hard to argue with the notion that a writ petition challenging a ruling in a small claims case should be heard by a judge other than the one who made the challenged ruling. There is already a similar statutory provision for small claims appeals. [Citation omitted.]
>
> The third recommended changed is based on *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior*

> *Court* (2001) 88 Cal.App.4th 136, which held that "the appellate division of the superior court has appellate and extraordinary writ jurisdiction of postjudgment enforcement orders of the small claims court." (*Id*. at pp. 144-45.) The Commission's proposal merely codifies this holding as it applies to extraordinary writs.

Exhibit p. 3.

Comments of the San Diego County Superior Court

The San Diego County Superior Court "agrees, *if modified,* with the proposed new Code Civ. Proc. §§ 1068.5, 1085.3 and 1103.5." Exhibit p. 5 (emphasis added). The other changes relating to writ jurisdiction in a small claims case are acceptable to the court as drafted. *Id*.

In the tentative recommendation, the second sentence of proposed new Section 1068.5 says: "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." Similar language appears in the second sentence of proposed new Sections 1085.3 and 1103.5.

The San Diego County Superior Court says that "[a]ll three of these sections, as currently drafted, need to be clarified to circumvent being barred by the rule of comity." Exhibit p. 5. The court explains that as drafted, the last sentence of subdivision (a) in all three sections "still states the superior court is ordering itself to change its order." The court recommends that the sentence be revised as follows: "Where a judicial officer of a superior court grants a writ of review directed to ~~the superior court~~ a judicial officer of the superior court small claims division, the superior court small claims division is considered an inferior tribunal for purposes of this chapter." Exhibit p. 5.

At some point, the Commission needs to consider this suggestion on its merits. In light of additional input we are expecting, however, it may be appropriate to defer such consideration.

Expected Additional Input

The Civil and Small Claims Advisory Committee of the Judicial Council has taken a look at the proposed changes relating to writ jurisdiction in a small claims case. As yet, the committee has not submitted comments, because its recommendations need to be reviewed at a higher level within the Judicial Council before the committee or another Judicial Council entity takes an official position.

We have been informally advised that the Civil and Small Claims Advisory Committee raised significant concerns about the proposed reforms. It is likely that a Judicial Council entity will recommend quite a different approach.

Until the Commission hears from the Judicial Council, it would be premature to finalize a recommendation on this subject. Given what we know at this point, it seems improbable that the Commission will be able to adequately deal with the expected input from the Judicial Council in time to introduce legislation on small claims writ jurisdiction in 2007. Instead of rushing to finalize reforms on that topic, it would be better to hold off until the Commission can give full consideration to the views of the Judicial Council, as well as the comments of the San Diego County Superior Court. But the other reforms in the tentative recommendation should not be delayed. The staff therefore recommends that **the proposed reforms relating to small claims writ jurisdiction be removed from the current proposal and studied further in the coming year.**

CONCURRENT JURISDICTION

The tentative recommendation proposed revisions to a number of statutes that could, but need not necessarily, be construed to confer concurrent jurisdiction on the municipal and superior courts. See the proposed amendments of Bus. & Prof. Code §§ 6455, 12606, 12606.2; Code Civ. Proc. §§ 580, 688.010, 688.030; Food & Agric. Code §§ 25564, 29733, 43039, 59289; Gov't Code §§ 12965, 12980.

The San Diego County Superior Court agrees with these amendments as drafted. Exhibit p. 5.

Similarly, the amendments relating to taxation (Code Civ. Proc. §§ 688.010, 688.030) are acceptable to the State Board of Equalization. Exhibit p. 4. According to the Board's Legal Department, the amendments would "not substantively affect the Board's ability to proceed in enforcement of tax liability" and would "accomplis[h] the stated goal of having the code provisions' language match the current structure of the California trial court system." *Id.*

Given this positive input and the lack of any negative comments, the Commission should **proceed with the proposed revisions.** The amendment of Business and Professions Code Section 12606.2 needs to be adjusted, however, to account for legislation enacted in 2006. A revised version of this amendment is attached at Exhibit pages 10-11. The Commission should **substitute this version for the corresponding amendment in the tentative recommendation.**

