Report
of the
Appellate Process Task Force

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The Task Force dedicates its efforts to the memory of our beloved Bernie Witkin, whose wise counsel and good humor inspired generations of California's judges and immeasurably improved the administration of justice.

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Chapter 1
Executive Summary

The Appellate Process Task Force issued an *Interim Report* in March, 1999, which reviewed the progress the Task Force had made in fulfilling its charge and indicated tentative recommendations that the Task Force was considering. The *Interim Report* was widely distributed to interested groups, members of the Task Force spoke about the *Interim Report* at several statewide meetings, and the contents of the *Interim Report* were given substantial coverage by the legal newspaper media in California. As a result, the Task Force received a significant number of comments on the Interim Report. At its meeting on June 14, 1999, the Task Force began the process of reviewing the comments and considering what changes to make to the *Interim Report* in light of the comments. That process continued at the Task Force's subsequent meetings on September 21, 1999, and December 14, 1999.

The *Report of the Appellate Process Task Force* updates the *Interim Report*, incorporating both revisions to the *Interim Report* and new material on which the Task Force has been working. As with the *Interim Report*, there remain certain issues under active consideration by the Task Force that are not yet ripe for full discussion. In addition, on recommendation of the Task Force, the Chief Justice created an Ad Hoc Task Force on the Superior Court Appellate Divisions to examine the work and resources of the appellate divisions of the superior courts. The Ad Hoc Task Force is chaired by Justice William F. Rylaarsdam, who is also a member of the Appellate Process Task Force. The Ad Hoc Task Force has made substantial progress on its work, and we anticipate that it will complete its work and report back to the full Task Force in the near future. Certain issues raised by Task Force members have been put on hold until receipt of that report. Accordingly, the *Report of the Appellate Process Task Force* should *not* be considered a final report, although, as indicated below, a number of the Task Force's recommendations are now ready for Judicial Council or other consideration.

A. The Task Force's Charge and Proceedings

The Task Force was created out of a widely felt need to consider how California's appellate courts, and particularly the Courts of Appeal, can efficiently handle rapidly rising caseloads in a timely manner without adding significant new resources to the court. Chief Justice Ronald M. George explained as follows in his May 1997 letters appointing members to the Task Force:

> As you may know, the Legislature recently authorized five new appellate judgeships and accompanying chambers staff. These positions are the first new judgeships since 1987. In the 10-year period since then, we have seen appellate records rise from 125 to 170 per justice. Caseloads continue to grow steadily at 5 to 6 percent per year. However, adding resources to keep pace with this growth may not be desirable or even possible.
>
> For this reason, I have established the Appellate Process Task Force to examine how the appellate courts do their work and to study, in depth, the types of changes that may be necessary for them to render timely justice in the future without continual infusions of additional resources.

The formal charge to the Task Force, which was approved by the Judicial Council's Rules and Projects Committee, is as follows:

> The charge to the Appellate Process Task Force is to examine the constitutional requirements, statutory provisions, and rules of court governing the manner in which appellate courts perform their functions and to evaluate court organizational structures, work flows, and technological innovations that affect the work of the Courts of Appeal. The task force shall make recommendations to the Judicial Council for how the functions, structure, and work flow might be revised to enhance the efficiency of the appellate process. The scope of the examination should include the jurisdiction of the Courts of Appeal, mandatory and discretionary review including the use of

writs in lieu of appeals for specified cases, the requirement for written opinions with reasons stated in every case, the requirements for publication of opinions, alternative types of dispositions, alternative appellate processes and different timetables for different types of appeals, use of subordinate judicial officers, and other structural changes, such as the use or elimination of divisions in the Courts of Appeal.

The Task Force first met on June 30, 1997, to begin its deliberations. The Task Force divided itself into three subcommittees: Court Operations; Ideas and Projects -- Case Management; and Jurisdiction. Early meetings of the subcommittees and of the Task Force included a heavy dose of brainstorming and agenda-setting. By the end of February, 1998, the subcommittees had identified issues that each committee believed deserved more detailed study. The list of issues included the following:

organization of districts and divisions;
changes in juvenile law that affect appeals;
pro per representation;
vexatious litigants;
allocation of work between Courts of Appeal and appellate divisions of superior courts;
allocation of work between Courts of Appeal districts and divisions;
differential case management;
use of docketing statements;
calendar preferences;
screening for expedited appeals;
greater use of writ review in lieu of appeal;
greater use of "certificate of probable cause" as prerequisite to appeal;
use of subordinate judicial officers such as commissioners or referees;
use of retired justices;
sanctions for non-meritorious appeals;
appellate ADR and settlement;
excerpts of the trial record;
electronic record preparation;
limitations on briefs;

Wende briefs;
special appellate panels for particular subjects;
oral argument;
tentative opinions;
publication of opinions;
memorandum opinions;
stare decisis and en banc procedures; and
internal operating procedures.

Over the summer of 1998, the Ideas and Projects -- Case Management Subcommittee and the Jurisdiction Subcommittee narrowed the range of issues under active consideration and began considering specific proposals for reform. The *Interim Report* included a status report on those proposals (some of which had received the interim blessing of the Task Force, some of which were still being considered by the subcommittees, and others of which had been tentatively rejected). The Task Force continued over the summer and fall of 1999 to refine its proposals in response to comments received to the *Interim Report*.

The Court Operations Subcommittee conducted a series of personal visits and interviews at each of the appellate court sites, learning first-hand about common and differing practices and perspectives from around the State. The subcommittee also distributed a detailed questionnaire to gather additional information. The site visits and questionnaire responses have been invaluable in broadening the Task Force's perspective, in identifying issues and problem areas worthy of additional study, and in providing a more qualitative understanding of how appellate work is done throughout the State. The information gathered through these visits usefully supplements what we already know about the appellate process by examining court rules and appellate caseload statistics. Substantial parts of Chapter 2 are drawn from results reported by the subcommittee.

B. Summary of Recommendations

The Task Force, by consensus or substantial majority vote, makes the following recommendations:

(1) The Task Force recommends that the four stand-alone divisions in Ventura (2d App. Dist., Div. 6), San Diego (4th App. Dist., Div. 1), Riverside (4th

App. Dist., Div. 2), and Santa Ana (4th App. Dist., Div. 3) should be converted into separate districts.

(2) The Task Force recommends adoption of an amendment to Rule 6.52 of Title Six of the Rules of Court to require the Administrative Presiding Justices Advisory Committee to submit an annual report to the Chief Justice and the Supreme Court addressing the workload and backlog of each district and division to ease analysis of equalizing caseloads under Rule 20 of the Rules of Court and Section 6 of Article VI of the Constitution.

(3) The Task Force recommends adoption of a new Rule of Court requiring the filing of a statewide docketing statement in civil appeals that can be used, among other things, to help identify jurisdiction on appeal.

(4) The Task Force recommends adoption of a new Rule of Court to encourage the use of memorandum opinions when an appeal or an issue within an appeal raises no substantial points of law or fact.

(5) The Task Force recommends that C.C.P. § 906 be amended to provide that the following issues in a civil action must be raised in a motion for new trial in order to be cognizable on appeal: juror misconduct, accident or surprise which ordinary prudence would not have prevented, newly discovered evidence which could not have been discovered with reasonable diligence, and excessive or inadequate damages.

The Task Force will continue to study the following subjects, among others:

(1) Substituting writ review for appellate review of certain post-judgment civil orders.

(2) Reallocating jurisdiction in some cases from the Courts of Appeal to the appellate divisions of the superior court (with an understanding that

reallocation can occur only after a more thorough analysis of the workload, procedures and resources of the appellate divisions, an

analysis that is presently being undertaken by an Ad Hoc Task Force under Justice Rylaarsdam's leadership).

(3) Improving the quality of appellate practice in civil cases by such possibilities as doing more to recognize appellate specialists, increasing the opportunities for appellate training through courses, books or videotapes, and creating standards for minimum continuing legal education for attorneys practicing in appellate courts.

(4) Establishing a pilot project in two appellate districts to explore the use of subordinate judicial officers on appeal.

(5) Creating a single state-wide Court of Appeal and considering other alternatives for greater coordination between districts so as to provide greater flexibility in allocating workload and greater uniformity in procedures.

(6) Improving processes involving the publication and non-publication of appellate decisions.

The Task Force has determined that the following subjects should not be given further consideration by the Task Force:

(1) The Task Force decided not to recommend changing California's rule that a Court of Appeal panel is not bound to follow decisions from other Courts of Appeal panels.

(2) The Task Force is opposed to creating a statewide en banc panel to handle conflicting Courts of Appeal decisions. A statewide en banc procedure should be reconsidered only if the number of unresolved conflicts starts to rise to substantial and unacceptable levels.

(3) On recommendation of the Jurisdiction Subcommittee, the Task Force decided not to consider any expansion in the use of certificates of probable cause as a prerequisite to appeals in criminal cases.

(4) The Ideas and Projects -- Cases Subcommittee considered the issue of calendar preferences in reaction to comments that the issue of preference

on appeal is somewhat murky. The subcommittee considered an amendment to Rule 19.3 of the Rules of Court to provide that an appellate court must grant calendar preference in all cases in which appellate or trial court calendar preference is provided by statute or rule and may grant calendar preference in any other case. After discussion, the subcommittee determined that the issue was better addressed by the Appellate Advisory Committee of the Judicial Council, and the Task Force concurs in this determination.

(5) The use of alternative dispute resolution techniques on appeal has been the subject of great interest in recent years, and all districts have at one time or another tried various ADR settlement techniques. The Jurisdiction Subcommittee decided that the issue was best left for consideration by another Judicial Council task force that specifically examined appellate ADR, the Appellate Mediation Task Force, and the Task Force concurs in that decision.

(6) The Ideas and Projects -- Cases Subcommittee considered a proposal to permit some cases to be decided on the basis of the opening brief alone. The subcommittee rejected this proposal because, although the process might be extremely beneficial to institutional respondents such as the Attorney General, it would provide no demonstrable benefit to the appellate courts and might even be an additional burden. The Task Force concurs in rejecting this proposal.

Comments regarding the *Report of the Appellate Process Task Force* or other suggestions for the Task Force should be sent to:

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Chapter 2
The Work and Workload of the California Courts of Appeal

A. Introduction

The California Courts of Appeal -- California's intermediate appellate courts -- are charged by the California Constitution with the following responsibility: To render judgments (Cal. Const., Art. VI, § 3) on matters subject to the courts' appellate and original jurisdiction (Cal. Const., Art. VI, §§ 10 & 11), and, with respect to judgments that determine causes, to issue a decision in writing with reasons stated (Cal. Const., Art. VI, § 14).

The challenge for the Task Force has been to determine what changes, if any, would help the Courts of Appeal fulfill their well-defined, constitutional mandate with greater speed and efficiency without significant, additional resources and without sacrificing fundamental decision-making values. In addressing this challenge, the Task Force spent considerable time discussing the caseload and organizational structure of the Courts of Appeal and in identifying different practices employed by the districts and divisions of the Courts of Appeal around the State. Most of the caseload data used by the Task Force are routinely gathered by the courts and reported to the Administrative Office of the Courts. Individual Task Force members, some of whom are appellate justices, brought personal knowledge and experience with them about practices around the State. Additional information was gathered by members of the Task Force's Court Organization Subcommittee who visited each Courts of Appeal site in the state to meet with justices, administrators and employees to identify specific practices, problems and suggestions for improving the process.

This chapter contains the Task Force's findings regarding existing caseloads, court organization and district and division practices. These findings establish the context in which the Task Force evaluated suggestions for improving the appellate process.

B. Appellate Court Organization

The California Constitution of 1879 created a single appellate court: The Supreme Court of California. At that time, the Supreme Court's appellate jurisdiction was broad and non-discretionary. The applicable language provided as follows:

> "The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also, in all criminal cases prosecuted by indictment, or information in a Court of Record on questions of law alone. The Court shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." (Constitution of 1879, art. VI, § 4)

Although a few types of judgments were not appealable as a matter of right (*see, e.g., Tyler v. Connolly* (1884) 65 Cal. 28, 30 (judgments of contempt not appealable)), the vast majority of causes within the jurisdiction of the superior courts were appealable to the California Supreme Court. As caseloads began to rise, the Supreme Court adjusted its practices to accommodate the increased work. The adjustments included such things as using appellate commissioners to assist the court and dividing the court into divisions. Ultimately, however, the court could not keep pace with the increasing number of appeals, and a constitutional amendment in 1904 created the California Courts of Appeal. Beginning with the creation of the Courts of Appeal, the Supreme Court's jurisdiction slowly but steadily was converted from largely appellate and non-discretionary, to largely extraordinary and discretionary. Today, the Supreme Court's mandatory appellate jurisdiction is limited to capital cases.

The 1904 amendment created three districts of the Courts of Appeal. The First District was located in San Francisco, the Second District was located in Los Angeles,

and the Third District was located in Sacramento. Each district had three justices.

Caseloads continued to rise, and more adjustments were necessary. In 1918 the California Constitution was amended to add two divisions of three judges each in San Francisco and Los Angeles. The 1918 amendment provided the precedent for establishing divisions within districts. Each division had three justices, and the divisional structure was used to create stable 3-justice panels within the district.

In 1928, the California Constitution was again amended, at the suggestion of the Judicial Council, to provide "relief from the existing congestion in the courts of the state." 1928 Ballot Pamphlet, Argument in Favor of Senate Constitutional Amendment No. 12. In order to avoid having to amend the constitution in the future to create additional appellate districts and divisions, a cumbersome process, the amendment authorized the Legislature to create and establish additional District Courts of Appeal and divisions.

Only one year later, in 1929, the Legislature employed its new power to form districts by creating a Fourth Appellate District with one division of three justices. 1929 Cal. Stats., ch. 691. The Fourth Appellate District consisted of counties taken from the First and Second Districts.

The next change came in 1941 when the Legislature increased the Second Appellate District to three divisions. 1941 Cal. Stats., ch. 1179. Twenty years later, the Legislature added a Fifth Appellate District consisting of one division, increased the First District to three divisions, and increased the Second District to four divisions. 1961 Cal. Stats., ch. 85. The Fourth District was increased to two divisions only four years later. 1965 Cal. Stats., ch. 1247.

Until 1966, the Legislature's authorization extended only to adding additional districts and, within districts, additional 3-justice divisions. As a practical matter, this meant that appellate justices could be added only, at a minimum, in 3-justice increments. It was not possible to add one or two justices at a time as needed. The 1966 amendments

to the California Constitution created greater flexibility in appellate court organization.

