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Be prepared for the new statutory changes that will affect the filing of writ petitions in California

Writ practice in the California appellate courts has changed little in the last decades. The case that provides the most extensive discussion of the considerations that lead California appellate courts to grant or deny a writ petition, *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273- 1274, 258 Cal.Rptr. 66, is now14 years old. Its still-current recitation of the criteria that appellate courts cite most often as a basis to grant writ relief is based on decisions dating from the 1950's, 1960's and 1970's. This state of equilibrium is likely to change on January 1, 2003, when Code of Civil Procedure section 166.1 will take effect.

The new statute, introduced by the Beverly Hills Bar Association, supported by the State Bar of California and the Consumer Attorneys Association of California, and opposed by the California Judges Association, is likely to change writ practice in California in major ways – many of which appear to be unintended by the Legislature and the statute's supporters.

At first glance, there is little in the new law that would suggest that it carries the potential for significant change in California appellate practice. When it goes into effect on January 1, 2003, new section 166.1 of the Code of Civil Procedure will say:

Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation. Neither the denial of a request for, nor the objection of another party or counsel to, such a commentary in the interlocutory order, shall be grounds for a writ or appeal.

Section 166.1 is based on federal law. 28 U.S.C. section 1292(b) creates federal appellate jurisdiction over interlocutory orders in civil cases, provided that a district judge finds that the order involves a controlling question of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal would materially advance the termination of the litigation. Once a district judge makes the finding required to create potential appellate jurisdiction for an interlocutory order, in writing, the appellant has ten days to apply to the Court of Appeals for an order permitting an appeal to be taken from the order. (28 U.S.C. section 1292(b).)

In 2001, the Beverly Hills Bar Association sponsored a resolution in the State Bar's 2001 Conference of Delegates, essentially seeking the adoption of 28 U.S.C. section 1292(b) in California. The resolution passed, and these organizations then co-sponsored the bill, introduced as Assembly Bill 2865.

According to the committee report on A.B. 2865 prepared by the Senate Committee on the Judiciary, the stated need for the new law was to "bring a uniformity of practice throughout the state with respect to a trial judge's comments on the importance of the legal question for which a writ or appeal is sought." The same report notes that State Bar's written comments in support of the bill it would simply codify a judge's implicit authority to comment on an order.

The California Judges Association (CJA) opposed the bill as unnecessary and potentially burdensome for the trial courts. The CJA noted trial judges already had the authority to notify the Court of Appeal that resolution of a controlling question of law may materially advance the litigation. The CJA feared the bill might cause delay rather than expedite litigation, spurring ancillary proceedings concerning a request for the finding that the question was controlling and that appellate resolution would materially advance the litigation. To meet this concern, the Legislature added the provision in the bill stating that the denial of a request for the "commentary" concerning the trial court's order would be grounds for a writ or an appeal.

The bill also dropped the federal requirement that the party seeking review of the trial court's order make its application to the appellate court within ten days. Rather, the bill's sponsors contemplated that existing writ procedures would be used. The Assembly Committee on the Judiciary's report on the bill stresses "AB 2865 does not change existing writ procedures, nor does it create a new mechanism for appellate review." Rather, the bill was seen as merely a codification of the existing practice of some judges to comment on their interlocutory orders. (*Id*.) The State Bar's comments on the bill state that the trial judge's comments are sometimes the determining factor in whether a party will seek a writ, and the bill would enable parties with limited resources "to make more measured decisions" before seeking a writ.

The Assembly report explains that a notation by the trial judge that the legal issue merits interlocutory appellate review "may be of guidance to the parties considering appellate review by writ or appeal, and may provide additional information to the appellate court, and

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may be taken into consideration by a reviewing court in its decision whether to accept the case for immediate appellate writ review."

The Senate Committee on the Judiciary's report makes a similar point, noting the bill's sponsor (Assembly member Paul Koretz, D-Los Angeles) states that the bill does not change existing writ procedure or create a new level of appellate review, but rather "authorizes trial courts to provide trial courts with additional information that may help define and resolve the issue that is the subject of the writ or appeal."

Likely to change how writs are written

A.B. 2865 was deemed non-controversial by the Assembly Committee on the Judiciary, was passed unanimously by the Senate and the Assembly, and signed by Governor Davis in September 2002. What does this mean for lawyers seeking and opposing writ review in the California courts? Despite the repeated statements in the bill's legislative history that the bill does nothing more than provide codification of the practice of some judges to comment on whether appellate review of a particular order would be a good idea or not, section 166.1 is likely to have major changes in how writs are sought, how they are opposed, and which writs are likely to be granted.

A *writ* is defined as an order issued by the reviewing court to an inferior tribunal, typically the superior court, directing it to do something (mandate) or forbidding it from doing something (prohibition). (Eisenberg, Horvitz & Weiner, *California Practice Guide— Civil Appeals and Writs* (Rutter Group 2000 rev.) ¶ 15.1.15, p. 15-3.) The writs of mandate and prohibition are designed to prevent what the U.S. Supreme Court has characterized as conduct amounting to a "judicial usurpation of power." (*Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 402, 96 S.Ct. 2119 (1976).)

New section 166.1 makes the trial court the gatekeeper for interlocutory appellate review. Contrary to the statements in the bill's legislative history, this is a significant change in California law. Trial courts have never before been asked to render an opinion for the benefit of the reviewing court about whether review is warranted.