GOVERNMENT CODE SECTION 71601

The Commission's 2002 recommendation on trial court restructuring included a proposed amendment of Government Code Section 71601, which defines various terms for purposes of the Trial Court Employment Protection and Governance Act. See *Statutes Made Obsolete by Trial Court Restructuring: Part I*, 32 Cal. L. Revision Comm'n Reports 1, 319-22 (2002). That amendment was chaptered out (i.e., nullified) by another bill amending the same section, so the Commission tried again to amend Section 71601 in 2003. See *Statutes Made Obsolete by Trial Court Restructuring: Part 2*, 33 Cal. L. Revision Comm'n Reports 169, 224-27 (2003). The amendment was again chaptered out. In 2005, an amendment incorporating some of the revisions recommended by the Commission was included in a bill (AB 176 (Bermudez)), but the bill was vetoed by the Governor for reasons unrelated to the revisions recommended by the Commission. The same thing happened again this year. See AB 1797 (Bermudez).

The Commission's current proposal would be an appropriate vehicle for seeking enactment of its ill-fated revisions of Government Code Section 71601, unhampered by other, more controversial revisions of the same section. The Commission **should add an amendment of Section 71601 to its current proposal.** Updated to reflect recent legislation, **the Commission's proposed amendment would read as follows:**

> **Gov't Code § 71601 (amended). Definitions**
>
> SEC. ____. Section 71601 of the Government Code is amended to read:
>
> 71601. For purposes of this chapter, the following definitions shall apply:
>
> (a) "Appointment" means the offer to and acceptance by a person of a position in the trial court in accordance with this chapter and the trial court's personnel policies, procedures, and plans.
>
> (b) "Employee organization" means either of the following:
>
> (1) Any organization that includes trial court employees and has as one of its primary purposes representing those employees in their relations with that trial court.
>
> (2) Any organization that seeks to represent trial court employees in their relations with that trial court.
>
> (c) "Hiring" means appointment as defined in subdivision (a).
>
> (d) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours, and other terms and conditions of employment between representatives of the trial court and the recognized employee organization or recognized

employee organizations through interpretation, suggestion, and advice.

(e) "Meet and confer in good faith" means that a trial court or representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation. The process should include adequate time for the resolution of impasses where specific procedures for resolution are contained in this chapter or in a local rule, or when the procedures are utilized by mutual consent.

(f) "Personnel rules," "personnel policies, procedures, and plans," and "rules and regulations" mean policies, procedures, plans, rules, or regulations adopted by a trial court or its designee pertaining to conditions of employment of trial court employees, subject to meet and confer in good faith.

(g) "Promotion" means promotion within the trial court as defined in the trial court's personnel policies, procedures, and plans, subject to meet and confer in good faith.

(h) "Recognized employee organization" means an employee organization that has been formally acknowledged to represent trial court employees by the county under Sections 3500 to 3510, inclusive, prior to the implementation date of this chapter, or by the trial court under Rules 2201 to 2210, inclusive, of the California Rules of Court, as those rules read on April 23, 1997, Sections 70210 to 70219, inclusive, or Article 3 (commencing with Section 71630) of this chapter.

(i) "Subordinate judicial officer" means an officer appointed to perform subordinate judicial duties as authorized by Section 22 of Article VI of the California Constitution, including, but not limited to, a court commissioner, probate commissioner, child support commissioner, referee, traffic trial commissioner, traffic referee, juvenile court referee, juvenile hearing officer, and temporary judge ~~pro tempore~~.

(j) "Transfer" means transfer within the trial court as defined in the trial court's personnel policies, procedures, and plans, subject to meet and confer in good faith.

(k) "Trial court" means a superior court ~~or a municipal court~~.

(*l*) "Trial court employee" means a person who is both of the following:

(1) Paid from the trial court's budget, regardless of the funding source. For the purpose of this paragraph, "trial court's budget" means funds from which the presiding judge of a trial court, or his or her designee, has authority to control, authorize, and direct expenditures, including, but not limited to, local revenues, all grant funds, and trial court operations funds.

(2) Subject to the trial court's right to control the manner and means of his or her work because of the trial court's authority to hire, supervise, discipline, and terminate employment. For purposes of this paragraph only, the "trial court" includes the judges of a trial court or their appointees who are vested with or delegated the authority to hire, supervise, discipline, and terminate.