In addition to the power to create appellate districts, each consisting of one or more divisions, the Legislature was given the power to create divisions consisting of "a presiding justice and 2 *or more* associate justices." Cal. Const., Art. VI, § 3 (emphasis added). The amendment gave the Legislature more flexibility in increasing the number of appellate justices and allocating them among the districts and divisions.

Between 1966 and the present, the Legislature has both added new districts and divisions and increased the size of existing divisions as follows:

court	1967	1968	1969	1973	1975	1979	1981	1987	1996	% Inc
1st	4 div 12 Js				4 div 16 Js		5 div 19 Js			58%
2nd-Ven.	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	1 div 3 Js		1 div 4 Js	33%
2nd-LA	5 div 15 Js	5 div 20 Js					6 div 23 Js			53%
3rd	1 div 3 Js	1 div 4 Js		1 div 6 Js	1 div 7 Js			1 div 10 Js		233%
4th-SD	1 div 3 Js		1 div 4 Js			1 div 5 Js	1 div 6 Js	1 div 8 Js	1 div 9 Js	200%
4th-Riv.	1div 3 Js		1 div 5 Js				1 div 4 Js	1 div 5 Js	1 div 6 Js	100%
4th-SA	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	1 div 4 Js	1 div 5 Js	1 div 6 Js	50%
5th	1 div 3 Js				1 div 4 Js	1 div 6 Js	1 div 8 Js	1 div 9 Js		200%
6th	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	xxxxx xxxxx	1 div 3 Js	1 div 6 Js		100%
total	5 dist 13 div 39 Js	5 dist 13 div 45 Js	5 dist 13 div 48 Js	5 dist 13 div 50 Js	5 dist 13 div 56 Js	5 dist 13 div 59 Js	6 dist 18 div 77 Js	6 dist 18 div 88 Js	6 dist 18 div 93 Js	138%

Table 2-a. Growth of Divisions and Districts 1967 to Present

There are currently 93 justices of the Courts of Appeal who are distributed among 18 divisions and within 6 districts as follows:

First District
4 divisions (4 justices each) and 1 division (3 justices) in San Francisco
Second District
6 divisions (4 justices each) in Los Angeles; 1 division (4 justices) in Ventura
Third District
1 division (10 justices) in Sacramento
Fourth District
1 division (9 justices) in San Diego; 1 division (6 justices) in Riverside; 1 division (6 justices) in Santa Ana
Fifth District
1 division (9 justices) in Fresno
Sixth District
1 division (6 justices) in San Jose

Each division of the Courts of Appeal has one presiding justiceship. The person appointed to that justiceship by the Governor becomes the Presiding Justice of that division. Each district also has an Administrative Presiding Justice, who is appointed by the Chief Justice. In the single-division districts, Rule 75 of the Rules of Court provides that "the presiding justice shall act as the administrative presiding justice." In multi-division districts, the Chief Justice appoints the administrative presiding justice "to serve at the pleasure of the Chief Justice for such period as may be specified in the designation order." Rules of Court, Rule 75. Accordingly, as presently constituted, the Chief Justice appoints the administrative presiding justice in the First, Second and Fourth Districts, and the presiding justice of the Third, Fifth and Sixth Districts (appointed by the Governor) is automatically the administrative presiding justice of those districts.

There is a substantial disparity in both the geography and population of the areas served by the districts. The Third District (with 10 justices), encompasses the largest geographic area with 23 northern California counties within its jurisdiction. The Sixth

District (with 6 justices), covering Santa Clara, Santa Cruz, San Benito, and Monterey Counties, has the smallest geographic jurisdiction. There are also population disparities between districts:

District	# of Justices	Population	Pop. / Justice
DCA1	19 Justices	5,302,300	279,068 / justice
DCA2	28 Justices	10,978,600	392,093 / justice
DCA3	10 Justices	3,131,860	313,186 / justice
DCA4	21 Justices	8,740,800	416,229 / justice
Div.I	9 Justices	2,936,900	326,322 / justice
Div.II	6 Justices	3,081,600	513,600 / justice
Div.III	6 Justices	2,722,300	453,717 / justice
DCA5	9 Justices	2,725,050	302,783 / justice
DCA6	6 Justices	2,372,900	395,483 / justice

These disparities may exist in part because the number of justices allocated by the Legislature to a district or division is influenced primarily by caseloads and not by population. For example, caseload numbers for 1997-98 show that there is a substantially lower rate of appellate filings per capita in the Fourth District, Second Division (60 filings per 100,000 people) than there is in the First District (73 filings per 100,000 people) or the Third District (83 filings per 100,000 people).[1] Moreover, the Fourth District, Second Division has had the lowest filing rate per capita for nine out of the last ten years. This is not to suggest that filing rates do not change, however, since the Fourth District, Second Division had a per capita filing rate of 48 filings per 100,000 people ten years ago, and that figure is now 25% higher. In fact, there has been a statewide increase in filings per capita over the last decade, rising from a statewide average of 66 filings per 100,000 to 75 filings per 100,000, a 13.6% increase.

C. Caseloads and Practices

[1] The caseload numbers used in this report are based upon data collected by the Administrative Office of the Courts ("AOC"). Most of these numbers have previously been reported in the Judicial Council's annual reports. With the assistance of AOC staff, we have analyzed some additional caseload data that does not appear in the annual reports in the same manner as reported here, and there have been a few corrections to the numbers appearing in the annual reports. Finally, the ratios we report (e.g., cases per justice or writs per research attorney) are generally based upon the number of authorized positions. Thus, the actual burden on a district may be greater than reported herein because of vacancies on the bench or in staff positions.

Each district has adopted a set of local rules and internal operating procedures that supplement the California Constitution, statutes and Rules of Court. Even with statutes, Rules of Court, local rules and internal operating procedures, some of what actually happens in each district, division and chambers is subject to individual variation and control. Identifying the range of individual variations in practice was one of the reasons the Court Operations Subcommittee arranged for site visits at each Courts of Appeal facility and distributed a detailed questionnaire to justices and employees within each court.

This section of the report contains a description of how Courts of Appeal fulfill the constitutional responsibility of making judgments in cases subject to appellate and original jurisdiction and issuing written opinions deciding causes. The variations among justices, divisions and districts have implications when considering changes in appellate processes. A change that might work well in one division may work poorly in another because the premise for the change is a work practice that exists in the first division but not in the other. Local conditions, such as differences in workload, local practice, and staff and judicial vacancies, will have an impact upon productivity. However, as will be seen, some of the Task Force's recommendations implicitly endorse one practice over another.

The appellate jurisdiction of the Courts of Appeal is divided into two main categories: discretionary jurisdiction and mandatory jurisdiction. Discretionary jurisdiction encompasses matters that come before the Courts of Appeal upon the filing of extraordinary writs, such as writs of mandamus, certiorari and prohibition. *See* Cal. Const., Art. VI, § 10. Mandatory jurisdiction encompasses matters brought before the court by appeal from superior court judgments. *See* Cal. Const., Art. VI, § 11; C.C.P. § 904.3(a) ("An appeal, other than in a limited civil case, is to the court of appeal"); Penal Code § 1235(b) ("An appeal from the judgment or appealable order in a felony case is to the court of appeal for the district in which the court from which the appeal is taken is located").

1. Writs

The filing of a petition for an extraordinary writ does not automatically create a "cause" in a Court of Appeal, triggering the Constitution's written-opinion requirement.

See Cal. Const., Art. VI, § 14 ("Decisions of the Supreme Court and courts of appeal *that determine causes* shall be in writing with reasons stated") (emphasis added). Instead, the Court of Appeal must first decide whether to exercise its discretionary jurisdiction over the matter presented by the writ. If the court refuses to exercise its discretionary jurisdiction, it may summarily deny the petition for a writ without filing a written opinion explaining the reasons for the denial. The general practice in California is that most writs are denied summarily without explanation.

The discretion which the Courts of Appeal employ in deciding whether to exercise jurisdiction over a petition for an extraordinary writ is extensive but not unbounded. It is settled that an appellate court can deny a petition for extraordinary writ even though the writ may, on its face, present a proper case on the merits for relief since other considerations involving the proper administration of justice may counsel against granting a petition for a writ. *See Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185. A useful summary of the factors that inform an appellate court's discretion in deciding whether to grant a petition for a writ is found in *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266:

> "(1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue; (2) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action; (3) conflicting trial court interpretations of the law require a resolution of the conflict; (4) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case; (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal." *Id*., 209 Cal.App.3d at 1273-74 (citations omitted).

It is clear that not all petitions for extraordinary relief are subject to the same discretionary treatment. In *Richmond v. City of Powers* (1995) 10 Cal.4th 85, the court dealt with a situation where the Legislature had provided by statute that the *only* means of appellate review was by filing a petition for an extraordinary writ. In these circumstances (i.e., where there is no effective review by appeal and a writ is the only method of review), the appellate court has a greater obligation to exercise its appellate jurisdiction. According to Justice Kennard,

> "When an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted. Referring to the writ of mandate, this court has said: 'Its issuance is not necessarily a matter of right, but lies rather in the discretion of the court, but where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he (or she) is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it.' [citation omitted] Accordingly, when writ review is the exclusive means of appellate review of a final order or judgment, an 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." *Id*., 10 Cal.4th at 114.

Rule 39.1B, involving juvenile court hearings for the termination of parental rights under Welfare and Institutions Code § 366.26, attempts to create another exception to the general rule of discretion involving extraordinary writs. Section 366.26(l)(4)(B) declares that the Legislature's intent is to "[e]ncourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits." Rule 39.1B(m) implements that intent by providing that "[a]bsent exceptional circumstances the appellate court shall review the petition for extraordinary writ and decide it on the merits." In light of these provisions, 39.1B writs are treated much more like appeals than writs. *But see Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469, 1475 ("The amendments to rule 39.1B, purporting to mandate in all procedurally regular writ matters creation of a cause and
disposition on the merits by written opinion conflict with section 366.26, and hence are

unconstitutional"). In many appellate courts, 39.1B writs are assigned immediately to chambers because of the high likelihood that a written opinion will be necessary. Because 39.1B writs impose different burdens upon appellate courts, statistics regarding these writs probably should be broken out from other writs and reported separately.

In general, three essential characteristics define the contours of the Courts of Appeal's writ jurisdiction: (1) It is discretionary; (2) It is extraordinary; and (3) A denial does not require oral argument or written justification. These three characteristics have greatly influenced the internal practices of the Courts of Appeal in considering petitions for extraordinary writs. In brief, the courts often rely upon staff who develop special expertise to perform the initial evaluation of all writs. By concentrating the initial processing of many writs in a small number of experienced clerks and staff attorneys who make recommendations to a writ panel for final disposition (which, in a vast majority of cases, means a denial of the petition), the courts achieve significant efficiencies in processing routine writ filings. When staff attorneys identify the unusual writ filing that presents serious issues worthy of more thorough examination, the writ may be diverted from initial review and likely denial by a writ panel directly to an individual justice's chambers and then processed along with appeals. In other words, differential case management is achieved by using staff to perform an initial evaluation (subject in every case to the ultimate determination of justices to whom staff must present their recommended dispositions).

Each division of three or four justices has one writ attorney to assist in processing petitions for extraordinary writs. Divisions with more than four justices and districts with only one division are generally allocated one writ attorney for every three justices. There are a total of 26 writ attorneys statewide.

There are some significant differences in the way divisions and districts handle writs. In all courts, when a petition for an extraordinary writ is filed, the petition is first checked by the clerk's office for preliminary screening and analysis to determine whether the writ requires emergency treatment (e.g., a request for an immediate stay in light of the threat of imminent injury). A writ that requires emergency treatment may be taken immediately to a writ panel, or, if three justices cannot be reached, to the Presiding Justice, for review and consideration, usually on the basis of an oral presentation.

For all other petitions, the clerk's office transfers the papers to a writ attorney who reviews the petition and prepares to present the petition to the writ panel. In most divisions and districts, the writ attorney prepares a brief written analysis, which may include a proposed disposition. The writ attorney then distributes that memorandum and the petition to the three justices who will make the initial decision whether to exercise

jurisdiction over the matter (writ panels change weekly or monthly). In some divisions and districts, the writ attorney does not circulate a written analysis of the petition and the court relies instead upon oral presentations from the writ attorney.

In most divisions and districts, writ conferences are held on a weekly basis, and the writ attorney appears at the conference to present the petition and answer any questions from the justices. Some divisions and districts have dispensed with formal writ conferences; in those courts, each justice reviews the writ attorney's memoranda, meeting with the writ attorney individually if necessary, and the panel makes its decision without a group conference, unless a conference is requested by one of the panel members.

If the panel decides to deny the writ, a brief order indicating the denial is issued, usually without any explanation of the reasons for the denial. Several divisions indicate that their general practice in the case of denials is to include citations to the most pertinent authorities so counsel will have some basis for understanding the reason for the denial. *See, e.g.,* Internal Operating Practices & Procedures, 2d Dist., Div. 1, § 9 ("It has become the practice of Division One to prepare a brief formal order citing the most pertinent authority"). If the panel decides to exercise jurisdiction over the matter, it will often grant the writ conditionally (by issuing an alternative writ or an order to show cause), the parties will submit full briefing, and the matter is then handled in the same way as an appeal (*see* discussion below).

Because the initial determination in most writ matters is only to determine whether to exercise the court's extraordinary jurisdiction, and because that determination can be made without oral argument or a written opinion, the internal procedures for handling petitions can be streamlined compared to how appeals are handled. The streamlining can be seen in the concentration of personnel involved in handling writs. First, the Courts of Appeal have uniformly adopted the practice of assigning writs to a writ attorney (except

for some Rule 39.1B writs), a specialist in reviewing petitions and preparing an analysis and recommendation for the three-justice panel. Over time, the writ attorney becomes familiar not only with the law and procedure regarding writs, but also with the judgmental considerations that affect the panels within the court. Development of this type of expertise helps to make the process of considering petitions for writs more

systematic and consistent. Second, in most courts, the three-justice panel meets with the writ attorney to discuss the matter and make a decision. This four-person meeting ensures that the court's collective expertise can be brought to bear upon every petition, and it maximizes the writ attorney's time in presenting the writ to the panel.

Although the Internal Operating Procedures are fairly uniform in their description of the writ process, the Court Operations Subcommittee discovered that actual practices vary between divisions and districts. At one extreme, some divisions require the writ attorneys to present to the panel relatively extensive memoranda for each writ (e.g., 5-15 pages in length). Other divisions and districts, at the other extreme, require almost no memoranda from the writ attorney and do most of the work orally with only a one or two sentence introduction to the writ. There are rather obvious workload and resources implications in deciding which of these models to employ.