In his opinion in *Omaha Indemnity Co. v. Superior Court*, 209 Cal.App.3d at 1273-1274, Justice Gilbert synthesized the various statements by the California Supreme Court concerning the reasons it was granting a writ into six general criteria:

- the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue;
- the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action;
- conflicting trial court interpretations of the law require a resolution of the conflict;
- the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case;
- the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and,
- the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal.

None of these criteria parallel new section 166.1. Nor do any of the existing criteria seem to require any finding by the trial court that appellate review would be helpful. Some are wholly inconsistent with the idea that the trial court's input should be considered by the appellate court– few trial judges could be expected to acknowledge that their order was clearly erroneous as a matter of law and substantially prejudicial to the petitioner.

Like its federal counterpart, new section 166.1 leaves to the appellate court the decision of whether to accept a matter for interlocutory review. But the legislative history suggests appellate courts are expected to take the trial court's views into account in deciding whether to grant a writ. The Assembly Committee on the Judiciary's report says the purpose of the bill is to allow the trial court "to alert the appellate court that its prompt resolution of the legal issue . . . may materially advance the ultimate resolution of the litigation." The same report anticipates that the trial court's views may be taken into consideration by the appellate court in deciding whether to grant review.

As a practical matter, new section 166.1 will be likely to encourage any party seeking a writ to first apply to the trial court for the "commentary" allowed by the statute. The statute says that the request must be written. It does not specify that the request be made in a noticed motion. Hence, the commentary would appear to be available ex parte, or perhaps in a party's opposition to a motion. Just as parties sometimes conclude an opposition to a demurrer with a request for leave to file an amended pleading, oppositions to motions could conclude with a request that if the motion is granted, that the trial court include the commentary to allow for interlocutory review. The statute may also encourage the party on the losing end of a motion to prepare the order for the trial court, since the commentary could be presented in the proposed order.

Oral requests for the commentary may also suffice. In addition to acting on a written request, the statute allows the trial court to include the commentary "at the judge's discretion." Hence, a trial court would seem to be free to add the commentary *sua sponte*, or perhaps after oral argument in which a party made the request.

While the certification required by federal law is required to be made in writing by the district court, section 166.1 does not contain this requirement. It would therefore seem that a trial court's comments made on the record would suffice to satisfy the statute, as long as they were part of the court's order.

Because the new provision is borrowed from federal law, there should be little debate about the meaning of the statutory requirement that the order from which review is sought concern "a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." Since section 1292(b) has been a part of federal law since 1897, many of the issues concerning its meaning have already been resolved. The federal statute has, however, been the subject of a considerable amount of litigation.

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(See, e.g., *U.S. v. Woodbury* (9th Cir. 1959) 263 F.2d 784, 787 [question brought on interlocutory appeal need not be dispositive of the lawsuit in order to be regarded as controlling]; *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria* (2d Cir. 1990) 921 F.2d 21, 24 [controlling question of law under section 1292(b) need not affect a wide range of pending cases]; *Ahrenholz v. Board of Trustees of University of Illinois* (7th Cir. 2000) 219 F.3d 674, 676 ["question of law" as used in section 1292(b) refers to a question concerning the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact, or the meaning of a contract term].

Presumably, the state courts will look to federal law to resolve any issues that come up about what the statute means. But, of course, California's courts will be free to forge their own answers if the federal approach seems unsatisfactory. Decisions of the lower federal courts are not binding on state courts on matters of federal law, but are entitled to great weight. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320, 93 Cal.Rptr.2d 36, 38.) Since section 166.1 is modeled on, but not identical to, 28 U.S.C. section 1292(b), the California courts will likely have considerable latitude in construing it.

Time will tell what impact will be

It will not be apparent for some time how much consideration the appellate courts will give the trial court's finding under section 166.1. It seems likely that the busy appellate courts will include the presence or absence of a section 166.1 commentary as one factor on their internal checklist of whether a matter warrants review. Obviously, if the trial court's order strikes the appellate court as clearly erroneous and significantly prejudicial, the appellate court will continue to consider granting a writ under the current criteria. But it seems probable that litigants who succeed in obtaining the commentary will be more likely than those who fail in obtaining writ relief.

For litigants who are defending the trial court's order, and hence opposing the writ petition, section 166.1 provides a new line of defense. If the petitioner fails to seek the trial court's views, it suggests that the writ either does not involve a "controlling" legal issue or an issue whose disposition would materially advance the conclusion of the litigation (or both.) It also suggests the petitioner is somehow trying to circumvent the normal appellate process, which would appear to start with an attempt to obtain the trial court's section 166.1 commentary.

If the petitioner seeks the commentary but fails to persuade the trial court to include it, the real party in interest is situated even more advantageously. It can argue the order fails to meet the requirements for interlocutory review and the learned trial judge concurs in this view. Human nature being what it is, it is difficult to see why most trial judges, when faced with a request for a finding that interlocutory review of one of their orders would be proper, would not view the request with a skeptical eye. While the provision in the statute that the issue be one about which there is substantial ground for difference of opinion seems designed to mitigate this problem, it seems unlikely to do so entirely. The foundation for a request for interlocutory review is, at bottom, that the trial court decided the issue incorrectly, and that the issue is so important that an appellate court must intervene to protect the petitioner's rights.

If the Legislature had been trying to reduce the number of cases in which writs were granted, adopting a statute like section 166.1, which makes the trial court the gatekeeper of the process would have been a logical place to start. If the Legislature did not actually intend section 166.1 to have any impact on writ practice in the State, then section 166.1 would seem to be another example of the law of unintended consequences.

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