(m) A person is a "trial court employee" if and only if both paragraphs (1) and (2) of subdivision (*l*) are true irrespective of job classification or whether the functions performed by that person are identified in Rule 810 of the California Rules of Court. The phrase "trial court employee" includes those subordinate judicial officers who satisfy paragraphs (1) and (2) of subdivision (*l*). The phrase "trial court employee" does not include temporary employees hired through agencies, jurors, individuals hired by the trial court pursuant to an independent contractor agreement, individuals for whom the county or trial court reports income to the Internal Revenue Service on a Form 1099 and does not withhold employment taxes, sheriffs, and judges whether elected or appointed. Any temporary employee, whether hired through an agency or not, shall not be employed in the trial court for a period exceeding 180 calendar days, except that for court reporters in a county of the first class, a trial court and a recognized employee organization may provide otherwise by mutual agreement in a memorandum of understanding or other agreement.

Comment. Subdivision (i) of Section 71601 is amended to refer to types of subordinate judicial officers. See former Section 72450 (traffic trial commissioners); Fam. Code §§ 4250-4253 (child support commissioners); Welf. & Inst. Code § 255 (juvenile hearing officers). Subdivision (i) is also amended for consistency of terminology. See Cal. Const. art. VI, § 21 (temporary judge).

Subdivision (k) is amended to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution.

NEXT STEP

As discussed above, the following changes should be made to the Commission's proposal:

- Update the amendment of Penal Code Section 977 to reflect legislation enacted in 2006.
- Update the amendments of Code of Civil Procedure Sections 904.1 and 904.2 to reflect legislation enacted in 2006.
- Delete the proposed reforms relating to writ jurisdiction in a small claims case (proposed amendments to Code Civ. Proc. §§ 1068, 1085 & 1103; proposed new Code Civ. Proc. §§ 1068.5, 1085.3 &

1103.5). Also delete the corresponding discussion in the preliminary part (narrative portion) of the proposal.

- Update the amendment of Business and Professions Code § 12606.2 to reflect legislation enacted in 2006.
- Add the amendment of Government Code § 71601 shown on pages 10-12. Include a short explanation of this reform in the preliminary part.

Subject to these changes and any other changes the Commission directs, the Commission should **approve the proposal as a final recommendation, for printing and submission to the Legislature in 2007.** The Commission should continue to work on trial court restructuring in the coming year, developing further legislation for introduction in 2008, addressing subjects such as small claims writ jurisdiction, appellate jurisdiction in instances of bail forfeiture, and other topics that remain unfinished (see CLRC Memorandum 2006-9).

Respectfully submitted,

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THE STATE BAR OF CALIFORNIA

— COMMITTEE ON APPELLATE COURTS

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TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Appellate Courts

DATE: October 26, 2006

SUBJECT: Statutes Made Obsolete by Trial Court Restructuring: Part 3 – Tentative Recommendation

The State Bar of California's Committee on Appellate Courts (Committee) has reviewed those portions of the August 2006 Tentative Recommendation, *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, that address 1) appellate jurisdiction; and 2) writ jurisdiction in a small claims case. The Committee appreciates the opportunity to submit these comments.

Appellate Jurisdiction

The Committee generally supports the recommendations in the section entitled "Appellate Jurisdiction," pages 4-9, 32-34. The recommendations would not change the law but would delete obsolete references to the municipal court. The Committee has the following comments.

(1) The Commission has invited comment on "whether it is a good idea to expressly refer to a writ petition relating to a misdemeanor or infraction case," and whether there should be two provisions rather than one – one in the Code of Civil Procedure and one in the Penal Code. (Recommendation, pp. 8-9.) The Committee supports the current recommendation. The subject matter is pretrial writ review. Pretrial writs are generally considered civil matters even when the underlying action is criminal in nature. Hence, they have always been discussed in the Code of Civil Procedure. Until now, there was no need to distinguish between underlying civil and criminal actions. A simple reference to the municipal court sufficed. Now the statute must refer to limited civil actions and misdemeanors and infractions. But doing so should cause no problem. Covering writ jurisdiction in one place, and in the Code of Civil Procedure, is preferable to dividing it into two codes, the Code of Civil Procedure and the Penal Code, when the rule will be the same as to both.

