

Interlocutory review: Getting the trial judge to endorse your writ

Under CCP section 166.1, the cache of the trial court can help get your writ into the six percent of civil writs that actually get reviewed

By Gerald Clausen

You've just suffered an adverse interlocutory ruling that, in your view, dooms your case. You're contemplating seeking a writ.

Of course, as a statistical matter, the chances of obtaining interlocutory review in a civil case in California are pretty slim – about six percent. That's the percentage of civil writs that have been disposed of over the last three years by written opinion – meaning that they were reviewed and decided on their merits. The remaining 94 percent were not reviewed.

Seeking writ review is a little like pitching a movie project to a Hollywood producer in the proverbial 25 words or less. The first thing you need to do is get the court's complete attention – not an easy matter. Given that the Courts of Appeal dispose of an average of 1900 matters per *month*, how much time do they really have to spend on the 160 or so of those matters that are civil writ petitions? Getting a court to spend sufficient time to fully appreciate the significance of the issue presented is often a formidable challenge.

Having a "hook"– such as a close legal issue that effectively determines the outcome of the case – certainly helps. But also important is how much "cache" you can bring to the table. It is one thing, for example, for a party seeking a writ to say that the case presents a close legal issue that effectively determines the outcome of the case. But suppose the trial judge who rendered the ruling were to agree with that characterization. Now we're talking.

Code of Civil Procedure section 166.1, enacted in 2003, provides a vehicle for doing just that. It sets forth a procedure similar to that provided in federal court under 28 U.S.C. section 1292, subdivision (b). Section 1292(b) authorizes a district judge to "certify" an issue he or she deems worthy of interlocutory review. Section 166.1 is similar:

> 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.

The process described in section 166.1 has been referred to as "certifying" an issue to the Court of Appeal. (See, e.g., *State ex rel. Department of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1007-1008.) The express purpose of the section is to encourage appellate courts to grant discretionary review of an issue certified by a judge.

> In enacting section 166.1, the Legislature's intent was to "codify a judge's implicit authority to comment on an order." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2865 (2001-2002 Reg. Sess.) as amended Aug. 14, 2002, p. 2.) "By focusing the attention of the appellate court on the point of law in dispute, the trial judge may encourage the appellate court to hear and decide the question, assisting the parties and the trial court to a resolution of the entire matter. (*Ibid.*)

(*Bank of America v. Superior Court* (2011) 198 Cal.App.4th 862, 869, fn. 6; see also *Lauermann v. Superior Court* (2005) 127 Cal.App.4th 1327, 1330, fn. 6 [intent of section 166.1 is to encourage appellate court to review the issue on the merits if losing party files petition for extraordinary relief]; accord, *Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 488, fn. 4.)

Common legal sense suggests that the section will fulfill this purpose. It seems almost indisputable that certification of an issue will increase by some measure the likelihood that interlocutory review will be granted.

Obtaining trial court certification

To certify an issue under section 166.1, a trial judge must make three specific findings: (1) that the order involves a controlling question of law, (2) as to which there are substantial grounds for difference of opinion, and (3) that appellate resolution of this question may materially advance the conclusion of the litigation.

To date, no California decision has construed these requirements. However, some guidance concerning them can be gleaned from section 166.1's federal counterpart, 28 U.S.C. 1292(b), whose operative language is virtually identical to that of section 166.1. Section 1292(b) permits a district judge to certify for appeal an otherwise non appealable interlocutory order by making substantially the same three findings required under section 166.1: (1) that the order involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (28 U.S.C. § 1292, subd. (b); see *In re Cement Antitrust Litigation* (*MDL No. 296*) (9th Cir. 1982) 673 F.2d 1020, 1026.)

(Although section 1292(b), unlike section 166.1, provides for review by appeal

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rather than extraordinary writ, the distinction is merely one of terminology. Under section 1292(b), an appellate court has discretion to refuse an appeal from an interlocutory order even if it is certified by the trial court. Consequently, despite the difference in terminology, review under both procedures is ultimately discretionary.)

Case law applying section 1292(b) has yielded few firm guidelines concerning the statute's three certification requirements. Of the three, the controlling-question-of-law requirement appears to have received the most attention and is probably the most important. (See *Katz v. Carte Blanche Corporation* (3d Cir. 1973) 496 F.2d 747, 754-755 ["The 'controlling question of law' requirement is the source of whatever difficulty may arise as to the propriety of an interlocutory appeal"].)