In addition, some divisions or districts do not hold regular, weekly writ conferences and instead rely primarily upon circulation of the writ attorney's written memorandum. In these divisions or districts the writ attorney may be required to visit separately with the justices on the panel. This type of procedure would seem to undermine the court's ability to act collectively as a three-justice court and to increase the time required of the writ attorney to process writs (conceivably tripling the time required to present the writ to the members of the panel).

Approximately 90% of the petitions for extraordinary writs are denied without opinion. The 90%-denial rate has not changed significantly over the last decade (the average over this period is 90.46% with a high of 92.17% and a low of 87.52%). This means that in nine out of ten petitions for writs, the only internal work product is produced by the writ attorney, and justice-time on such matters is limited to writ conferences. Accordingly, the most important resource figure with respect to processing petitions for writs is the number of petitions filed per writ attorney. The number of petitions filed per justice is a less important figure (the most important per justice figure is the number of writs actually referred to chambers where a written opinion is produced).

The data indicates that the number of petitions for extraordinary writs has been rising significantly in the last few years, and the number of petitions per writ attorney has similarly risen. In just the last five years, there has been a 25.2% increase in the number

of petitions filed (from 7,119 in 1993-94 to 8,915 in 1998-99). This translates to an increase in petitions per writ attorney from 274 in 1993-94 to 343 in 1998-99. In other words, each writ attorney is responsible for processing approximately 7 petitions for extraordinary writs per week (up from 5.48 per week five years ago). Assuming the writ attorney spends 40 hours per week exclusively on writs (and many writ attorneys also handle a small number of appeals), this means each writ on average receives 5.7 hours worth of attention. This is down from an average five years ago of 7.3 hours per petition.

The number of petitions per writ attorney (and the limited time which can be devoted to each writ) varies significantly between divisions. Table 2.1 shows the relevant numbers for 1998-99.

Court	Petitions Filed	Per Justice	Per Writ Attorney
First	1,439	76	288
Second	3,066	128	511
Second-Ven.	318	80	318
Third	953	95	318
Fourth-SD	663	74	332
Fourth-Riv.	722	120	361
Fourth-SA	590	98	295
Fifth	705	78	235
Sixth	459	77	230

Table 2-b. Filings of Original Proceedings for 1998-99

It appears from this table that the Second District in Los Angeles is comparatively under-staffed with respect to writs. Reports from those courts confirm that writ attorneys are swamped with writs.

The numbers in Table 2-b lump together all original proceedings, and the cumulative reporting can conceal real workload problems. For example, internal

procedures of most courts treat petitions for writs in Rule 39.1B cases more like appeals than writs and create a heavier workload on a court than an equivalent number of other writs. Since the distribution of Rule 39.1B writs around the State varies significantly (from a low of 3.94% of all writs in one district to a high of 11.15% of all writs in another district), caution must be exercised in placing too great a reliance on the raw figures.

2. Appeals

a. Notice of Appeal

The appellate process begins when a litigant files a notice of appeal with the trial court. Rules of Court, Rule 1. The clerk of the trial court mails a notification of the filing of a notice of appeal to all counsel of record other than the appellant, and also sends a notification to the Court of Appeal for the appropriate district. Rule 1(b).

There is a significant difference between the number of notices of appeal filed and the number of perfected appeals. In order to perfect an appeal, the record from the trial court must be prepared and briefs must be filed. It is only when those two additional steps have been taken that an appeal is ready for consideration by the Court of Appeal. There are typically several thousand more notices of appeal filed than records of appeal. In 1996-97, for example, 18,802 notices of appeal were filed, but only 16,881 records of appeal were filed, a 10% difference. Over the last ten years, the average difference between these numbers was 16.7%.

Some of that difference is accounted for by multiple appeals being filed in single cases. For example, both parties may appeal a final judgment in some cases, or there may be appeals from post-judgment orders. In these circumstances, there will be more than one notice of appeal even though there may be only one record on appeal (and, once consolidated, one appeal). However, it appears that most of the difference is due to final

dispositions of separate appeals before the record has been filed. These final dispositions include appeals that have been abandoned, dismissed or settled. For example, during FY 1997-98, the Courts of Appeal disposed of 19,254 appeals, but only 16,613 of those were disposed of after the record was filed. This means that 2,641 appeals (13.7%) were disposed of before the record was filed.

The significant number of appeals disposed of before the record is filed raises some questions for further study by the Task Force. The number is important because if all of those appeals went through the entire appellate process, the already crushing workload of the Courts of Appeal would be substantially increased. The Task Force will explore in greater detail the different reasons for the early disposition of appeals and determine whether the reasons suggest any particular methodologies for increasing early dispositions (e.g., greater use of settlement programs, or using a docket statement to help screen out unmeritorious appeals or appeals where jurisdiction is lacking).

b. Record and Brief Filing

The second step in perfecting an appeal is the preparation of the record. Rules of Court, Rules 4-12. With limited exceptions, the record on appeal consists of the Reporter's Transcript (Rule 4) and the Clerk's Transcript (Rule 5) or a Joint Appendix in Lieu of a Clerk's Transcript (Rule 5.1). Some districts permit the filing of the Superior Court file in lieu of a Clerk's Transcript (Rule 5.2).

Ideally, the Courts of Appeal would have nothing to do with the process of preparing the Reporter's and Clerk's Transcript since these are essentially trial court functions. However, the Court Operations Subcommittee discovered that delays in record preparation are a recurrent problem in some districts. In districts with a large number of
counties, the appellate court copes with delays in record preparation only through constant follow-up which drains staff time from the clerk's office. In a few instances, the appellate court has been forced to issue orders to show cause directed to the clerk of the superior court or to court reporters. There appears to be a lack of initiative by some trial courts in making sure their reporters prepare the record properly. Although problems with record preparation do not have significant resource implications for the Courts of Appeal, delays in record preparation are a significant issue for litigants who are legitimately interested in an expeditious resolution of the appeal.

As noted above, a substantial number of the notices of appeal are ultimately abandoned or settled prior to filing the record. Because the time period from the filing of the notice of appeal to the filing of the record usually involves comparatively little appellate court resources, for purposes of understanding appellate workload trends, the number of records of appeal filed is the more useful number. That number has been steadily increasing, and the rate of increase has significantly exceeded the rate of

California's population growth. From 1989-90 until 1998-99, the Courts of Appeal saw a 24.4% increase in appellate records filed compared with only an estimated 12% population increase. As Table 2.2 indicates, the increase has been higher in criminal and juvenile matters than in civil cases.

Year	Total	Civil	Criminal & Juv.
1989-90	13,012	5,264	7,748
1990-91	13,024	5,374	7,650
1991-92	14,763	5,962	8,801
1992-93	14,308	5,934	8,324
1993-94	14,267	5,786	8,481
1994-95	14,923	5,367	9,556
1995-96	15,641	5,628	10,013
1996-97	16,881	6,387	10,494
1997-98	15,931	5,858	9,973
1998-99	16,186	6,172	10,014
Percent Increase	+24.4%	+17.2%	+29.2%

Table 2-c. Number of records filed 1989-90 to 1998-99.

In civil causes, the appellant's opening brief is ordinarily due 30 days after the filing of the record. Rules 13 & 16. Respondent's brief is due 30 days after the filing of the appellant's brief. Rules 14 & 16. Appellant's reply brief, if any, is due 20 days after the filing of the respondent's brief. Rules 14 & 16. No other briefs are permitted except by permission of the Chief Justice or Presiding Justice of the court. Rule 14. Amicus briefs are provided for in Rules 14(b) (Supreme Court) and 14(c) (Courts of Appeal). Briefs in criminal and juvenile causes are governed in part by Rules 37, 39 and 39.1, which provide a similar timeline (the only difference being a 40-day period for filing of the appellant's opening brief).

The number of pending, fully briefed appeals at any particular time measures the

quantity of cases sitting in the appellate pipeline and can give a sense of a court's backlog. The Courts of Appeal annually report this number as of June 30. The numbers of pending, fully briefed appeals per justice are as follows:

Court	92-93	93-94	94-95	95-96	96-97	97-98	98-99	% Inc.
1st	37	38	38	42	41	35	36	-2.7
2d-LA	52	50	50	44	46	44	43	-17.3
2d-Ven.	58	64	34	61	27	34	35	-39.7
3d	50	45	68	69	71	67	76	+52.0
4th-SD	69	68	87	78	103	92	64	-7.2
4th-Riv.	96	114	124	120	82	59	60	-37.5
4th-SA	84	124	150	190	182	160	153	+82.1
5th	66	58	55	75	88	109	114	+72.7
6th	59	58	58	46	57	63	76	+28.8
Average	56	58	63	66	68	65	64	+14.3

Table 2-d. Number of pending, fully-briefed appeals from 1992-93 to 1998-99.

This table indicates that the Fourth District's San Diego and Santa Ana Divisions and the Fifth District are experiencing a substantial backlog problem compared to other districts and divisions.

c. Preparation of Internal Memoranda

When the record and briefs have been filed, the case is ready for preliminary analysis by the court. In some districts and divisions, appeals are randomly assigned to justices for preparation of an internal memorandum and proposed disposition (in one division, the random assignment is accomplished by physically drawing names from a basket). In other districts and divisions, each appeal is examined first by staff for the

purpose of determining the complexity of the appeal. Simple appeals (e.g., civil or criminal routine dispositions, including criminal apepals where a *Wende* brief has been filed) may be assigned to central staff for preparation of the internal memorandum and proposed disposition (there are some 90 central staff attorneys around the state, although some districts and divisions are now assigning central staff directly to chambers). The preliminary examination of each appeal by staff permits appeals to be weighted and then distributed to justices in a manner that roughly equalizes the burdens on the chambers.

The Court Operations Subcommittee discovered several interesting variations in the process of preliminarily evaluating cases assigned to chambers. In one district, justices front-loaded the process of case preparation with an early conference of the panel. Twice a month, when each of the justices receives his or her new cases to process, the justices quickly read all of the briefs in the cases assigned to them as prospective authors, and they also read all of the briefs in those cases in which they will be a non-authoring participating justice. They make notes concerning the case as to what the case is all about, what the issues are, and what the proposed disposition of each of the issues will probably be. They then meet within a day or two, before they have assigned the cases to their attorneys for further preparation, and discuss each of the cases among themselves. An attempt to obtain consensus is made, and the bare outline of a proposed opinion is fashioned. The justices then go back to their chambers and proceed with their usual opinion preparation process. It appears that this front-loaded conference insures the integrity of the three-justice collegial decision process.

Another variation was found in a district that used the writ panel to hear routine disposition appeals. The routine disposition appeals were initially prepared by central staff attorneys. Before the weekly writs conference, central staff attorneys would present the routine disposition appeals to the panel. That writ panel would become the panel for the appeal. The attorney gives a brief oral presentation of the case, the panel discusses it with the attorney, and then gives direction for the preparation of the opinion, with one of the justices designated as author. The staff attorney would then work directly with the assigned justice to produce the final opinion.

Each justice has two research attorneys and a secretary. Some justices supplement their staff with law student externs, and, as noted above, some central staff attorneys have been reassigned to individual chambers. In 1998-99, one limited-term research attorney was assigned to each justice in the Fourth District's Riverside and Santa Ana divisions,

and to the Fifth District to assist those courts in dealing with their caseloads. The Task Force supports the allocation of additional staff support to these courts. Flexibility in providing extra support where it is needed and when it is needed should be a basic feature of our intermediate appellate system.

There is a very close working relationship between justices and their chambers' staff. In light of the at-will status of Courts of Appeal employees and the element of trust that is required between a justice and his or her chambers staff, there exists a degree of fear and uncertainty among chambers staff regarding job security, particularly when a justice leaves the court. However, most of the districts and divisions have established a general practice of keeping research attorneys and staff notwithstanding changes in justices.

Each justice controls the utilization of his or her chambers staff, and there is significant variation between chambers. In some chambers, the justice assigns cases randomly to staff for preparation of the initial memorandum. Memorandums prepared by staff are then reviewed and edited by the justice before circulation to other panel members. In other chambers, cases are screened and assigned according to complexity, workload and, sometimes, subject matter. Justices in some chambers assign all cases to staff, with the justice becoming involved primarily after preparation of the initial memorandum; some justices, by contrast, assign some cases to themselves for preparation of the initial memorandum.

The number of appeals with records filed per justice has risen steadily over the last decade. More than anything else, the numbers in the following table demonstrate the challenge currently being faced by California's intermediate appellate courts.

	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
1st	121	124	128	123	129	137	137	138	123	125
2d-LA	171	155	209	194	185	169	187	233	202	218

	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
2dVen	192	181	186	198	203	209	253	151	141	186
3d	144	136	159	162	155	174	179	170	173	177
4thSD	157	174	174	162	158	200	194	173	174	151
4thRiv	166	161	184	166	183	197	206	188	196	205
4thSA	139	160	172	209	209	217	231	190	170	170
5th	134	146	148	136	143	169	170	183	179	167
6th	131	148	144	149	148	146	150	151	179	161
State-wide	148	148	168	163	162	170	178	182	171	174

Table 2-e. Number of appeals filed with records per justice from 1989-90 to 1998-99.

To return to the 1989-90 figure of 148 records filed per justice, the California Legislature would have to add 15 new justices to the Courts of Appeal (a 16% increase) bringing the total number of justices to 108 (up from the current number of 93). As a rough approximation, each new justice increases the Courts of Appeals' annual budget by about $820,000.[2] Adding fifteen new justices would increase the Courts of Appeals' budget by at least $12,300,000 (increasing the budget from around $76 million to $88.3 million annually). The Task Force notes that legislation was introduced in 1999 to add twelve justices to the Courts of Appeal. The addition of new justices and associated resources would go a long way towards reducing the immediate workload crisis, although the appellate courts will continue to operate under stress for so long as the increase in caseloads continues to outpace the increase in the number of new justices. The Task

[2] Approximately 80% of the budget of the Courts of Appeals consists of personnel expenses. Staff levels in the Courts of Appeals are tied fairly closely to the number of justices. There are roughly 7 staff employees for each justice.

Force hopes legislation to add appellate justices will be approved in the near future.

There are an irreducible number of steps that must be taken to decide appeals correctly and to prepare a written opinion explaining the basis of the appeal (e.g., reading briefs, reviewing relevant portions of the record, performing legal research, drafting the internal memorandum and opinion, cite-checking and proof reading). At a rate of 174 appeals annually per chambers, every justice must produce 3.3 opinions per week and must review 6.6 opinions per week written by colleagues (and this assumes a 52-week year with no vacation time). There is, of course, wide variation among appeals. Straightforward appeals can be completed much more quickly than complex matters. In light of the rising caseload and the limited amount of time available for processing that caseload, one of the Task Force's central objectives is to ensure that justices' time is properly focused on the most important aspects of the constitutional functions of the Courts of Appeal.