(2) The Committee suggests the Commission further consider recommending one substantive change in the law, the one alluded to on page 8, footnote 39. The proposed new Code of Civil Procedure section 904.3 should additionally preclude an appeal from a judgment of the appellate division of the superior court granting or denying a petition for writ of certiorari in a limited civil case or a misdemeanor or infraction case. Doing so would finally close what

the Supreme Court described as a "loophole" in the decision that recognized that the Legislature failed to close it in 1982. (*Bermudez v. Municipal Court* (1992) 1 Cal.4th 855, 864.) The Committee sees no reason to provide greater review of contempt matters in limited civil cases and misdemeanor or infraction cases than is available for contempt matters in major civil and felony cases. It agrees with the Supreme Court's observation "that it is 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, and we invite the Legislature to consider this anomaly." (*Id*. at p. 864, fn. 7.)

The Committee appreciates that the Commission is primarily interested in merely deleting obsolete references to municipal courts rather than recommending substantive changes. But it might seriously consider this one, as it can be easily done simply by adding "or certiorari" to the list of petitions from which an appeal may not be taken in the proposed new Code of Civil Procedure section 904.3. This might be a good opportunity to bring this anomaly to the Legislature's attention.

The Committee also appreciates the constitutional concern the Commission expressed on page 8, footnote 39. California Constitution, article VI, section 11 (section 11), provides that, except in death cases, "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." (Italics added.) The anticipated constitutional challenge is that because the Courts of Appeal had appellate jurisdiction over writs of certiorari on June 30, 1995, this jurisdiction may not be eliminated.

Obviously, the courts would have to resolve this question should the statutory change be made and challenged, and one cannot predict what the courts would do. However, the Committee thinks a strong plain-meaning argument exists that the constitution permits this particular change. The recommended change does not affect matters within the original jurisdiction of the *superior courts*, but rather of the *appellate division of the superior court*. That there is a meaningful difference in this regard between the superior courts and the appellate division of the superior court is indicated by reading section 11 in light of the immediately preceding section, which defines the various courts' original jurisdiction. California Constitution, article VI, section 10 (section 10), provides in the first and second sentences that the "Supreme Court, courts of appeal, *superior courts*, and their judges have *original jurisdiction* in" various types of matters. (Italics added.) The third sentence states: "*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." (Italics added.)

Because section 10 distinguishes between the original jurisdiction of the superior courts and of the appellate division of the superior court, the plain language of section 11 strongly indicates that, while appellate jurisdiction over matters within the original jurisdiction of *superior courts* may not be restricted, appellate jurisdiction over matters within the original jurisdiction of the *appellate division of the superior court may* be restricted. Ironically, the Supreme Court's rationale in *Bermudez* in concluding that the Legislature excluded writs of certiorari from the statute's coverage seems to apply equally here. To paraphrase and adapt what

the *Bermudez* court said about the current section 904.1: "[T]he express mention of [the superior courts' original jurisdiction] in this context implies exclusion of [the original jurisdiction of the appellate division of the superior court]." (*Bermudez v. Municipal Court*, *supra*, 1 Cal.4th at p. 864.)

Accordingly, if the Commission agrees that the suggested change would be beneficial, the Committee believes the Commission should not refrain from recommending it merely because the change might be subject to a constitutional challenge. The Committee believes, however, that the Commission should proceed cautiously because of the constitutional concern. If it recommends this change, it may be appropriate to consider soliciting public comment regarding this specific question.

Writ Jurisdiction in a Small Claims Case

The Committee supports the recommendations in the section entitled "Writ Jurisdiction in a Small Claims Case" and believes that all three recommended changes are sensible.

First, because the appellate division of the superior court does not have jurisdiction over small claims appeals, it also does not have jurisdiction over writs arising from small claims cases. (Cal. Const., Art. VI, section 10 [appellate division of superior court has writ jurisdiction "in causes subject to its appellate jurisdiction"].) The proposed amendments merely clarify what the Constitution already requires.

Second, it is hard to argue with the notion that a writ petition challenging a ruling in a small claims case should be heard by a judge other than the one who made the challenged ruling. There is already a similar statutory provision for small claims appeals. (Code Civ. Proc., section 116.770(a) ["The 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"].)

