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A little help here?

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EXCEPTIONALLY APPEALING

Statutes should always have a point, but code sections numbered with a point seem especially interesting, and thereby worthy of a tale. Numbering a statute "Section 123.1" evokes the idea that the original Section 123 had such a serious omission that it needed an appendage tagged on to sort out the mess. Appellate practice -- focusing narrowly on the obscure and unusual -- seems to gravitate to such statutes, for instance our (in)famous anti-SLAPP statute, Code of Civil

Procedure Section 425.16, not to mention our holy grail, CCP Section 904.1, governing appealability. Another famous appellatety section with a point is CCP Section 166.1. (Yes, "appellatety" is a word we use in Exceptionally Appealing.)

Regular old CCP Section 166 spells out the ordinary powers of superior court judges, such as hearing and deciding motions. It's one of those statutes that states something very prosaic and obvious, yet necessary. In 2002, however, it got an interesting neighbor, Section 166.1. That section is two sentences long. The first sentence empowers a judge -- sua sponte or at the request of a party or counsel -- to include in an 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." The second sentence makes clear that there can be no writ or appeal arising from a judge's ruling on a Section 166.1 request.

On its face, Section 166.1 is a rather peculiar statute. As you might guess, it was drafted by lawyers for their use, specially to help get interim court rulings in front of appellate courts. A bit of background and storytelling is in order. The background is simply this: The usual ticket to the Court of Appeal is a final judgment or an appealable order. These can be hard to come by and can take a long time and a lot of effort to get. Meanwhile, a trial court can make any number of extremely important, potentially case-dispositive rulings during litigation that parties wish they could appeal. The way to get these before the Court of Appeal is by writ petition, meaning the appellate court has discretion to take review if it wants to. Usually it doesn't want to, so over 90% of writ petitions are summarily denied. Capturing the Court of Appeal's attention, and essentially cutting into the appellate line, is exceedingly hard. Lawyers understandably wanted some help here. Perhaps if the trial court itself urged the Court of Appeal to take review, that might advance the ball?

Trial judges always had the power to note in an order that a ruling was a significant one for which immediate appellate review might help resolve the case. But what judge wants to go on record saying that maybe they made the wrong call? And is it really a trial court's place to encourage an appellate court to exercise discretion to take a matter? Thus, such notations in orders were rare indeed.

Enter the lawyers. Lawyers wanted to be able to encourage -- literally to give courage to -- trial courts to indicate that writ review would be a good idea. Having a statute to cite expressly allowing this could go a long way. So the Beverly Hills Bar Association sponsored a bill to: "explicitly authorize trial court judges to note at their discretion, as some now do, that resolution of the matter may be expedited by appellate determination of a legal issue. While this notation would not be binding on an appellate court or provide a new mechanism for appellate review, it is seen as a means of potential guidance to the parties and reviewing courts." Cal Bill Analysis, Assembly Com., 2001-2002 Reg. Sess., AB 2865 (May 7, 2002).

The lawyers had a good point: Given the policy that litigation should proceed as efficiently and expeditiously as possible, controlling questions of law should be promptly resolved by appellate courts when so doing could "materially advance the ultimate resolution of the litigation." If that last bit sounds familiar, that's because federal litigation has a similar practice in 28 U.S.C.

Section 1292(b). Indeed, this federal practice of certified interlocutory appeals was apparently the genesis and model for Section 166.1. (As originally proposed, the rule would have more closely mirrored the federal rule for interlocutory appeal, and was proposed as a possible Section 904.1(c), then a possible Section 166(a)(6), and ultimately just a standalone 166.1.)

The Consumer Attorneys of California and the State Bar supported BHBA's proposal. Supporters noted that the bill would not change existing procedures or create any new form of appellate review; rather, it would merely codify a judge's existing implicit authority to comment on the need for review an order. A judge's view might help parties decide whether to seek writ relief or not. The California Judges Association initially opposed the bill as unnecessary and potentially burdensome. Hence, the second line of 166.1 -- "Neither the denial of a request for, nor the objection of another party or counsel to, such a commentary in the interlocutory order, may be grounds for a writ or appeal" -- was added to allay concerns that disputes over "certification" could lead to further appeals or writs. (Orders under Sections 1292(b) and 166.1 are often called "certifying" issues for review, even though the word "certify" is not used in either statute. *See, e.g.*, *State ex rel. Dept. of Highway Patrol v. Super. Ct.*, 60 Cal. 4th 1002, 1007-08 (2015).) With that tweak, the bill passed without a single nay vote. (Count that as a big win for a bar association serving the bar! Have you paid dues for CLA and your local bar group?)