Chapter 3
Recommendations Regarding Appellate Court Structure

A. Conversion of Stand-Alone Divisions into Districts

As set forth in Chapter 2, the structure of the Courts of Appeal has essentially been a result of historical constitutional limitations and ad hoc growth. The historical limitation was that, until 1966, districts could grow larger than 3 justices only by adding 3-justice divisions. The limitation helps explain why the First and Second Districts (which grew beyond 3 justices during the first half of the century) have multiple divisions even though all of the justices in the First District are located in San Francisco and most of the justices in the Second District are located in Los Angeles. When the limitation was removed by a 1966 constitutional amendment (which authorized the Legislature to create divisions of 3 *or more* justices), the Legislature increased the size of the existing single-division districts by adding justices without increasing the number of divisions, and it created the Sixth District as a single-division district. The Fourth District was a special case because it was divided into three separate facilities. The Legislature created a single division of the Fourth District for each facility and permitted each of those facilities to grow by adding justices without creating more divisions.

In light of this ad hoc structural development, the Jurisdiction Subcommittee and Task Force considered whether the divisional structure within districts should be abolished. Under current law, some districts have multiple three- or four-justice divisions, and other districts have a single division with all justices in the district being members of that division. There does not appear to be any particular rationale for these differences in structure other than historical accident. In theory, there are pros and cons to either approach. For example, in a single-division district composed of 9 or 10 justices, panels are formed by random selection, and the justices benefit from being exposed to a wider range of colleagues without sacrificing productivity. On the other hand, the random selection of justices for panels in those districts arguably can introduce a greater degree of uncertainty into decision-making since there are so many combinations of justices who may be assigned to particular panels. By contrast, in

districts which employ three- or four-justice divisions, there are a much smaller number of combinations of panels, arguably creating more predictability in decision-making (at least once a case is assigned to a division). Task Force members also observed that the justices in small divisions are more likely to know how the other justices within the division think, work and are likely to react, which arguably increases productivity and collegiality. However, small divisions with static panels may also lead to less independence in reciprocal review by concurring justices as responsibility for authoring opinions rotates among the same small group of justices. Finally, most Task Force members were of the opinion that changing such a basic organizational structure within the multiple division districts would be extremely difficult to achieve in light of all the social, cultural, historical and political obstacles. The Task Force was not convinced that the theoretical gains that might be achieved by abolishing divisions would be worth the certain and substantial costs associated with such a change effort.

Although the Task Force does not advocate abolishing all existing divisions within districts (in part because of the political obstacles to attaining such a goal), the Task Force recommends that new divisions should not be created in the future and that certain existing divisions should be converted to districts.

The Task Force believes that as new justices are added to the Courts of Appeal, those new justices should be added to existing divisions, and the Legislature should generally avoid creating new divisions for new justices, even in those districts which already have multiple divisions. In addition to the concerns expressed above about possible stagnation and dependence within 3- and 4-justice divisions, the Task Force is concerned that creating more divisions will only further fragment an already fragmented organizational structure in a way that impairs flexibility in managing resources and caseloads. Organizational flexibility is particularly important when the Courts of Appeal must respond to rising caseloads without new resources. Principles of sound judicial administration counsel in favor of the concentration of resources performing similar judicial functions in the smallest number of organizational units. It would be ironic if, at precisely the time when the state has nearly completed the successful unification of

our trial courts, thereby reducing the number of separate jurisdictional entities at the trial level, we continued to expand the number of autonomous jurisdictional units at the appellate level. The same reasons of efficiency and flexibility that warranted trial court unification suggest that we should stop creating new divisions at the appellate level.

The Task Force also believes that some existing divisions can and should be converted into new districts. Under current law, the following divisions are free-standing (i.e., are located within their own building separate from other divisions within the same district):

Second Appellate District -- Division Six (Ventura)
Fourth Appellate District -- Division One (San Diego)
Fourth Appellate District -- Division Two (Riverside)
Fourth Appellate District -- Division Three (Santa Ana)

The Task Force has reached a consensus that a division-to-district conversion of these free-standing divisions would be in the best interests of the proper administration of justice. Converting these free-standing divisions into districts will have the salutary effect of concentrating administrative and budget responsibilities in what are, in reality, geographically and functionally separate, autonomous organizational units. A division-to-district conversion will thus reduce one layer of unnecessary bureaucracy. Under the current structure, the presiding justices of the four free-standing divisions must present their budget requests to the Judicial Council and the Judicial Council's Presiding Justices Advisory Committee through the presiding justice of the district as an intermediary. This creates the potential for the distinct interests of the stand-alone divisions to be compromised at the district level even before the district's budget is presented to the Presiding Justices Advisory Committee and the Judicial Council. The compromises can affect matters as critical to court efficiency and operations as personnel adjustments, purchase or lease of computer hardware or software, and facility expenditures.

The conversion will also provide a much better link between the geographical jurisdiction exercised by the free-standing divisions and the electoral districts in which the justices must stand for retention. By court rule, appeals are assigned to each of these

divisions from cases arising in superior courts in specifically named counties. For

example, cases in the superior courts in San Diego and Imperial Counties are appealed only to Fourth District, Division One, which sits in San Diego. Yet the justices who serve on Division One are required to stand for a retention election in a district that includes Inyo, San Bernardino, Riverside and Orange Counties. Converting the free-standing divisions into separate districts will realign the electoral boundaries with the geographical jurisdictional boundaries actually observed by the divisions.

It should be noted that the reasons for converting free-standing divisions into stand-alone districts have somewhat less force with respect to the Second District, Sixth Division, which serves Ventura County. This is because, given their geographic proximity, the justices from the Sixth Division have remained significantly involved with the other divisions of the Second District with respect to governance issues within the district. However, on balance, the Task Force believes that the stand-alone division in Ventura should be converted into its own district so it can better manage its own facilities and operations.

Converting the free-standing divisions into districts will have no effect upon the assignment of cases because, as noted above, cases are already assigned to each of these divisions from specifically named counties within their districts. The proposal below maintains the pre-existing, county-based case assignments.

To convert California's free-standing divisions into separate appellate districts, the Government Code should be amended as follows:

Gov't Code § 69100. Districts [amended]

The state is divided into ~~six~~ nine court of appeal districts designated and constituted as follows:

(a) The Counties of San Francisco, Marin, Sonoma, Napa, Solano, Lake, Mendocino, Humboldt, Del Norte, Contra Costa, Alameda, and San Mateo shall constitute the First Appellate District.

(b) The ~~Counties of San Luis Obispo, Santa Barbara, Ventura, and~~ County of Los Angeles shall constitute the Second Appellate District.

(c) The Counties of Siskiyou, Modoc, Trinity, Shasta, Lassen, Tehama, Plumas, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Yolo, Placer, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Alpine, and Mono shall constitute the Third Appellate District.

(d) The Counties of ~~Inyo, San Bernardino, Riverside, Orange,~~ San Diego ~~,~~ and Imperial shall constitute the Fourth Appellate District.

(e) The Counties of Stanislaus, Tuolumne, Merced, Mariposa, Madera, Fresno, Kings, Tulare, and Kern shall constitute the Fifth Appellate District.

(f) The Counties of Santa Clara, Santa Cruz, Monterey, and San Benito shall constitute the Sixth Appellate District.

(g) The Counties of Inyo, San Bernardino, and Riverside shall constitute the Seventh Appellate District.

(h) The Counties of San Luis Obispo, Santa Barbara, and Ventura shall constitute the Eighth Appellate District.

(i) The County of Orange shall constitute the Ninth Appellate District.

Comment. This section is amended to convert all free-standing court of appeal divisions (i.e., divisions which are housed in separate facilities) into court of appeal districts. The free-standing division in San Diego becomes the Fourth Appellate District, and free-standing divisions in Inyo/San Bernardino/Riverside, San Luis Obispo/Santa Barbara/Ventura, and Orange become the Seventh, Eighth and Ninth districts, respectively.

§ 69102. Second district [amended]

The Court of Appeal for the Second Appellate District consists of ~~seven~~ six divisions having four judges each~~. One division shall hold its regular sessions in Ventura County, Santa Barbara County, or San Luis Obispo County, at the discretion of the judges of that division, and the other divisions~~ , and shall hold ~~their~~ its regular sessions ~~at~~ in Los Angeles.

§ 69104. Fourth district [amended]

The Court of Appeal for the Fourth Appellate District consists of one division having nine judges and shall hold its regular sessions at San Diego. ~~three divisions. One division shall hold its regular sessions at San Diego and shall have nine judges. One division shall hold its regular sessions in the San Bernardino/Riverside area and shall have six judges. One division shall hold its regular sessions in Orange County and shall have six judges.~~

§ 69107. Seventh district [new]

The Court of Appeal for the Seventh Appellate District consists of one

division having six judges and shall hold its regular sessions in Riverside County.

§ 69108. Eighth district [new]

The Court of Appeal for the Eighth Appellate District consists of one division having four judges and shall hold its regular sessions in San Luis Obispo County, Santa Barbara County, or Ventura County, at the discretion of the judges of the division.

§ 69109. Ninth district [new]

The Court of Appeal for the Ninth Appellate District consists of one division having six judges and shall hold its regular sessions in Orange County.

§ ~~69107~~ 69110. Creation of new districts or divisions; appointment of judges; classification by lot [amended]

Upon the creation of a new court of appeal district or division, the Governor shall appoint pursuant to subdivision (d) of Section 16 of Article VI of the Constitution three or more persons to serve as judges thereof as provided in the legislation creating the district or division. The judges of said district or division elected at the first general election at which they had the right to become candidates shall so classify themselves by lot that the term of office for at least one of them expires at the end of four years, at least one of them at the end of eight years, and at least one of them at the end of 12 years, and entry of such classification shall be made in the minutes of said district of division, signed by each of the judges thereof, and a duplicate thereof filed in the office of the Secretary of State.

Comment. Former section 69107 is renumbered as 69110.

The bill to accomplish this proposed reorganization should include transition language to provide that Section 69110 does not apply to the reorganization of the districts, that the existing justices within the affected divisions automatically become justices of the new districts without affecting their terms of office and without requiring any action by the Commission on Judicial Appointments, and that the presiding justices of the divisions become the administrative presiding justices of the new districts.

Chapter 4

Recommendations Regarding Case Management

A. Workload Adjustment Among Districts and Divisions

One effect of the State having been divided into separate districts, each having its own Court of Appeal, is that there are significant workload disparities among districts and divisions. There are many reasons why disparities may arise and persist over time. Population growth in a district or division may increase the number of cases being filed in the lower courts and appealed to the Courts of Appeal. The mix of cases (e.g., percentage of criminal appeals, civil appeals and complex writ matters) can vary from district to district over time, confounding efforts to forecast workloads. Vacancies on a Court of Appeal may not be promptly filled leaving a court shorthanded. Whatever the reason, when caseload disparities unrelated to productivity persist over several years, and the Legislature does not address the disparities, the Judicial Branch should take whatever steps it can to correct the problem temporarily.

An example of the extent of caseload disparities and the negative impact on litigants is readily at hand. The Fourth District Court of Appeal has, by far, the largest backlog of cases in the State. For FY 1997-98, the Fourth District reported that the median time from a civil appeal being fully briefed to the filing of an opinion was 528 days (i.e., 50% of the cases were handled within 528 days), with Division 3 of the Fourth District reporting a median of 716 days (the highest in the State). This compares with an overall State median of 157 days from fully briefed to opinion. It is no coincidence that the Fourth District has had one of the heaviest caseloads per justice as well as the largest population per justice.

Recognizing that temporary disparities were inevitable and unhealthy (because, among other things, they introduce significant delays into appellate decision-making which harms litigants), the drafters of the California Constitution expressly made

provision for temporary workload adjustment. Section 6 of Article VI of the California Constitution provides in pertinent part as follows:

> The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.
>
> Judges shall report to the council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned.

In addition to the Chief's power to reassign judges, Rule 20 of the California Rules of Court gives the Supreme Court the power to reassign cases among the Courts of Appeal districts and divisions. Rule 20 provides in pertinent part as follows:

> **Rule 20. Transfer of Causes.**
>
> **(a) [By Supreme Court]** Except as provided in (b) [which relates to a Presiding Justice's limited power to transfer certain causes between divisions within the Presiding Justice's district], causes may be transferred from the Supreme Court to a Court of Appeal, or from a Court of Appeal to the Supreme Court, or from one Court of Appeal to another, or from one division to another, only on order of the Supreme Court. . . . .

From these provisions, it is apparent that the power to respond to workload disparities already has been vested in the Chief Justice and the California Supreme Court. However, as a practical matter, that power has not been exercised except upon a request made by the Administrative Presiding Justice of the over-burdened district with the concurrence of the Presiding Justices from the district receiving the cases.

Even though there have been substantial caseload disparities among districts and divisions, workload adjustments (either by reassigning justices or transferring cases) have been rare. As a practical matter, the infrequency of transfers may be, in part, the result of the practice of waiting to act until an overloaded district requests help and secures the agreement of another district for assistance. This practice is procedurally cumbersome, puts the onus upon an impacted district for seeking assistance and finding a

district willing to provide assistance, and, to some extent, relieves the Chief Justice and the Supreme Court of the responsibility for making an independent determination of the need for corrective action.

Whatever the reasons for the infrequency of requests to transfer cases (or justices), the end result is the same. Substantial workload disparities persist for long periods of time with the result that appeals in some parts of the State take much longer to resolve than in other parts of the State.

The Jurisdiction Subcommittee considered a range of ideas to address this problem. A great deal of time was spent considering possible amendments to Rule 20 to make the transfer of cases essentially automatic once certain objective thresholds had been passed (e.g., "(1) the number of fully briefed causes of a District or Division of the Court of Appeal exceeds those in any other District or Division by 15 percent and (2) the average per justice annual dispositions in that District or Division exceeds 130"). The committee ultimately rejected an automatic trigger mechanism on the ground that the decision whether to transfer necessarily required the exercise of discretion that could not solely be reflected in objective criteria.

The subcommittee also considered amending Rule 20 so that the Supreme Court would have a mandatory duty on an annual basis to "substantially equalize" the workload of justices by transferring causes among districts and divisions. As drafted, this proposal did not purport to define "substantially equalize" and thus reintroduced a significant element of discretion in deciding when caseloads had been equalized. However, the subcommittee rejected this proposal because it would have imposed an apparently mandatory duty on the Supreme Court every year to meet a target (i.e., substantial equalization) and would have put the initial onus on the Supreme Court to perform the necessary analysis and make the determination of whether to transfer. Subcommittee members were concerned about imposing such a mandatory duty upon the Supreme Court and about whether a top-down workload adjustment system (i.e., where the Supreme

Court performs the analysis and simply orders transfers) could function properly over time.