The third recommended change is based on *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court* (2001) 88 Cal.App.4th 136, which held that "the appellate division of the superior court has appellate and extraordinary writ jurisdiction of postjudgment enforcement orders of the small claims court." (*Id*. at pp. 144-145.) The Commission's proposal merely codifies this holding as it applies to extraordinary writs.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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October 10, 2006

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

Re: Law Revision Commission proposal

Dear Ms. Gaal:

As requested, the Board's Legal Department has reviewed the Law Revision Commission's tentative recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 3.* In the opinion of the Legal Department, the tentative recommendation accomplishes the stated goal of having the code provisions' language match the current structure of the California trial court system. The amendments to the provisions relating to the enforcement of state tax liability do not substantively affect the Board's ability to proceed in enforcement of tax liability. The tentative recommendation is therefore acceptable to the Board.

Sincerely,

Margaret Shedd
Legislative Counsel

MS:jth:ap

cc: Ramon J. Hirsig – MIC: 73
Randie Henry – MIC: 43
David Gau – MIC: 63

COMMENTS OF MIKE RODDY ON BEHALF OF THE SUPERIOR COURT OF SAN DIEGO COUNTY

Feedback form submitted on October 30, 2006, by Mike Roddy, Executive Officer of the Superior Court for the County of San Diego

emailaddress: Mike.Roddy@SDCourt.ca.gov
Message: Response to Request for Public Comment
Title: Statutes Made Obsolete by Trial Court Restructuring: Part 3 (Study J-1402)

Comment:

1) The Court agrees with the revisions to Penal Code Sections 977 and 977.2.

2) The Court agrees with the addition of Code of Civil Procedure Section 904.3 and responds the Commission's request for input on whether it is advisable to expressly refer to appellate review of judgments on writ petitions relating to misdemeanor and infraction cases in a Penal Code section as follows: A separate Penal Code section is neither necessary nor advisable. Existing Code of Civ. Proc. §§ 1068(b), 1085(b) and 1103(b), dealing with writ review, reference misdemeanor and infraction cases. This makes sense because writ petitions are civil in nature even when they pertain to proceedings in criminal cases. It would follow logically that provisions for appellate review of judgments on these civil proceedings would also be found in the Code of Civil Procedure. There are a number of provisions in the Penal Code pertaining to writ review. Nothing in the proposed amendments conflicts with or duplicates those provisions.

3) The Court agrees, if modified, with the proposed new Code Civ. Proc. §§ 1068.5, 1085.3 and 1103.5. All three of these sections, as currently drafted, need to be clarified to circumvent being barred by the rule of comity. As drafted, the last sentence of subjection (a) in all three sections still states the superior court is ordering itself to change its order. The language in all three code sections should be amended to state: "Where a judicial officer of a superior court grants a writ directed to a judicial officer of the superior court small claims division, the superior court small claims division is considered an inferior tribunal for purposes of this chapter."

4) The Court agrees with the remainder of the proposed changes and additions as drafted.

Name: Mike Roddy
Title: Executive Officer
Organization: Superior Court of San Diego County
Commenting on behalf of an organization
Address: County Courthouse, 220 West Broadway
City, State, Zip: San Diego, California 92101

Superior Court of California
County of Santa Clara
191 North First Street
San Jose, California 95113
(408) 882-2700
HALL OF JUSTICE

October 5, 2006

MEMO

TO: California Law Revision Commission

FROM: Alex Cerul, Santa Clara County Superior Court
Staff Attorney

RE: Comment on "Statutes Made Obsolete by trial Court Restructuring"

The Presiding Judge of Santa Clara County Superior Court, the Honorable Judge Danner, and the Judges of the our Appellate Division, asked that I bring an issue to your attention. It involves appellate jurisdiction in certain instances of bail forfeiture.

Prior to unification the Appellate Division would review all bail forfeitures ordered by Municipal Court judges. A Municipal Court judge could forfeit bail in a misdemeanor case, or, in a felony case when sitting as a magistrate hearing a preliminary hearing. This was in line with *Newman v. Superior Court of Los Angeles County* (1967) 67 Cal.2d 620, 623, which held that "the amount of the bail is not determinative as to the court which may order a forfeiture or as to the appropriate court for appeal from such an order." Now, of course, there are no longer Municipal Court judges. So where does this leave the appeal of bail forfeitures in those circumstances?