It has been held that this requirement encompasses "at the very least every order which, if erroneous, would be reversible error on final appeal." (*Id.* at p. 755; see *In re Cement, supra*, 673 F.2d at p. 1026.) What it may encompass beyond this is unclear. The Ninth Circuit has held that all that must be shown in order for a question to be "controlling" is that resolution of the issue on appeal could "materially affect" the outcome of the litigation in the district court (*In re Cement, supra*, 673 F.2d at p. 1026) – not a particularly instructive legal standard.

But the absence of clear guidelines concerning the three certification requirements may be of little significance since many federal courts (including the Ninth Circuit) focus more on whether a case comes within the policies and intent underlying section 1292(b) than on a mechanical application of its requirements. In *Katz*, *supra*, the court said, "The key consideration is . . . whether [the order] truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies . . . ." (496 F.2d at p. 756.) Those policies include "the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." (*Ibid.*) Similarly, the Ninth Circuit has said that section 1292(b) "was not intended merely to provide review of difficult rulings in hard cases," but was instead intended to be used only in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." (*United States Rubber Co. v. Wright* (9th Cir. 1966) 359 F.2d 784, 785; see also *In re Cement, supra*, 673 F.2d at p. 1026.)

Thus, in urging the trial court to invoke section 166.1, counsel should point out, for example, how an early appellate resolution of the issue might enhance settlement possibilities, narrow the scope of the litigation, shorten the potential length of trial or possibly eliminate the need for trial altogether. (See *Katz, supra*, 496 F.2d at p. 755.)

The effect of certification on writ review

As noted, the purpose of section 166.1 is to encourage a Court of Appeal to review an interlocutory order involving a certified issue, and it seems likely to have that effect. Officially, however, "Section 166.1 'does not change existing writ procedures or create a new level of appellate review.' (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2865, supra, as amended Aug. 14, 2002, p. 2.)" (*Bank of America v. Superior Court, supra*, 198 Cal.App.4th 862, 869, fn. 6.)

Thus, section 166.1 does not provide a *right* to appellate review. (See *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 161 [certification order pursuant to section 166.1 did create appellate court jurisdiction over purported appeal from non appealable order; cf., *City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, [where trial court certified issue under section 166.1, Court of Appeal would treat party's purported appeal from non appealable order as petition for writ].) An appellate court still has discretion to deny a writ petition despite the existence of a certified issue. (See, e.g., *State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 587, fn. 3 [describing summary denial of prior petition for writ review of certified issue]; *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1000, fn. 4 [same].)

Consequently, a petitioner must still assert in the petition circumstances supporting writ review. In *Omaha Indemnity Co. v. Superior Court (Greinke)* (1989) 209 Cal.App.3d 1266, 1271-1275, the Court of Appeal summarized the various criteria that can justify the grant of writ relief, culled from Supreme Court precedent:

> (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. The extent to which these criteria apply depends on the facts and circumstances of the case.

(*Id.* at pp. 1273-1274.)

Nevertheless, a trial court's certification will generally give a petitioner a leg-up in arguing the *Omaha Indemnity* criteria. For example, a ruling that involves a "controlling question of law" under section 166.1 necessarily "substantially prejudices petitioner's case" under *Omaha Indemnity*. Similarly, an issue "as to which there are substantial grounds for difference of opinion" under section 166.1 may in some cases also be one of "widespread interest" or one which "presents a

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significant and novel constitutional issue" or yields "conflicting trial court interpretations of the law requir[ing] a resolution of the conflict." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1273, criteria 1 & 3.) And a case in which "appellate resolution" of the issue might "materially advance the conclusion of the litigation" (§ 166.1) may also be one in which direct appeal is an inadequate remedy and the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1274, criteria 5 & 6.)

Conclusion

Even prior to the enactment of section 166.1, a writ petition that presented an issue meeting the three certification criteria no doubt generally stood a greater than six percent chance of being granted. What formal certification under the section adds to the mix is the trial court's cache – its imprimatur that the issue meets criteria traditionally considered relevant to a grant of discretionary review. That alone makes it a powerful tool.


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