In order to preserve the necessary element of discretion, and to maintain

direct Courts of Appeal involvement in considering workload adjustments, the Jurisdiction Subcommittee decided that the initial responsibility for considering whether an adjustment needed to be made should be left where it currently is, i.e., with the Administrative Presiding Justices. However, in order to ensure that workload adjustment be given serious consideration, and to alleviate the need for it to be raised by a particular district, the Jurisdiction Subcommittee decided that workload adjustment should be made an agenda item which the Administrative Presiding Justices Advisory Committee must consider every year. In this way, the burden of raising the issue is taken away from any particular district which may make it easier for the issue to be discussed.

The Jurisdiction Subcommittee has learned of substantial practitioner concerns with transferring cases between districts, with particular emphasis upon the inconvenience and expense to parties and counsel associated with a transferred case. The subcommittee believes these concerns, while legitimate, can be addressed. For example, oral argument in a transferred case could still be held in the transferor district so counsel and parties do not have to travel to a distant county. Alternatively, in divisions allowing oral arguments by videoconferencing, the need to travel to the courthouse may disappear altogether.

The Jurisdiction Subcommittee recommends that Rule 6.52 of Title Six of the Rules of Court be amended as follows:

Rule 6.52. Administrative Presiding Justices Advisory Committee

(a) [Area of Focus] The committee shall make recommendations to the council on policy issues affecting the administration and operation of the Courts of Appeal.

(b) [Additional Duties] In addition to the duties described in rule 6.34, the committee shall:

(1) Establish administrative policies that promote the quality of justice by advancing the efficient functioning of the appellate courts;

(2) Advise the council of the appellate courts' resource requirements and solicit the council's support in meeting budget, administrative, and staffing requirements;

(3) Make proposals on training for justices and appellate support staff to the Governing Committee of the Center for Judicial Education and Research; ~~and~~

(4) Comment on and make recommendations to the council about appellate court operations, including:

(A) Initiatives to be pursued by the council or the Administrative Office of the

Courts; and

(B) The council's goals and strategies ~~.~~ ;

(5) Advise the Chief Justice and the Supreme Court regarding equalization of work of justices, districts and divisions of the Courts of Appeal; and

(6) To assist the Chief Justice in equalizing the work of judges pursuant to Section 6 of Article VI of the California Constitution and the Supreme Court in expediting judicial business pursuant to Rule 20, once annually the committee shall submit a report to the Chief Justice and the Supreme Court regarding the workload of the available justices of the districts and divisions of the Courts of Appeal and whether they should be substantially equalized by transferring causes among the districts and divisions of the Courts of Appeal or by assigning justices to another division or district temporarily. In deciding whether to recommend the transfer of cases or the assignment of justices, the committee may consider all relevant information, including the productivity of the justices, the mix of civil and criminal cases in the sending and receiving courts, and the burden on the parties and sending and receiving courts that transfer or assignment may cause.

(c) [Membership] The committee consists of:

(1) The Chief Justice as chair; and

(2) The administrative presiding justices of the Courts of Appeal designed under rule 75.

(d) [Funding] Each year, the committee shall recommend budget change proposals to be submitted to the Chief Justice for legislative funding to operate the appellate courts. These proposals shall be consistent with the budget management guidelines of the Administrative Office of the Courts Finance Bureau.

(e) [Allocations] The committee shall allocate resources among the appellate courts and approve budget management guidelines based on the actual allocation made by the Chief Justice.

(f) [Administrative Director of the Courts] The Administrative Director shall meet regularly with the committee and shall notify and, when appropriate, consult with the committee about appellate court personnel matters.

B. Mandatory Docketing Statement

The Task Force has endorsed the concept of requiring the filing of docket statements in civil appeals in the Courts of Appeal. As noted by the Appellate Courts Committee of the Los Angeles County Bar Association, "[a]part from providing jurisdictional information, the [docketing] statements can . . . be used to

determine the existence of any related cases pending in the Courts of Appeal. The preparation of a joint docketing statement could also be considered where feasible in civil cases. Such a joint docketing statement could be used to coordinate record preparation and briefing schedules and page limits and to determine possibilities for settlement."

In addition to these benefits, docketing statements can be used systematically to gather more detailed information regarding the types and characteristics of cases being handled by the Courts of Appeal. At present, courts report filings and dispositions, and those statistics are broken down into civil, criminal, juvenile and original causes. There is not, however, much additional information regarding the nature of appeals. Carefully designed, an appellate docketing statement could ultimately improve our understanding of workload differences among districts and divisions.

Finally, a mandatory docketing statement would focus counsel's attention on questions of whether appellate jurisdiction actually exists and whether an appeal is appropriate. The hope is that the information elicited by the mandatory docketing statement may make the prospective appellant realize that he or she does not have an appealable judgment or order, or does not have a reasonable chance of success on the appeal.

The Ideas and Projects -- Cases Subcommittee, which is charged with handling this issue, has proposed the following new Rule of Court to require use of a mandatory docketing statement:

Rule 1.5. Mandatory Docketing Statements [New]

(a) [Time of filing] After filing of the notice of appeal, the clerk of the Court of Appeal shall mail a mandatory docketing statement form to appellant.

Appellant shall complete, serve and file the statement form with the clerk of the Court of Appeal within 10 days after the date of mailing by the clerk.

(b) [Late filing] If the docketing statement is not timely filed with the clerk of the Court of Appeal, the clerk shall forthwith notify the appellant in writing that the appeal may be dismissed unless, within 15 days after the mailing of the notice, the appellant either files the statement and shows good cause why the statement was not timely filed or shows good cause why the filing of the statement should be excused. If an adequate

excuse for nonfiling is not shown within that time, the appeal may be dismissed forthwith.

(c) [Form of docketing statement] The docketing statement shall be a Judicial Council Form.

The recommended form is reproduced in an appendix.

C. Appellate ADR, Settlement, Mediation

The Jurisdiction Subcommittee discussed at several early meetings a wide variety of appellate ADR, settlement and mediation programs. All districts have employed settlement programs of one sort or another, and such programs remain an effective way of reducing caseloads. The Judicial Council's Task Force on Appellate Mediation was studying appellate ADR at the same time, and the Jurisdiction Subcommittee concluded that the mediation task force provided a better forum for discussing the use of ADR on appeal and for considering what additional steps, if any, can be taken to encourage settlement of disputes on appeal.

The Task Force on Appellate Mediation issued its Report and Recommendations on February 12, 1998. The Task Force on Appellate Mediation summarized its recommendations as follows:

1. The task force recommends that a new program of appellate mediation be established in the First District.

2. The program should provide:

- Mediation on a mandatory and confidential basis for selected civil cases;

- Minimal disruption of appellate procedures or deadlines; and,
- Pro bono mediators chosen by the court from among appellate attorneys who successfully complete a training course sponsored by the court.

3. The program should be implemented and administered by a director,

with oversight by the court.

4. An evaluation of the program should be conducted after the program has been operating for an appropriate period of time.

D. Memorandum Opinions

The California Constitution requires that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal. Const., Art. VI, § 14. The writing requirement serves multiple functions. First, appellate judges themselves report that the writing requirement contributes to discipline in decision-making. As one appellate judge has explained, "[a] remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes." Frank M. Coffin, *The Ways of a Judge*, p. 57 (1980). Second, having decisions in writing is the accepted basis by which common law is developed (at least insofar as a written decision is published). Absent a written and published opinion, there would be no useful record of an appellate court's decision or reasoning. Third, the requirement ensures that each litigant is given an explanation of the reasons in support of the court's opinion, and the public availability of written opinions promotes public confidence in the appellate courts and their processes. Fourth, written opinions provide a convenient basis for the Supreme Court to decide whether to grant review in particular cases.

Although all appellate decisions that determine causes must be in writing with reasons stated, some decisions deserve a more elaborate statement of reasons than others. When a decision involves a particularly complex or uncertain area of law or involves close questions of fact, the court's statement of reasons may need to be more extensive in order fully to explain the court's interpretation of the law or the court's understanding

of the facts. On the other hand, when a decision is controlled by well-settled law, does not involve close questions of fact and does not involve close questions of whether the trial court properly exercised its discretion in matters clearly within the trial court's discretion, there is no need for a lengthy explanation of the court's decision. Instead, the court's opinion can focus only upon the relevant facts and law, can omit any discussion of contextual but nonrelevant facts, and can avoid lengthy discussions of the

law, citing only controlling authorities.

This type of abbreviated or "memorandum" opinion still satisfies the goals set forth above of disciplining the court, informing the parties of the reasoning which supports the court's decision, and providing a convenient basis for Supreme Court review. A memorandum opinion is less likely to be able to contribute to the development of the law since a memorandum opinion will typically omit the contextual facts and legal discussions that are the hallmarks of useful legal precedents. However, by definition, a memorandum opinion is appropriate only in cases that are essentially controlled by existing authorities, so there is a significantly reduced need for an elaborate opinion that can be relied upon by other courts. Moreover, the need for an elaborate opinion to guide future courts is entirely eliminated in the case of unpublished opinions which, by virtue of Rule 976, may not even be cited by parties or courts.

Bernie Witkin long advocated that justices write shorter opinions, including memorandum opinions. He devoted two entire chapters to the topics of shorter and memorandum opinions in his leading work on appellate opinions. B.E. Witkin, *Manual on Appellate Court Opinions*, pp. 238-268 (1977). Memorandum opinions are also encouraged by Section 6 of the Standards of Judicial Administration. Section 6 provides as follows:

> **Sec. 6. Memorandum Opinions.**
> The Courts of Appeal should dispose of causes that raise no substantial issues of law or fact by memorandum or other abbreviated form of opinion. Such causes could include:
> (a) An appeal that is determined by a controlling statute which is not challenged for unconstitutionality and does not present any substantial question of interpretation or application.
>
> (b) An appeal that is determined by a controlling decision which does not require a reexamination or restatement of its principles or rules.
> (c) An appeal raising factual issues that are determined by the substantial evidence rule.

Notwithstanding the above, memorandum opinions are still rarely

employed by justices of the Courts of Appeal with only a few notable exceptions. A brief perusal of unpublished opinions from any of the six districts indicates that justices are generally not drawing distinctions between cases that deserve a more thorough explanation and those that deserve a more summary treatment.

There are several reasons why memorandum opinions are not more popular with appellate justices. First, the Supreme Court of California has occasionally reversed on the ground that a judgment was not properly supported by an opinion with reasons stated. *See, e.g., Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243 (holding that a Courts of Appeal opinion by one justice where a second justice concurred in the result only and the third justice dissented did not constitute a writing "with reasons stated" under Section 14 of Article VI). These decisions have created some reluctance among Courts of Appeal justices to tread close to the line by writing memorandum opinions.

Second, although a memorandum opinion will be shorter than a more elaborate opinion in the same case, the shorter opinion may actually require more time to draft than the more elaborate opinion. While this may seem counter-intuitive, it is the practical result of the process many justices use to prepare themselves for deciding individual cases. Many courts use an internal memorandum drafted either by a justice or by staff as the primary basis for initially becoming familiar with the facts and law that are needed to decide an appeal. That internal memorandum, in part because of its completeness, may help focus the court on the most important parts of the record and law which the court can consult as necessary. It also is often drafted in such a way that it can easily be converted into the court's opinion. Editing the complete internal memorandum into a memorandum opinion would likely entail more work than simply converting the internal memorandum into a regular opinion.

The Task Force is convinced, however, that memorandum opinions should be used more frequently and that, properly employed, memorandum opinions have the potential to increase the Courts of Appeals' productivity without sacrificing accuracy in decision-making. Some justices prepare for some cases primarily by reviewing briefs filed by the parties and, in these cases, have a reduced need for a complete memorandum that summarizes the record and applicable law. As explained in Chapter 2, justices in one division hold a conference after the justices have read the briefs and before a memorandum has been prepared. In other cases, while there may be one or more issues that require full treatment in an opinion, other issues in the appeal can just as

appropriately be dealt with in a more summary fashion. In these situations, the court does not need to expend the resources to prepare a complete internal memorandum since the justices have familiarized themselves with the case by relying upon the parties' own briefing, and a more concise memorandum opinion will conserve the court's resources.

As for concerns about the constitutionality of memorandum opinions in light of the written-opinion requirement, a recent decision by the Supreme Court resolves the issue in favor of memorandum opinions. In *Lewis v. Superior Court* (Cal. 1999) 19 Cal.4th 1232, the court rejected the contention that the Court of Appeal's three-page decision granting a peremptory writ of mandate violated the written-opinion requirement because it did not include a discussion of all the authorities and of all the facts with citations to the record. The court explained as follows:

> "[A]n opinion is not a brief in reply to counsel's arguments. [citation omitted] In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions. . . . [A] Court of Appeal has no constitutional obligation to discuss or distinguish decisions of other Courts of Appeal simply because a party deems them to be controlling or contrary to the result reached by the court. The constitutional requirement is satisfied as long as the opinion sets forth those reasons upon which the decision is based; that requirement does not compel the court to discuss all its reasons for rejecting the various arguments of counsel." *Id.*, 19 Cal.4th at 1263-64.

Moreover, the Supreme Court itself has engaged in the practice of issuing memorandum opinions. In the first three volumes of California Reports (Third), covering the 1970 calendar year, the court expressly identified certain opinions as "memorandum cases." *See Cline v. Credit Bureau of Santa Clara Valley* (1970) 1 Cal.3d 908 (two paragraphs); *County of San Diego v. Superior Court* (1970) 1 Cal.3d 677 (two paragraphs); *People v. Seals* (1970) 1 Cal.3d 574 (one paragraph); *Alhambra City School District of Los Angeles County v. Mize* (1970) 2 Cal.3d 806 (thirteen paragraphs), *vacated*, 403 U.S. 927 (1971); *Bradshaw v. Superior Court* (1970) 2 Cal.3d 332 (two paragraphs); *Foytik v.*

Aronson (1970) 2 Cal.3d 818 (seven paragraphs); *In re Chargin* (1970) 2 Cal.3d 617 (three paragraphs); *Larez v. Shannon* (1970) 2 Cal.3d 813 (nine paragraphs); *Alfred B. v. Superior Court* (1970) 3 Cal.3d 718 (two paragraphs). Although the court did not continue its practice of expressly labelling some opinions as "memorandum cases," the court still publishes opinions that would easily qualify for that label. *See People v. Tello* (1997) 15 Cal.4th 264 (six paragraphs). In short, brevity is not unconstitutional.