EX 6

BAIL FORFEITED BY MAGISTRATE PRIOR TO FELONY INFORMATION

Newman, supra, held that when a magistrate, at the time for a preliminary hearing, forfeits bail he or she does so as a "court." In *Newman* the magistrate who forfeited bail was a judge of the Municipal Court. Accordingly, when he took off his 'magistrate hat' he reverted to being a Municipal Court judge and the Appellate Division was, therefore, the appropriate place to take the appeal.

Now that there are no longer Municipal Court judges, whenever a magistrate forfeits bail he or she does so as a Superior Court judge and it would appear that, pursuant to *Newman supra*, any appeal should go to the Court of Appeal because it is action by a Superior Court judge in a felony case. The matter is not a misdemeanor or infraction over which the Appellate Division has jurisdiction.

BAIL FORFEITED IN MISDEMEANOR CASE

The *Newman* court also reaffirmed that "forfeiture of bail is an independent, collateral matter, and is civil in nature." (*Newman* at p. 622, citing *People v. Wilcox* (1960) 53 Cal.2d 651, 654. See also *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657: "While bail bond proceedings occur in connection with criminal prosecutions, they are independent from and collateral to the prosecutions and are civil in nature.") It would appear then that even in the case of a misdemeanor the Appellate Division might not have jurisdiction by virtue of the criminal case because the forfeiture is not part of the misdemeanor or infraction case but instead is a civil matter in which "the amount of the bail is not determinative."

OUR CURRENT PRACTICES

The preceding is a good argument for the proposition that the Appellate Division does not have jurisdiction in bail forfeiture cases as it previously did. Nevertheless, the

Santa Clara County Superior Court Appellate Division has continued to decide appeals of bail forfeitures as it had prior to unification. The original basis for this was the statement of legislative intent that court unification not increase the workload of the Court of Appeal. At the present time, however, we recognize that the justification for our bail appeal policy has become unclear.

Partially contributing to our continued practice is the fact that unification could not change our facility or organizational structure. Santa Clara County's Hall of Justice is divided into an East and a West wing. The West wing was Municipal Court and after unification local practice was to call it "Limited Jurisdiction -- Criminal" because it continued to be the location of all misdemeanor cases and preliminary hearings. While this is probably not technically correct (see *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1036, fn. 1,) it is locally entrenched. Since, practically speaking, local procedures vis-à-vis misdemeanors and preliminary hearings did not change much there is definitely inertial resistance to the idea of changing the appellate structure. Especially when there is no clear direction, from either the case law or statutes, to do so.

REQUEST FOR ACTION

For the above reasons we would greatly appreciate a statute definitively establishing where bail forfeiture appeals should be heard. It is likely other counties would also find this beneficial. The abolition of the Municipal Court means that some aspect of the *Newman* case is no longer applicable. But it is far from clear which aspect that should be. Perhaps the Appellate Division should decide only cases which can be characterized as "limited civil cases" (under $25,000) regardless of the charge (felony or misdemeanor) and regardless of the procedural posture of the case (before or after preliminary hearing). While it is clear that in misdemeanor cases in which the bail amount is under $25,000 the appeal goes to the Appellate Division, and it is clear that in

felony cases, post indictment or information, with bail over $25,000 the appeal goes to the Court of Appeal, the areas that need clarification are: (1) bail in misdemeanor cases over $25,000, (2) bail in felony cases under $25,000, and (3) bail, in any amount, forfeited in the pre information (magistrate) procedural posture. We express no opinion on the resolution of this issue but only request that there be one. As one of the judges I work with said, we do not have a dog in this race, we are only spectators.

Feel free to contact me at (408) 808-6782 if there are any questions or for any further information or input you may desire.

AMENDMENTS REVISED TO INCORPORATE 2006 LEGISLATION

Bus. & Prof. Code § 12606.2 (amended). Misleading food containers

SEC. ____. Section 12606.2 of the Business and Professions Code is amended to read:

12606.2. (a) This section applies to food containers subject to Section 403 (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343 (d)), and Section 100.100 of Title 21 of the Code of Federal Regulations. Section 12606 does not apply to food containers subject to this section.

(b) No food containers shall be made, formed, or filled as to be misleading.

(c) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for reasons other than the following:

(1) Protection of the contents of the package.