Since its enactment in 2002, use of Section 166.1 seems infrequent at best. First off, many litigators just don't know about it. Second, even when invoked, whether successfully or not, the fossil record rarely preserves signs. Digging online (on Westlaw) turns up fewer than a hundred mentions of it in trial court orders, and never more than 10 in a year. (Of course online coverage of trial court orders is sporadic at best.)

Fewer than 50 appellate decisions refer to Section 166.1, nearly all just mentioning it in passing without substantive comment. *See, e.g.*, *Lauermann v. Super. Ct.*, 127 Cal. App. 4th 1327, 1330 n.6 (2005) (noting somewhat dismissively that the "intent is evidently to encourage the appellate court to review the issue on the merits if the losing party files a petition for extraordinary relief"); *Tate v. Wilburn*, 184 Cal. App. 4th 150, 161 (2010) (noting Section 166.1 does not create appellate jurisdiction).

In one interesting instance, *Farmers Ins. Exch. v. Superior Court*, 218 Cal. App. 4th 96, 108 (2013), the Court of Appeal found the certification decision important enough to recount in its opinion the details of the trial court's certification. The opinion details how, given the "awfully unusual sequence of events" (involving depublication of the trial court's "lynch pin authority" after the ruling), the trial court agreed that it "would, for whatever it's worth, certify the question."

This raises the $64,000 (perhaps the cost associated with filing some writ petitions?) question: What is the worth of a Section 166.1 "certification"? Do such orders actually provide appellate courts with helpful information about whether to take a writ petition? The answer is a definite "maybe, sometimes, in a blue moon." The typical Court of Appeal writs attorney or justice would probably say that the trial court's view of whether a ruling is worthy of review isn't especially

important or helpful: "It's our job to know what's worth taking, and we don't need any help with that. Like obscenity, we know it when we see it."

The lack of evidence, after nearly two decades, that a Section 166.1 nudge actually increases the odds of getting writ review thus raises the $6,400 question (perhaps the cost of seeking a Section 166.1 order): Should counsel bother? Opinions here diverge. Some lawyers don't think it's worth it to pester the trial court for this. Depending on how the point is raised, it takes varying degrees of time and effort (better spent on other things, possibly the writ petition), and the potential payoff ranges from nil to dubious. But other lawyers see value in the attempt. E.g., Drobny, "Diligent Trial Attorneys Know How to Prepare for Possible Appellate Writ Petitions," Law.com (July 17, 2019) ("Although the Court of Appeal is free to ignore a Section 166.1 statement by the trial court, the statement often increases the odds that the appellate court will choose to take jurisdiction of the writ petition.").

Often, raising the point is no harder than speaking up about it at a hearing and seeing what happens. If it's denied, then there's little or no harm. But if it's granted, then a writ petition has another factor to add to the scale in favor of writ review. To be sure, the gravity of a 166.1 order may not carry more weight than a feather. And yet in closely balanced cases even a grain of sand just might tip the scales. When it comes to capturing the court's attention for a writ, the odds are so bad that, in theory, any little bit helps. Zealous advocates who want to do everything they can to bolster their clients' cause will not let the chance slip by. They get the point. n

Bibliography: Clausen, "Interlocutory review: Getting the Trial Judge to Endorse Your Writ," Plaintiff (Dec. 2015); Barak, "The Extraordinary Nature of Writ Relief: Writ Petitions Are Very Rarely Granted, So Litigants Should Consider Not Filing Them," 27 L.A. Lawyer 12 (May 2004); Erhlich, "Be prepared for the new statutory changes that will affect the filing of writ petitions in California," Advocate (2002).

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