Recognizing that the productivity-enhancing value of memorandum opinions depends in part on the preparation style adopted by individual justices, the Task Force does not recommend that memorandum opinions be made mandatory. However, the Task Force believes that memorandum opinions are unlikely to become common unless a Rule of Court is enacted that advocates their use in certain cases. The proposed Rule of Court will provide greater legitimacy to memorandum opinions than the existing Standard of Judicial Administration and will provide common guidelines for their use around the State.

The Task Force proposes that Division III of Title 3 of the Rules of Court be retitled "Memorandum Opinions and Publication of Appellate Opinions," and that Rule 975 be added to the Rules of Court to read as follows:

Rule 975. Memorandum Opinions

(1) [Standard] Where any appeal or an issue within an appeal raises no substantial points of law or fact, the Courts of Appeal should dispose of the matter by memorandum opinion. Such matters include but are not limited to:

(a) An appeal or issue that is clearly controlled by settled law;

(b) An appeal or issue that is factual and the evidence is clearly sufficient or clearly insufficient; or

(c) An appeal or issue that is a matter of judicial discretion and the decision was clearly within the discretion of the trial court or clearly an abuse of discretion.

(2) [Criminal Appeals] In criminal appeals, the length of sentence imposed should be considered as a factor in determining whether to resolve the case with a memorandum opinion.

(3) [Form of Opinion] A memorandum opinion or the portion of the opinion constituting the memorandum opinion shall identify the issue or issues presented and shall include a succinct, straight-forward statement of only the relevant facts and a concise statement of controlling precedent and rationale.

Chapter 5
Recommendations Regarding Judicial and Staff Resources

A. Courts of Appeal Subordinate Judicial Officers

Cases filed in the Courts of Appeal come in all shapes and sizes. As a matter of efficient judicial administration, the Courts of Appeal should devote only as many resources to a particular case as that case merits. For example, some cases are sufficiently addressed by a memorandum opinion; others require a more thorough explanation of the law and facts. The decision whether to write a memorandum opinion or a more extensive opinion should, if at all possible, be made early in the process. Another example is the process used to handle writs. Writ attorneys often initially review petitions and prepare recommended dispositions for routine writs, conserving chambers time for those writs that require greater attention.

In considering how best to marshal the resources of the Courts of Appeal, the Task Force has noted that under current practices, three justices are required to act upon all causes. This means that no matter how clear the result, three justices must pass upon the appeal. This may not be the best use of the court's resources, particularly when, as many Task Force members reported, the percentage of appeals which clearly are not well founded among the court's total workload is significant. As justices find more and more of their time spent on clearly unfounded matters, there is inevitably a dilution of energy and resources available for more complex appeals, resulting in a demoralization of spirit. The overall result may be to reduce the amount of judicial energy available for complex and important cases without gaining any greater accuracy in decision-making in straightforward cases.

The Task Force considered several approaches to what is essentially a resource-allocation issue. One possibility is to reduce the number of justices needed to act on an appeal. Perhaps, for example, two justices instead of three should be permitted to render

a decision. And, if two justices are sufficient for some purposes, then perhaps consideration should be given to having a single justice resolve certain appeals. Alternatively, drawing upon the experience in California's trial courts, perhaps certain cases could be resolved by Courts of Appeal "commissioners" or "referees" who could act as appellate subordinate judicial officers.

Each of these possibilities arguably sacrifices to an undue extent the reliability of decision-making that is safeguarded by having three appellate justices pass on every case and the public confidence engendered by three-justice decision-making. Moreover, there are constitutional considerations. According to the California Constitution, each division of the Courts of Appeal "shall conduct itself as a 3-judge court" and the "[c]oncurrence of 2 judges present at the argument is necessary for a judgment." Cal. Const., Art. VI, § 3.

In the *Interim Report*, the Task Force suggested that the potential benefits from a more appropriate allocation of judicial resources -- better matching the level of appellate resources to the needs of individual appeals -- would be worth exploring with a well-developed and carefully monitored Appellate Referee Pilot Project. The pilot project generated a significant number of comments, mostly negative. The Task Force has not concluded its deliberations on this proposal, and the proposal is therefore not yet ready for Judicial Council consideration.

Under the proposed project, the Administrative Presiding Justice of the district would assign to the Appellate Referee those cases where all of the issues appear to meet one or more of the following criteria: (1) The issues are clearly controlled by settled law; (2) The issues are factual and the evidence is clearly sufficient or clearly insufficient; or (3) The issues are matters of judicial discretion and the decision was clearly within the discretion of the trial court or clearly an abuse of discretion. If the Appellate Referee subsequently determines that the case does not satisfy this standard, the case would be referred back to the APJ for assignment to a three-justice panel. In cases that are decided by the Referee, the litigants would be entitled to oral argument, and the Referee would be required to issue a signed, unpublished opinion resolving the appeal. At the request of any party, or on motion of two members of the three-justice panel, the appeal would be heard *de novo* by the panel. The appeal would then be assigned in the ordinary course for oral argument and decision. Absent a request for *de novo* review, the

Referee's opinion would stand as the opinion for the Court of Appeal, and that opinion could be subject to a petition for review by the Supreme Court.

The Task Force believes that the ability to secure *de novo* review by a three-justice panel and the requirement that the Referee issue only unpublished opinions provide constitutionally sufficient protections to the parties and the public. *See, e.g., State v. Rolax* (Wash. 1985) 702 P.2d 1185 (upholding constitutionality of appellate commissioner system because of provision for *de novo* review by three-justice panel). An appeal would end at the Court of Appeal level with the Referee's judgment and opinion if and only if neither the parties nor the court are dissatisfied with the referee's disposition of the case. Failure to seek *de novo* review would, in effect, constitute a waiver of further appellate proceedings at the Court of Appeal level. This is similar to the use of juvenile court referees who are constitutionally permitted to make decisions on the merits only because of procedures for *de novo* rehearing by a judge, procedures which, when invoked, ensure that "the referee's initial findings and orders [are] only advisory and their rendition constitutes no more than a subordinate judicial duty." *In re Edgar M.* (1975) 14 Cal.3d 727, 736. *See also In re John H.* (1978) 21 Cal.3d 18, 25 (failure to seek *de novo* hearing of ruling by juvenile court referee constitutes waiver of any right to have a judge consider the matter).

The criteria for assigning an appeal to the Referee would be based in part upon Washington Rules of Court governing motions on the merits. In Washington, appellate commissioners are authorized to resolve motions on the merits to affirm or reverse appeals (with a commissioner's decision reviewable by the court pursuant to a motion to modify). The Washington rules provide in relevant part as follows:

> "(1) Motion to Affirm. A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.
>
> (2) Motion to Reverse. A motion on the merits to reverse will be granted in whole or in part if the appeal or any part thereof is

> determined to be clearly with merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and clearly not supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly an abuse of discretion." Wash. Rules of Court, Rule 18.14(e).

The Appellate Referee Pilot Project is intended to conserve scarce appellate resources and to concentrate the appropriate level of resources on the right cases. Just as not every trial need be presided over by a Judge Learned Hand, not every appeal need be reviewed by a panel consisting of Traynor, Cardozo and Holmes. When the resolution of an appeal is entirely straightforward and does not contribute at all to the development of the law, it may not be necessary to require the full participation of three appellate justices. Instead, there should be enough flexibility to permit such appeals to be handled expeditiously by an experienced and supervised subordinate judicial officer whose decisions are subject to *de novo* rehearing on motion of any party or the court.

The Task Force considered whether the proposed pilot project would, notwithstanding its intended goals, actually result both in increasing the cost to counsel and the court and in lengthening the time from final briefing to a final judgment. It is apparent that the project has the potential to decrease costs and shorten delay only if the work product of the Appellate Referee is of sufficiently high quality that the parties are comfortable waiving *de novo* review. If *de novo* review is routinely sought, costs and delay could increase, and the pilot project will not have accomplished its intended goal. In this way, the success of the pilot project depends directly upon the quality of opinions produced and the satisfaction level of litigants. Thus, the evaluation of this project would be placed in the hands of litigants themselves.

A proposed rule to establish the pilot project follows:

Rule __. Appellate Referee Pilot Project

(a) [Purpose and application] This rule establishes the procedures

applicable to an appellate referee pilot project. It applies in the _____ and _____ Appellate District Courts of Appeal, for the duration of the Appellate Referee Pilot Project, which may commence on [date to be determined], and remain in effect for three years.

(b) [Assignment of causes] The administrative presiding justice may, by order, assign to the appellate referee any appeal that appears to meet the criteria listed in subdivision (c). If the appellate referee determines that the appeal does not qualify for review under subdivision (c), the administrative presiding justice shall cause it to be assigned to a three-judge panel.

(c) [Criteria] An appeal may be assigned to the appellate referee if all of the issues meet one or more of the following criteria:

(1) The issues are clearly controlled by settled law;

(2) The issues are factual and the evidence is clearly sufficient or clearly insufficient; or

(3) The issues are matters of judicial discretion and the decision was clearly within the discretion of the trial court or clearly an abuse of discretion.

(d) [Oral argument] Each party is entitled to oral argument before the referee, subject to rule 22.1.

(e) [Referee's decision] The appellate referee shall issue a signed opinion within 60 days after the case is submitted within the meaning of rule 22.5(a). If no application for de novo review is filed under subdivision (f) and the court does not order de novo review on its own motion, the decision of the appellate referee becomes the decision of the court and is final for all purposes 15 days after it is filed. Any party's failure to file a timely application for de novo review constitutes a waiver of any right to petition for rehearing under rule 27.

(f) [Application for de novo review]

(1) *[Power to order de novo review]* The Court of Appeal may order de novo review after the decision by the appellate referee within 20 days after the filing of the decision of the appellate referee. De novo review may be ordered upon application, as provided in subdivision (f)(2) of this rule, or on the court's own motion.

(2) *[Time for filing application]* A party seeking de novo review must serve and file an application therefor within 15 days after the filing of the decision of the appellate referee.

(3) *[Contents of application]* The application for de novo review shall include a caption with the appeal name and number, and include a request for de novo review citing this rule. No other legal authority is required to accompany the request. A

copy of the decision of the appellate referee shall be attached to the application.

(g) [Referral to three-judge panel] Upon application for de novo review in compliance with subdivision (f) of this rule or upon the court's sua sponte order for de novo review, the administrative presiding justice shall assign the appeal to a three-judge panel of the Court of Appeal. The three-judge panel shall review the appeal de novo, and permit the parties to orally argue the appeal. Upon de novo review, all rules normally applicable to an appeal apply.

(h) [Decision by three-judge panel] The three-judge panel of the court may issue a new opinion or may issue an order adopting the decision of the appellate referee as its own.

As noted above, the Task Force's proposed pilot project generated the greatest number of comments of any proposal in the Interim Report, and nearly all of the comments were negative. Concerns were expressed both about the merits of the proposal and about whether the project could possibly be successful. Many critics, including many appellate justices, expressed the view that having subordinate judicial officers decide appeals was fundamentally inconsistent with the constitutional structure of the appellate system in California and deprived litigants and the public of appellate decision-making by judges who are accountable to the people. It was suggested that sending cases to an appellate referee would trivialize the appeals selected for the program. It was also argued that the proposal was unlikely to accomplish its intended goal of significantly reducing workload because there is no real deterrent or cost to seeking *de novo* review, and counsel's ethical obligations arguably would require seeking all possible relief on appeal (especially in criminal cases where appointed counsel has a constitutional obligation to provide effective representation on appeal). The gist of these negative comments was that, in practice, adding appellate referees would simply add another layer of process, increasing the cost and delay of resolving appeals.

The comments on the pilot project raised issues that the Task Force itself had previously considered. Recognizing that having subordinate judicial officers deciding appeals would raise important issues about the legitimacy of appellate decision-making, the Task Force designed the project so that it would be a success only if counsel decided not to seek *de novo* review in most cases. The Task Force believes that the proposal properly puts control over its success in the hands of individual appellants and their counsel. Perhaps in a perfect world, there would be no need to consider the use of

subordinate judicial officers on appeal. However, we have periodically seen long stretches of time when rising caseloads have significantly outstripped the resources available to the Courts of Appeal, which can result in delaying justice to the public. There is also the question of whether the number of appellate justices can be substantially increased without creating other problems (e.g., increasing conflicts in the law).

On the other hand, both the breadth and near unanimity of negative comments about the proposed pilot project suggests the need for caution in forwarding the proposal to the Judicial Council. Among other things, the Task Force is still considering several other issues the resolution of which might affect the Task Force's judgment regarding the need for the pilot project. For example, pending the report of the Ad Hoc Task Force on the Superior Court Appellate Divisions, the Task Force has delayed considering the reallocation of some types of cases between the Courts of Appeal and the appellate divisions of the superior courts. If the Task Force ultimately were to recommend a reallocation of some types of cases from the Courts of Appeal to the appellate division, that recommendation might affect the Task Force's assessment of the need for the pilot project. Therefore, the subordinate judicial officer pilot project proposal is not yet ripe for Judicial Council consideration.

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Chapter 6.
Recommendations Regarding En Banc Procedures and Appellate Jurisdiction

A. En Banc Procedures in the Courts of Appeal and *Stare Decisis*

1. *Stare Decisis* in California Courts

As a general matter, *stare decisis* is the judicially-created principle that precedents should ordinarily be followed. This principle helps bring greater predictability and stability in the application and development of law by judges. Instead of every legal issue being decided anew with each case, judges ordinarily will apply the law as previously declared by other judges. *Stare decisis* does not imply rigidity in the law, however, since it is a doctrine that admits of exceptions when necessary to achieve justice and to move the law forward.

In California, one of the primary authorities discussing *stare decisis* is *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, which held:

> Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

This discussion of *stare decisis* emphasizes the "vertical" aspect of the doctrine,

that is, the rule that courts of a lower jurisdiction are *bound* to follow decisions from courts of higher jurisdiction. Thus, a decision by the Supreme Court of California is binding on all lower courts. Similarly, a decision by a Court of Appeal is binding on all lower courts so long as there is no conflicting Courts of Appeal authority (as explained below, a Court of Appeal is *not* bound to follow other Court of Appeal decisions). When there is a conflict between two or more Court of Appeal decisions, the trial courts may choose among the conflicting appellate decisions.

Stare decisis also has a "horizontal" component dealing with the question of whether courts of equal jurisdiction are bound to respect and follow each other's decisions. There is some authority for the proposition that a decision by one panel of the Courts of Appeal is binding on all other panels of the Courts of Appeal until the first decision is disapproved by the California Supreme Court. The Supreme Court suggested as much in *Cole v. Rush*, (1955) 45 Cal.2d 345, *overruled on other grounds in Vesely v. Sager* (1971) 5 Cal.3d 153, 167. Referring to an appellate decision as to which the Supreme Court denied hearing, the court said:

> [The Court of Appeal] judgment stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by *this court* or until change of the law by legislative action.