(2) The requirements of the machines used for enclosing the contents in the package.

(3) Unavoidable product settling during shipping and handling.

(4) The need for the package to perform a specific function, such as where packaging plays a role in the preparation or consumption of a food, if that function is inherent to the nature of the food and is clearly communicated to consumers.

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value that is both significant in proportion to the value of the product and independent of its function to hold the food, such as a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed or durable commemorative or promotional packages.

(6) Inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required food labeling exclusive of any vignettes or other nonmandatory designs or label information, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.

(d) This section shall be interpreted consistent with the comments by the United States Food and Drug Administration on the regulations contained in Section 100.100 of Title 21 of the Code of Federal Regulations, interpreting Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), as those comments are reported on pages 64123 to 64137, inclusive, of Volume 58 of the Federal Register.

(e) If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose those federal requirements are incorporated into this section and shall apply as if they were set forth in this section.

(f) Any sealer may seize any container that is in violation of this section and the contents of the container. By order of the superior court of the ~~city or~~ county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon any conditions that the court may impose to ensure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

Comment. Subdivision (f) of Section 12606.2 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. As amended, subdivision (f) makes clear that if the value of seized containers is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order condemnation of containers under this section in specified circumstances.

Code Civ. Proc. § 904.1 (amended). 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 the action on the ground of inconvenient forum, or from a written

order of dismissal under Section 581d following an order granting a motion to 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.

Code Civ. Proc. § 904.2 (amended). Appeal from ruling by judicial officer in limited civil case

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

904.2. An appeal <u>of a ruling by a superior court judge or other judicial officer</u> in a limited civil case is to the appellate division of the superior court. An appeal <u>of a ruling by a superior court judge or other judicial officer</u> 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 the action on the ground of inconvenient forum, or from a written order of dismissal under Section 581d following an order granting a motion to 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.

Penal Code § 977 (amended). Presence of defendant and counsel

SEC. ____. Section 977 of the Penal Code is amended to read:

977. (a)(1) In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only, except as provided in paragraphs (2) and (3). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2.

(3) If the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. For purposes of this paragraph, a misdemeanor offense involving driving under the influence shall include a misdemeanor violation of any of the following:

(A) Paragraph (3) of subdivision (c) of Section 192.

(B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

(C) Section 23152 of the Vehicle Code.

(D) Section 23153 of the Vehicle Code.

(b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by

paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following form:

"WAIVER OF DEFENDANT'S PERSONAL PRESENCE"

"The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if the defendant were personally present in court, and further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place."

(c) The court may permit the initial court appearance and arraignment ~~in municipal or superior court~~ of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an ~~initial hearing in superior court~~ arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. The defendant shall have the right to make his or her plea while physically present in the courtroom if he or she so requests. If the defendant decides not to exercise the right to be physically present in the courtroom, he or she shall execute a written waiver of that right. A judge may order a defendant's personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(d) Notwithstanding subdivision (c), if the defendant is represented by counsel, the attorney shall be present with the defendant in any county exceeding 4,000,000 persons in population.

Comment. Subdivision (c) of Section 977 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

In the first sentence, the reference to "municipal or superior court" is deleted because municipal courts no longer exist and all arraignments are held before a judicial officer of the superior court.

In the third sentence, the reference to "an initial hearing in superior court in a felony case" is replaced by a reference to "an arraignment on an information in a felony case." This revision is necessary to clarify the type of proceeding to which the sentence applies.

Before unification, a felony defendant was either (1) indicted and arraigned on the indictment in superior court or (2) arraigned on a complaint before a magistrate in municipal court and, if held to answer at a preliminary hearing, later arraigned on an information in superior court. Because subdivision (c) is expressly inapplicable to an indicted defendant, the reference to "an initial hearing in superior court in a felony case" in the third sentence was sufficient to indicate that the sentence pertained to an arraignment on an information, not an arraignment on a felony complaint.

Now that the municipal and superior courts have unified, both an arraignment on a felony complaint and an arraignment on an information occur in superior court (technically, the arraignment on the complaint occurs before a superior court judge acting as magistrate). The phrase "initial hearing in superior court in a felony case" is thus vague; it could encompass either an arraignment on a felony complaint or an arraignment on an information or both. The amendment eliminates this ambiguity consistent with the pre-unification status quo.