

## First Supplement to Memorandum 2011-10

**Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case**

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In the Commission's study of writ jurisdiction in a small claims case, two new points have come to the staff's attention, as discussed below.

**Authority of the Supreme Court and Courts of Appeal to Deny a Writ on the Ground That It Was Not First Presented to a Lower Court**

In several places, the legislation proposed in the tentative recommendation would specify that the Supreme Court or, in some instances, also a court of appeal, could deny a particular type of writ on the grounds that it had not first been presented to a lower court. For example, proposed Code of Civil Procedure Section 1068.5(f) would provide:

(f)(1) A petition that seeks a writ of review relating to an act of a superior court in a small claims appeal may be heard by the appropriate court of appeal.

(2) A petition described in this subdivision may also be heard by the Supreme Court. *If the petition was not previously presented to the appropriate court of appeal, the Supreme Court may deny the petition on that basis.*

(Emphasis added.) Similarly, proposed Code of Civil Procedure Section 1068.5(g) would provide:

(g)(1) A petition that seeks a writ of review relating to a postjudgment enforcement order of the small claims division may be heard by the appellate division of the superior court.

(2) A petition described in this subdivision may also be heard by the appropriate court of appeal or by the Supreme Court. *If the petition was not previously presented to the appellate division of the superior court, the court of appeal or the Supreme Court may deny the petition on that basis.*

(Emphasis added.)

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

Yesterday, we learned from Alan Wiener of the Administrative Office of the Courts that the Civil and Small Claims Advisory Committee does not think it necessary to include such statutory language. The committee does not disagree with the principle expressed, but believes that principle is sufficiently well-established in case law that statutory language is unnecessary. Like the committee's other input, this input is informal and does not reflect an official position of the Judicial Council.

As an example of existing case law, Mr. Wiener pointed to *In re Ramirez*, 89 Cal. App. 4th 1312, 108 Cal. Rptr. 2d 229 (2001), in which a court of appeal denied a writ of habeas corpus "on the ground it was not presented in the superior court in the first instance." *Id.* at 1320. The court of appeal explained that "both the courts of appeal and superior courts have original jurisdiction in habeas corpus proceedings," and "[c]onsequently, 'this court has discretion to refuse to issue the writ as an exercise of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance.'" *Id.* at 1316 (footnote omitted), quoting *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962) (writ of habeas corpus denied on same basis). The staff has not yet had time to look for similar case law involving the types of writs under consideration in this study (writs of review, writs of mandate, and writs of prohibition).

**The Commission should consider the possibility of deleting the express statutory language on this point, and relying on case law instead.** The Comments to proposed Code of Civil Procedure Sections 1068.5, 1085.3, and 1103.5 already refer to *Ramirez* in two places. If the staff finds additional relevant authority, it could be included in the Comments as well.

### **New Court Decision Involving a Matter Heard by Judges of the Appellate Division**

In an earlier communication, Mr. Wiener alerted the staff to a new court decision that is relevant to this study, *Magallan v. Superior Court*, 192 Cal. App. 4th 1444, \_\_ Cal. Rptr. 3d \_\_ (2011).

In *Magallan*, a magistrate granted a criminal defendant's motion for discovery relating to a suppression motion. The prosecution filed a writ petition in superior court, challenging the discovery order. That petition was heard by a "panel of three superior court judges, who were the same three judges who formed the superior court's appellate division." *Id.* at 1449. The writ was granted, and the defendant then sought to overturn that result in the court of appeal.

In the court of appeal, the defendant “claim[ed] that the judges who heard the prosecution’s writ petition lacked subject matter jurisdiction because these three judges had not been assigned to any ‘writ department’ of the superior court but were instead serving as the ‘appellate division’ of the superior court in acting on the petition.” *Id.* at 1451. In advancing this argument, the defendant relied on the constitutional provision stating that the “appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court *in causes subject to its appellate jurisdiction.*” Cal. Const. art. VI, § 10 (emphasis added). The defendant noted that the appellate division lacked appellate jurisdiction of his felony case, and argued that it therefore lacked writ jurisdiction as well.

But the court of appeal rejected this jurisdictional argument, stating:

We hold that the superior court panel did not lack subject matter jurisdiction simply because the same three judges also formed the superior court’s appellate division, *as the record does not establish that they were sitting as the appellate division when they held a hearing on the writ petition.*

*Id.* at 1449 (emphasis added). The court of appeal further explained that the “three judges who heard the petition explicitly stated that they were *not* acting as the appellate division in hearing the writ petition, and the fact that they also served on the appellate division did not prevent them from properly serving in their ordinary capacity as superior court judges in hearing the writ petition.” *Id.* at 1455 (emphasis in original).

*Magallan* thus recognizes that members of an appellate division may hear a writ petition in their capacity as ordinary superior court judges, and, if they do so, they are not subject to the constitutional restriction on the writ jurisdiction of the appellate division.

*Magallan* is important in the instant study, because the tentative recommendation proposes to assign jurisdiction of a writ relating to an act of the small claims division (other than a postjudgment enforcement order) to

[A] judge of the superior court who satisfies both of the following requirements:

- (1) The judge is a member of the appellate division of the superior court.
- (2) The judge did not make any ruling that is challenged by the writ petition.

See proposed Code Civ. Proc. §§ 1068.5(a); 1085.3(a); 1103.5(a).

As discussed at pages 12-14 of Memorandum 2011-10, the Civil and Small Claims Advisory Committee has urged the Commission to delete the second of these requirements, in reliance on the general statutes governing judicial disqualification. The staff expressed support for this idea, but warned that there were some countervailing points.

Among our concerns was the possibility that “[i]f jurisdiction were simply given to ‘a member of the appellate division,’ one could argue (1) *that is tantamount to giving jurisdiction to the appellate division itself*, and (2) the statute is therefore unconstitutional.” Memorandum 2011-10, p. 13 (emphasis added). ***Magallan* tends to undercut that line of attack, which the staff viewed as “an uphill argument” even before *Magallan* was decided. *Id.* at 13-14.**

Respectfully submitted,

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