Id., 45 Cal.2d at 351 (emphasis added). This statement seems to say that even the panel of the Courts of Appeal which made the decision could not later overrule it.

Some cases follow the suggestion in *Cole v. Rush*. *See, e.g., Maillet v. Workmen's Comp. Appeals Bd.* (1972) 23 Cal.App.3d 107, 111; *Scott v. E.L. Yeager Constr. Co.* (1970) 12 Cal.App.3d 1190, 1194. However, Witkin flatly states otherwise:

> A decision of a Court of Appeal is not binding in the Courts of Appeal. One district or division may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions.

9 Witkin, Cal. Procedure, Appeal, § 934, p. 971 (4th ed. 1997).

There are many cases supporting this statement of the law, and it is clear that Courts of Appeal are following Witkin's interpretation of *stare decisis* instead of the suggestion in *Cole v. Rush*. *See, e.g., Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476, 1483 (4th Dist., Div. 1 declines to follow decision of 3d Dist.); *Santa Monica Hosp. Med. Ctr. v. Superior Court* (1988) 203 Cal.App.3d 1026, 1031 (2d Dist., Div. 4, declines to follow 2d Dist., Div. 7); *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 315 (4th Dist., Div. 2 overrules its prior decision; two justices participated in both decisions); *People v. Yeats* (1977) 66 Cal.App.3d 874, 879 (4th Dist., Div. 2 "overrules" and/or "declines to follow" prior decision of 4th Dist. when it was a single-division district).

Many reasons support this approach to *stare decisis*. First, permitting every Court of Appeal to render its own interpretation of the law, relatively unconstrained by the opinions of other Court of Appeal panels, subjects the law to constant reevaluation and testing in the crucible of individual cases. Second, conflicts among Court of Appeal decisions are an important way in which new ideas can be introduced into the law. Good ideas can flourish, while bad ideas will ultimately whither. Third, conflicts create an ongoing, informed debate that helps to inform the Supreme Court when it intervenes to resolve the conflict. Fourth, requiring one panel of the Courts of Appeal to follow another might introduce an unhealthy element of competition within the Courts of Appeal as one panel tries to rush to publication an opinion in an area where there may be multiple appeals pending raising the same or similar issues. Particularly in light of the Supreme Court's power and responsibility to resolve important conflicts between Court of Appeal decisions, a substantial majority of the Task Force members concludes that the benefits of California's approach outweigh the temporary confusion and risk of inconsistent results introduced into the law by permitting each Court of Appeal panel to follow its own conscience in stating and interpreting the law.

In summary, California law has fully embraced a strong concept of *stare decisis* in its vertical component, but has rejected *stare decisis's* horizontal component.

2. Criticisms of California's Version of *Stare Decisis* and Proposals for Reform

There are critics of California's rejection of the horizontal component of *stare decisis* who raise two primary concerns. First, absent a doctrine of horizontal *stare decisis*, it is possible for conflicts to arise between districts and divisions that remain unresolved for many years (because the California Supreme Court may not intervene to resolve the conflict). Conflicts create confusion and disharmony in the law. Second, even absent clear conflicts, the absence of horizontal *stare decisis* fosters an undercurrent of uncertainty in the development of the law, over-emphasizing for each three-judge appellate panel its independence from other panels of the Courts of Appeal. Critics note that California's approach to horizontal *stare decisis* is unique among state courts.

These criticisms may, as a practical matter, be somewhat exaggerated. The number of conflicts between published Courts of Appeal opinions does not appear to be large, and the Supreme Court appears to be taking up most conflicts under its review jurisdiction. Moreover, conflicts permit an issue to be fully vented in the Courts of Appeal before being taken up by the Supreme Court. Thus, conflicts between districts and divisions have both positive and negative features.

As for the asserted undercurrent of uncertainty, although one panel of the Courts of Appeal is technically not bound to follow decisions from other panels, panels in practice appear to respect the views of other panels and to reject such views only for important reasons that are set forth in the court's opinion. In other words, an informal version of horizontal *stare decisis* may operate in practice, if not in theory.

There are essentially two versions of horizontal *stare decisis* that might be considered. First, California could adopt a state-wide doctrine, generally binding all three-judge panels in the State to follow the opinions of earlier panels. Second, California could adopt an intra-district doctrine, generally binding three-judge panels within a district to follow decisions from within that district. (This is similar to the rule followed in the federal circuit courts of appeal.)

The Task Force was nearly unanimous in concluding that there should be no change in California's doctrine of *stare decisis.* California has lived with its current doctrine for many decades, and there is no broad-based movement for reform of the doctrine coming from the bench or the bar. Although concerns about unresolved conflicts and simmering uncertainty are legitimate, a convincing case has not yet been made that the number of conflicts or the degree of uncertainty is so high that horizontal *stare decisis,* statewide or intra-district, has become necessary as an antidote.

3. En Banc Panels and *Stare Decisis*

Although there was no consensus on the Task Force that horizontal *stare decisis* should be introduced in California, there was general agreement that if a stronger version of horizontal *stare decisis* existed in California, it would be advisable to create some form of en banc procedures. An en banc procedure envisions calling together more than three Courts of Appeal justices to resolve an important legal question or a legal question where there exists a conflict in the Courts of Appeal. The decision of the en banc panel then becomes generally binding upon other panels of the Courts of Appeal (subject, of course, to contrary action by the Supreme Court).

It would be possible to create a doctrine of horizontal *stare decisis,* either statewide or intra-district, without creating en banc procedures. If conflicts between Courts of Appeal opinions developed notwithstanding *stare decisis,* or conflicts between districts developed in the context of intra-district *stare decisis,* those conflicts could still be resolved as they are today by the California Supreme Court. An en banc procedure is not logically necessary as an adjunct to horizontal *stare decisis.*

However, the Task Force sees significant advantages to having an en banc procedure if horizontal *stare decisis* is introduced. Under current law, three-judge panels can express their disagreement with the opinions of other three-judge panels by voting their conscience. If horizontal *stare decisis* were introduced, disagreements between panels might not be expressed as readily in published opinions, but the disagreements might persist below the surface and affect decision-making and opinion writing in subtle ways. The en banc procedure serves, in part, as a safety valve for the expression of these differing viewpoints. It permits difficult issues to be addressed by a larger number of

Courts of Appeal justices thereby reflecting the collective wisdom of a wider range of

experiences and viewpoints.

The Task Force considered two types of en bancs, a statewide en banc to handle conflicts among districts and divisions, and an intra-district en banc to handle conflicts only within a district. There was no interest in creating intra-district en bancs, which were viewed as excessively cumbersome in light of the relatively low payoff (i.e., reducing conflicts only within a single district). The Task Force decided that a statewide en banc was not appropriate at this time. As noted above in the discussion of *stare decisis*, the Task Force is not convinced that there are enough important, unresolved conflicts among districts and divisions to justify the expense and additional bureaucratization required by an en banc procedure. Absent such conflicts, the primary justification for an en banc procedure disappears. If it appears that the number of unresolved conflicts starts to rise to a substantial and unacceptable level, the Task Force would recommend that a statewide en banc procedure be reconsidered.

B. Appellate Jurisdiction

1. New Trial Motion as Prerequisite for Appeal in Civil Actions

Under current law, trial court error in civil actions generally need not have been asserted in a new trial motion in order to be cognizable on appeal. *See, e.g., Estate of Barber* (1957) 49 Cal.2d 112, 118-119. The primary exception to this rule involves claims of excessive or inadequate damages, which must be asserted in a new trial motion. *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918-919. The rationale for the case-law exception is that the trial judge is in a better position than an appellate court to determine whether a damages award was influenced by passion or prejudice. *Id.*, 11 Cal.3d at 919.

Upon examining the other grounds for granting a motion for new trial (*see* C.C.P. § 657), the Cases Subcommittee found that several grounds in addition to excessive or inadequate damages would be better reviewed initially by the trial judge or, as a practical matter, required presentation first to the trial judge (in order to make an appellate record). In particular, where the questions are whether "ordinary prudence" would have prevented accident or surprise (C.C.P. § 657(3)) or whether "reasonable diligence"

would have produced newly discovered evidence (C.C.P. § 657(4)), the salient issue is one which the trial judge is in a better position to evaluate than an appellate court. In two situations, a new trial motion is essential anyway in order to make a record justifying relief: jury misconduct (C.C.P. § 657(2)), which usually requires submission of juror affidavits in the superior court, and newly discovered evidence (C.C.P. § 657(4)), which requires presentation of the new evidence in the superior court unless the evidence is discovered during the pendency of the appeal (in which case the remedy is a writ of coram vobis).

The Task Force agreed with the Cases Subcommittee's recommendation that a statute should be enacted to provide that the following issues must be raised in a motion for new trial in order to be cognizable on appeal: juror misconduct, accident or surprise which ordinary prudence would not have prevented, newly discovered evidence which could not have been discovered with reasonable diligence, and excessive or inadequate damages. The appropriate amendment follows:

Code of Civil Procedure § 906. Scope of Appellate Review

Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. The provisions of this section do not authorize
the reviewing court to review any decision or order from which an appeal might have been taken. A judgment shall not be reversed or modified on appeal because of a ground specified in subdivisions (2) through (5) of Section 657 if that ground was not asserted in a timely motion for new trial.

Because this proposal affects both appellate and trial practice, it may be appropriate to add similar language in C.C.P. § 657, which deals with new trial motions, to that trial counsel is aware of the appellate consequences of failing to raise the

specified issues in a motion for new trial.

2. Writ Review of Post-Judgment Orders

Pursuant to C.C.P. § 904.1(a)(2), "an order made after a judgment" is appealable so long as the judgment itself is appealable under C.C.P. § 904.1(a)(1). The list of appealable post-judgment orders is long and runs the gamut from attorney's fees and costs to the grant or denial of equitable relief from the judgment (e.g., C.C.P. § 473), modification of support and custody orders in family law cases, and the like. *See generally* 9 Witkin, Cal. Procedure, Appeal, §§ 135-155 (4th ed. 1997).

The Jurisdiction Subcommittee has been considering whether certain post-judgment orders in civil cases which currently are appealable by virtue of C.C.P. § 904.1(a)(2) should instead be reviewed exclusively by use of an extraordinary writ. For example, one could imagine amending Section 904.1 so that orders granting or denying a motion for attorney's fees or an order granting or denying a motion to tax costs would not be appealable and would be reviewable only by extraordinary writ.

The Jurisdiction Subcommittee has not concluded its deliberations on this point and makes no recommendation at present to the Task Force. There are both constitutional and policy questions that still require exploration.

The constitutional issues relate to whether and in what circumstances writ review can be substituted for review by appeal. Prior to the passage of Proposition 220 in June, 1998, which dealt primarily with unification of California's superior and municipal courts, the appellate jurisdiction provision of the California Constitution, Article VI, Section 11, provided as follows, in pertinent part:

> "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 and in other causes prescribed by statute. Superior c ourts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties."

It was arguable that this language not only conferred jurisdiction on the Courts of Appeal, but also created a constitutional right to appeal in causes within the jurisdiction of the superior court. The proper interpretation of Section 11 was before the California Supreme Court in *Powers v. City of Richmond* (1995) 10 Cal.4th 85. The issue in *Powers* was whether, in light of the above language, the Legislature constitutionally could make a petition for extraordinary writ the exclusive method of seeking appellate review of superior court judgments in actions arising under the Public Records Act.

A majority of the court in *Powers* rejected the proposition that Section 11 created a constitutional right of appeal. *Id*., 10 Cal.4th at 115 (Kennard, J., plurality opinion) ("We conclude that the 'appellate jurisdiction' provision does not require the Legislature to provide for direct appeals in all cases within the original jurisdiction of the superior courts"); 10 Cal.4th at 123 (George, C.J., concurring) ("the state Constitution generally has not been interpreted to require that appellate review of a superior court decision invariably proceed by direct appeal"). Instead, the court held that Section 11 is only a grant of judicial authority to the Courts of Appeal.

As the plurality explained, however, its conclusion does not mean that the Legislature has unfettered power to deny a litigant appellate review by the Courts of Appeal. There remain constitutional limitations upon the Legislature's power:

> "[Our conclusion] does not mean, however, that the 'appellate jurisdiction' provision imposes no restrictions on the Legislature's authority to allocate appellate review as between direct appeals and extraordinary writ petitions. As we have seen, the plain language of the provision reveals that it is a grant of judicial authority and this form of grant has been interpreted to mean that, although the Legislature may regulate the mode of appellate review, it may do so only to the extent that it does not thereby 'substantially impair the constitutional powers of the courts, or practically defeat their exercise.' [citation omitted] If it could be demonstrated in a given case, or class of cases, that, for whatever reason, the Courts of Appeal or this court could not effectively exercise the constitutionally granted power of appellate review by an extraordinary writ proceeding,
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> then such a proceeding could not constitutionally be made the exclusive

mode of appellate review." *Powers*, 10 Cal.4th at 110 (Kennard, J.).

Chief Justice George expressed similar constitutional concerns in his concurring opinion (*id*., 10 Cal.4th at 123-24), although he eschewed a broad holding regarding the interpretation of Section 11 and limited his opinion to affirming the constitutionality of the particular writ review statute before the court. *Id*., 10 Cal.4th at 115-16.

The court clarified and restated its *Powers* holding in *Leone v. Medical Board of California* (2000) 22 Cal.4th 660, where a majority of the court upheld the constitutionality of a statute, Bus. & Prof. Code § 2337, that limits appellate review of a superior court's judgment in a medical licensing case to review by extraordinary writ. The majority explained that the appellate jurisdiction clause of the California Constitution is a grant of power to the courts and does not "convey an intention to grant litigants a right of direct appeal from judgments in proceedings within the superior courts' original jurisdiction." *Id*., 22 Cal.4th at 64. Accordingly, the Legislature can constitutionally regulate the mode of appellate review (i.e., review by direct appeal or by writ) so long as the mode of review does not, as noted in *Powers* and reiterated in *Leone*, substantially impair the constitutionally granted power of appellate review. *Id*., 22 Cal.4th at 66.

In light of the holdings and constitutional limitations suggested in *Powers* and *Leone*, the Jurisdiction Subcommittee is moving forward cautiously in considering proposals to substitute writ review for appellate review in certain types of cases. Caution is particularly warranted since, putting aside constitutional considerations, there is little consensus on the basic policy question of whether writ review is an acceptable substitute for review by appeal. The topic appears to be one that is sensitive and controversial for virtually all appellate lawyers, not to mention for many appellate justices. The reaction from the Appellate Courts Committee of the Los Angeles County Bar Association suggests the depth of opposition:

> **Discretionary Appeals:** The committee is strongly against a system of discretionary appeals. The right to appellate review to correct prejudicial errors is pivotal to ensuring a fair hearing and protecting the integrity of the judicial process. There are numerous problems inherent in implementing such a system that may, in fact, increase the workload of the courts. Further, any attempt to devise standards to limit the cases that can be reviewed will be difficult to administer and, in all likelihood, will

produce inconsistent results. Counsel will again have difficulty explaining to a client why his or her case has been rejected and this too could create the impression that the interests of justice have not been served.

The Jurisdiction Subcommittee will continue to explore this issue.

3. Expansion in Use of Certificate of Probable Cause

Penal Code § 1237.5 provides that appeals by defendants following a plea of guilty or nolo contendere are permissible only where the trial court has issued a certificate of probable cause for the appeal. Section 1237.5 provides in full as follows:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

The Jurisdiction Subcommittee considered whether Section 1237.5 should be expanded to encompass *all* criminal appeals and permit an appeal only upon issuance of a certificate of probable cause that an appeal would be "arguably meritorious." The proposal was intended to screen out clearly meritless appeals. The subcommittee was essentially unanimous in rejecting this proposal as being too cumbersome and inefficient, and as requiring too great a change in existing law. It was noted that the proposal would create several significant extra levels of delay and expense at both the appellate court and trial court levels due to the need for defendant's appellate counsel to go back to the trial court to seek a certificate after the preparation of the appellate record. Moreover, there is a long-standing line of decisions indicating that certificates of probable cause must be

granted unless the underlying appeal appears "wholly frivolous." *See People v. Lloyd* (1998) 17 Cal.4th 658, 668 (Brown, J., dissenting); *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76. The proposal would work a significant change in the law by

permitting issuance of the certificate only if an appeal was "arguably meritorious."

The Jurisdiction Subcommittee then turned its attention to a more modest proposal to extend Section 1237.5 to certain other types of criminal appellate issues (e.g., sentencing questions). After lengthy discussions, however, it became clear that no consensus on the merits of expanding the use of certificates of probable cause in criminal appeals was possible. There were a number of objections to any expansion. First, while it may appear that subjecting certain commonly-raised issues to the certificate requirement would lead to a reduction in Courts of Appeal caseload, that initial impression may be mistaken (or, at least, the reduction may not be as great as anticipated). Suppose, for example, Section 1237.5 was extended to include sentencing issues (including those arising after a jury trial conviction), and suppose a notice of appeal was filed but a certificate was sought and denied by the superior court (or no certificate was sought on the sentencing issues). As a practical matter, this would not entirely prevent the sentencing issue from being brought to the Courts of Appeal since counsel is likely to file a writ petition seeking relief from the refusal to issue the certificate on the sentencing issues (or from counsel's failure to obtain a certificate) while also appealing on the merits. This procedure ultimately may not result in a significant conservation of judicial resources, and, instead, may promote additional fragmentation and complexity. *See People v. Hoffard* (1995) 10 Cal.4th 1170.

Second, independent of workload issues, proposals to expand the use of certificates of probable cause in criminal cases face significant criticism and opposition from the criminal defense bar. In general, the opposition stems from the central fact that any workload savings to the Courts of Appeal from increasing the use of certificates of probable cause results primarily from the appellate courts being relieved of the oral argument and written opinion requirements that govern appeals (since, as noted above, appeals will be replaced with writs seeking to overturn the trial court's refusal to issue a certificate, and writs are not subject to the oral argument and written opinion requirements). Those requirements lie at the core of an appellate system that is committed to ensuring a full opportunity for careful judicial reflection in every appeal and a reasoned explanation of appellate decision-making to appellants, respondents and the

public. Thus, expanding the use of certificates of probable cause carries with it a substantial cost to the public, litigants and the courts in terms of the quality of appellate

justice.

In light of the substantial concerns raised by the criminal defense bar and the uncertainty about whether expanding the use of certificates of probable cause would actually result in a significant workload savings to the Courts of Appeal, the Jurisdiction Subcommittee decided not to recommend any change in existing law, and the Task Force concurred in this decision.

4. Allocation of Jurisdiction Between Courts of Appeal and the Appellate Divisions of the Superior Court

As a result of the Supreme Court of California's decisions in *Powers v. City of Richmond* (1995) 10 Cal.4th 85, *Leone v. Medical Board of California* (2000) 22 Cal.4th 660, *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, and the passage of Proposition 220, there may be somewhat greater flexibility in the allocation of appellate jurisdiction between the Courts of Appeal and the appellate divisions of the superior court. The Task Force is considering whether such flexibility actually exists and whether, if it does exist, there should be any reallocation of appellate jurisdiction. If certain categories of cases could be reallocated from the Courts of Appeal to the appellate divisions, it would provide some relief to the Courts of Appeal. While a reallocation would increase the caseload of the appellate divisions, because the appellate divisions are *not* subject to the California Constitution's written-opinion requirement (*see* Rules of Court, Rule 106), reallocation of some cases could result in an overall reduction in judicial resources that are devoted to handling some appeals.

The Task Force has not made any recommendations regarding reallocation of jurisdiction (tentative or otherwise). The issue remains under consideration, and the next several paragraphs are intended only to highlight some of the issues being discussed by the Jurisdiction Subcommittee, which is charged with examining the question. The Jurisdiction Subcommittee has tentatively concluded that there needs to be a careful evaluation of the procedures used in, and the resources available to, appellate divisions before expanding their jurisdiction. The need to evaluate the current status of the appellate divisions before considering reallocation of cases from the Courts of Appeal to

the appellate divisions may forestall any action by the Task Force on this issue since the Task Force's charge does not include an examination of appellate divisions.

As explained above, prior to Proposition 220, the Supreme Court construed

Section 11 of Article VI of the California Constitution as a grant of authority to the Courts of Appeal to review superior court judgments, but as not creating a constitutional right to appeal superior court judgments. Proposition 220, approved by the voters in June 1998, substantially amended Section 11 of Article VI. It now provides in pertinent part as follows:

> (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.

This language is not a model of clarity, and its definitive interpretation will have to await Supreme Court review. At a minimum, however, it appears that this provision should be interpreted as adopting the holding in *Powers* since the date given in Section 11, "June 30, 1995," is after the date the decision in *Powers* became final (*Powers* was issued on May 8, 1995) and that date was amended into Proposition 220 *after* the decision in *Powers* was final.

Even if Section 11 is interpreted as adopting *Powers*, that does not necessarily mean appellate jurisdiction can be reallocated between the Courts of Appeal and the appellate divisions without constitutional limitation. First, *Powers* did not involve reallocation between courts; it involved the choice between review by appeal and review by writ. Second, *Powers* itself recognized constitutional limits upon the Legislature's power to change the mode of appeal. Third, Section 11's language that the Courts of Appeal have appellate jurisdiction "in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995" arguably expresses an intent to limit (or proscribe) the Legislature's power to reallocate jurisdiction from the Courts of Appeal to the appellate divisions. The scope of the limitation depends on how courts will interpret "causes of a type," and that phrase is undefined and ambiguous.

In summary, there exists significant constitutional uncertainty regarding any proposal to reallocate appellate jurisdiction from the Courts of Appeal to the appellate divisions of the superior court.

In light of the constitutional questions, the Jurisdiction Subcommittee has focused primarily upon relatively modest proposals. For example, the subcommittee has considered having criminal causes that began as felony prosecutions but ended only with misdemeanor convictions be appealed to the appellate division of the superior court instead of to the Courts of Appeal. Since the ultimate conviction is only for a misdemeanor, this would arguably not be a "cause of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995." Similarly, the subcommittee is examining whether a civil action that results in a judgment of less than $25,000 should be appealed to the appellate division. The civil action proposal appears to be more problematic than the criminal action proposal because of the need to deal appropriately with pro-defendant judgments in cases that may, upon reversal, involve more than $25,000 in controversy (e.g., motions to dismiss or summary judgment in cases where damages are plainly in excess of $25,000).

Even if the constitutional questions can be satisfactorily resolved, and even if the subcommittee can agree upon specific reallocation proposals in theory, there remain practical concerns about the capacity of the appellate divisions to handle additional cases. Part of the concern relates to whether appellate divisions in all counties have the resources to handle any additional cases, and part of the concern relates to the quality of decision-making in appellate divisions. An Ad Hoc Task Force on the Superior Court Appellate Divisions is examining these and others issues and expects to finish its work next year.

5. Waiver of Appeal After Guilty Plea

The Cases Subcommittee has been considering the question of whether anything can or should be done to reduce or eliminate criminal appeals in plea bargain/indicated sentence cases where no Fourth Amendment issue exists.

An express, knowing, intelligent and voluntary waiver of appeal from a judgment of conviction and an indicated sentence will be enforced. For example, in *People v. Panizzon* (1996) 13 Cal.4th 68, the Supreme Court held that the defendant's appeal, which challenged the constitutionality of a sentence which the defendant had agreed to incident to a plea bargain, must be dismissed, reasoning that "defendant is barred from challenging the negotiated sentence on appeal because the terms of the plea bargain prohibit such a challenge." *Id*., 13 Cal.4th at 79.

Although waivers of appeal are clearly authorized, justices on the Task Force report seeing a substantial number of post-guilty plea appeals that could have been avoided by an appropriate waiver. However, proposals to require or encourage waivers of appeal raise complex issues regarding the proper and efficient administration of the criminal justice system. The Cases Subcommittee will continue to discuss this topic over the next several months.

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Chapter 7.
Conclusion

Historically, the usual response to increasing Courts of Appeal caseloads has been to increase the number of justices and staff. The number of justices has been increased either by adding new districts or divisions within districts, or by increasing the size of existing divisions. The number of clerks, research attorneys and other court employees is generally determined by reference to the number of justices (e.g., 2 research attorneys for every justice).

The Task Force's challenge has been to consider responses to caseload increases that do not require the addition of substantial new resources to the Courts of Appeal. The challenge is an especially difficult one because the existing organizational structure and culture of each district and division has developed over long periods of time and reflects underlying, fundamental norms of judicial responsibility and due process on appeal.

The recommendations by the Task Force reflect two fundamental principles of judicial administration: congruence and equalization. **Congruence** between the nature of the work presented and the resources dedicated to perform that work ensures the most efficient utilization of scarce resources. **Equalization** of workload between districts, divisions, panels and chambers ensures optimal productivity, reduces burnout from sustained overwork, and guarantees equal access to timely appellate justice across the State.

These principles can be seen at work in the Task Force's recommendations to convert free-standing divisions into districts (which achieves greater congruence between organizational structure and the demands of efficient administration), to provide for an annual workload adjustment report (which promotes both congruence and equalization of workload), to provide for a mandatory appellate docketing statement (which will help the courts to achieve greater congruence by providing some initial indication of the nature of an appeal), and to support greater use of memorandum opinions (which promotes congruence between the nature of an appeal and the resources devoted to its resolution).

The Task Force is convinced that substantial appellate reform can occur only in the context of a free and energetic dialogue among judges, court administrators, court staff, the bar, and concerned members of the public. The *Interim Report* began that dialogue, and the Task Force has been impressed with both the quality and quantity of comments it received in response. The Task Force hopes the dialogue will continue and that appellate justices, court staff and appellate practitioners will continue to think creatively to improve the administration of justice at the appellate level.

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NOTE TO APPELLANT: YOU MUST FILE THIS FORM WITH THE CLERK OF THE COURT OF APPEAL WITHIN 10 DAYS OF ITS MAILING TO YOU BY THE CLERK. ATTACH TO THIS FORM (1) A FILE-STAMPED COPY OF THE JUDGMENT OR ORDER APPEALED, AND (2) PROOF OF SERVICE OF THIS FORM ON ALL PARTIES TO THE APPEAL.

1. Appeal is from
   - a. ☐ Judgment after jury trial
   - b. ☐ Judgment after court trial
   - c. ☐ Default judgment
   - d. ☐ Judgment of dismissal after demurrer sustained
   - e. ☐ Judgment of dismissal pursuant to Code of Civil Procedure sections 581d, 583.250, 583.360, 583.430
   - f. ☐ Judgment after order granting motion for summary judgment
   - g. ☐ Order after judgment pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2)
   - h. ☐ Order or judgment pursuant to Code of Civil Procedure section 904.1, subdivisions (a)(3)–(13)
   - i. ☐ Other *(describe and designate code section that authorizes this appeal)*:

2. Nature of action *(check all that apply):*
   - a. ☐ Tort
     - (1) ☐ Medical malpractice
     - (2) ☐ Product liability
     - (3) ☐ Other personal injury
     - (4) ☐ Personal property
     - (5) ☐ Other tort *(describe)*:
   - b. ☐ Contract
   - c. ☐ Eminent domain
   - d. ☐ Family law
   - e. ☐ Probate
   - f. ☐ Guardianship
   - g. ☐ Conservatorship
   - h. ☐ Trust proceedings
   - i. ☐ Real property rights
     - (1) ☐ Title to real property
     - (2) ☐ Other *(describe)*:
   - j. ☐ Writ proceedings in Superior Court
     - (1) ☐ Mandate (Code of Civil Procedure section 1085)
     - (2) ☐ Administrative Mandate (Code of Civil Procedure section 1094.5)
     - (3) ☐ Prohibition (Code of Civil Procedure section
     - (4) ☐ Other *(describe)*:
   - k. ☐ Equitable action
     - (1) ☐ Declaratory relief
     - (2) ☐ Other *(describe)*:
   - l. ☐ Unfair competition (Bus. & Prof. Code, § 17200)
   - m. ☐ Other action *(describe)*:

(Continued on reverse)

SHORT TITLE:	CASE NUMBER:

3. ☐ This appeal arises from an action designated as a "limited civil case" pursuant to Code of Civil Procedure sections 85 and 904.2.

4. List here or on a separate sheet all parties to this appeal, their party designations, and their respective attorneys of record (*names, addresses, telephone numbers and facsimile numbers*):

5. Date judgment or order entered:

6. a. Date of service by party of notice of entry, if any:
   b. Date of mailing by clerk of notice of entry, if any:

7. Date of entry of order denying motion for new trial or motion to vacate judgment, if any:

8. Does the judgment or order appealed from dispose of all causes of action, including cross-actions, between the parties?
   ☐ Yes
   ☐ No
   If no, please explain:

9. ☐ There are related prior or pending appeals or writ petitions *(name of court, case number, title of case)*:

10. ☐ Related bankruptcy case or court-ordered stays affect this appeal (*attach a copy of the petition and any documentation related to the stay*).

11. ☐ The appeal is entitled to calendar preference pursuant to statute *(please cite authority)*: