SUPREME COURT COPY

S172684

IN THE

SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

NOV 30 2009

Frederick K. Ohlrich Clerk

Deputy

DANA BRUNS,

Plaintiff-Appellant,

vs.

E-COMMERCE EXCHANGE, INC., et al.,

Defendants-Respondents.

After a Decision by the Court of Appeal, Second Appellate District, Division Five
Case No. B201952

Appellant's Motion For Judicial Notice; Memorandum And Declaration In Support Thereof

LAW OFFICES OF KEVIN M. TRIPI
Kevin M. Tripi (State Bar No. 116201)
2030 Main Street, Suite 1040
Irvine, California 92614
(949) 833-9112
kevintripi@hotmail.com
Attorneys for Plaintiff and Appellant, Dana Bruns

TABLE OF CONTENTS

	Page
Motion for Judicial Notice	1
Memorandum of Points and Authorities	4
I. Introduction.	4
II. Argument.	5
A. Legislative history and historical background of C.C.P. §583.340.	5
1. Legislative history materials of our State Senate.	5
a. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366.	5
(1) Relevance.	5
(2) Legal basis.	7
(3) History of request.	7
b. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as amended 2/14/84).	8
(1) Relevance.	8
(2) Legal basis.	8
(3) History of request.	8

c. Senate Republican Caucus analysis of SB 1366. 9

(1) Relevance. 9

(2) Legal basis. 9

(3) History of request. 9

2. Legislative history materials of the California Law Revision Commission. 9

a. Cal.Law Rev.Com. Memorandum "81-14" (2/27/82). 10

(1) Relevance. 10

(2) Legal basis. 11

(3) History of request. 13

b. Cal. Law Rev. Com. "Staff Draft Tentative Recommendation Relating To Dismissal For Lack Of Prosecution" (5/82). 13

(1) Relevance. 13

(2) Legal basis. 13

(3) History of request. 14

c. *Recommendation relating to Dismissal for Lack of Prosecution* (9/82) 16 Cal. L. Revision Com. Reports 2234. 14

(1) Relevance. 14

(2) Legal basis. 14

(3) History of request. 15

d. *Revised Recommendation relating to Dismissal for Lack of Prosecution* (6/83) 17 Cal. L. Revision Com. Reports 905. 15

(1) Relevance. 15

(2) Legal basis. 16

(3) History of request. 16

e. Cal. Law Rev. Com. Memorandum "81-20" (6/4/81). 17

(1) Relevance. 17

(2) Legal basis. 17

(3) History of request. 17

f. Cal. Law Rev. Com. "Staff Draft Recommendation Relating To Dismissal For Lack Of Prosecution" (9/82). 18

(1) Relevance. 18

(2) Legal basis. 18

(3) History of request. 18

B. Legislative history and historical background of CRC Rule 3.515. 19

1 Relevance. 19

2 Legal basis. 19

3 History of request. 20

III. Conclusion. 20

Declaration of Kevin M. Tripi 21

TABLE OF AUTHORITIES

Cases | **Page**

Cases	Page
Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (1999) 71 Cal.App.4th 1518	20
California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836	5, 13
California State Restaurant Assn. v. Whitlow (1976) 58 Cal.App.3d 340	19
Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072	6
Conservatorship of Coombs (1998) 67 Cal.App.4th 1395	19-20
Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789	10,11-12, 15, 16
Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (1999) 71 Cal.App.4th 1518	20
Estate of Joseph (1998) 17 Cal.4th 203	12
Golden Day Schools, Inc. v. Department of Education (1999) 69 Cal.App.4th 681	9
Guillemin v. Stein (2002) 104 Cal.App.4th 156	7, 8
Hall v. Hall (1990) 222 Cal.App.3d 578	11
Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal.3d 456	7, 8
In re Marriage of Perry (1998) 61 Cal.App.4th 295	7, 8

New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal.App.3d 1145	15, 16
People v. Allen (2001) 88 Cal.App.4th 986	9
Rittenhouse v. Superior Court (1981) 235 Cal.App.3d 1584	10
Rojas v. Superior Court (2004) 33 Cal. 4th 407	12, 13-14, 17, 18
State of South Dakota v. Brown (1978) 20 Cal.3d 765	6
Sierra Club v. San Joaquin Local Agency Formation Com. (1999) 21 Cal.4th 489	12
Van Arsdale v. Hollinger (1968) 68 Cal.2d 245	9

California Statutes

Code of Civil Procedure §581a	11
Code of Civil Procedure §583	11
Code of Civil Procedure §583.310	4
Code of Civil Procedure §583.340	4, 10, 11,14, 15-16, 19
Code of Civil Procedure §583.340(b)	5-10, 12, 13, 16, 17
Code of Civil Procedure §583.340(c)	17
Code of Civil Procedure §583.360	4

Federal Statutes

47 U.S.C. §227(b)(1)(C) 4

Other Authority

CRC Rule 203.5 11

CRC Rule 3.515 4, 6, 18

CRC Rule 8.252(a)(2)(B) 7

CRC Rule 1514 10, 11

S172684

IN THE

SUPREME COURT OF CALIFORNIA

DANA BRUNS,

vs.

E-COMMERCE EXCHANGE, INC., et al.,

Defendants-Respondents.

Appellant's Motion For Judicial Notice; Memorandum And Declaration In Support Thereof

---

Plaintiff and Appellant, Dana Bruns, moves this Court to take judicial notice of the following materials in accordance with the provisions of *Evidence Code* §§452(c), 453, and 459[1]:

1. The legislative history and historical background of *Code of Civil Procedure* §583.340, including the following:

   A. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366
   [*See*, AA 38-41; Exhibit 1 to concurrently filed declaration of Kevin M. Tripi ("Tripi Dec.")];

---

[1] All of the materials to be noticed relate to "proceedings" occurring before the order and judgment that is the subject of this appeal. This statement is provided in conformance with the requirements of CRC Rule 8.252(a)(2)(C).

B. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as amended February 14, 1984) [*See*, AA 42-46; Exhibit 2 to Tripi Dec.];

C. Senate Republican Caucus analysis of SB 1366 [*See*, AA 47-48; Exhibit 3 to Tripi Dec.];

D. Cal.Law Rev.Com.Memorandum "81-14" (2/27/82) [*See*, AA 2-35; Exhibit 4 to Tripi Dec.];

E. Cal. Law Rev. Com. "Staff Draft Tentative Recommendation Relating To Dismissal For Lack Of Prosecution" (5/82) [*See*, ARA 76; Exhibit 5 to Tripi Dec.];

F. *Recommendation relating to Dismissal for Lack of Prosecution* (9/82) 16 Cal. L. Revision Com. Reports 2234 [*See*, AA 38-41; Exhibit 6 to Tripi Dec.];

G. *Revised Recommendation relating to Dismissal for Lack of Prosecution* (6/83) 17 Cal. L. Revision Com.Reports 905 [*See*, AA 49-121; Exhibit 7 to Tripi Dec.];

H. Cal. Law Rev. Com. Memorandum "81-20" (6/4/81) [*See*, ARA 71; Exhibit 9 to Tripi Dec.]; and,

I. Cal. Law Rev. Com. "Staff Draft Recommendation Relating To Dismissal For Lack Of Prosecution" (9/82) [*See*, ARA 76; Exhibit 8 to Tripi Dec.].

2. The legislative (rule making) history and historical background of *California Rule of Court* rule 1514,[2] including the following:

   A. Judicial Council of California's "Report and Recommendation concerning Rule for Coordination of Civil Actions Having Common Questions of Fact or Law" (10/23/73). [*See*, ARA 4; Exhibit 10 to Tripi Dec.].

[2] CRC Rule 1514 has been re-designated as Rule 3.515.

This motion is made on the grounds that this appeal raises critical issues concerning the interpretation of *Code of Civil Procedure* §583.340 and rule 3.515 of the California Rule of Court, and the informed and correct interpretation of section 583.340 and rule 3.515 necessitates consideration of their legislative history and historical background. Each of the materials for which judicial notice is requested provide the historical background and legislative history of section 583.340 and/or rule 3.515.

This motion is based upon the attached memorandum of points and authorities and declaration of Kevin M. Tripi and exhibits thereto, the record on appeal, the appellate briefs, and upon all of the pleadings and records in this action.

Respectfully submitted,

DATED: November 27, 2009 LAW OFFICES OF KEVIN M. TRIPI

By: Kevin M. Tripi
Attorneys for Plaintiff-Appellant

Memorandum of Points and Authorities

I. Introduction.

This is a putative class action which seeks relief from businesses which engage in the unlawful pattern and practice of sending unsolicited advertisements to telephone facsimile machines. This pattern and practice violates the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §227(b)(1)(C). Ms. Bruns is the recipient of unsolicited advertisements which were faxed to her by Defendants-Respondents.

Plaintiff appealed from the order of the trial court (and resulting judgment) which granted motions to dismiss this lawsuit which were brought by Defendants under *Code of Civil Procedure* §§583.310, 583.340 and 583.360. The Second District Court of Appeal, Division Five, reversed the trial court, holding that various periods of time should have been, but were not, excluded from the five-year dismissal time computation. Defendants now challenge the correctness of the Second District Court of Appeal's decision.

This appeal raises critical issues concerning the interpretation of *Code of Civil Procedure* §583.340 and Rule 3.515 of the California Rule of Court. The informed and correct interpretation of section 583.340 and Rule 3.515 necessitates consideration of their legislative history and historical background. Each of the materials for which judicial notice is requested provide the historical background

and constitute the legislative history of section 583.340 and/or Rule 3.515.

II. Argument.

A. Legislative history and historical background of C.C.P. §583.340.

In *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844, this Court admonished,

> "[B]oth the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose."

Plaintiff seeks judicial notice of each and all of the enumerated materials/documents because they individually and collectively reveal the intent behind the statute, the historical circumstances of its enactment, and explain its intended public policy.

1. Legislative history materials of our State Senate.

a. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366.[3]

(1) Relevance. The most critical issue in this appeal is the meaning and intent behind the tolling provisions of C.C.P. §583.340(b), namely, whether the tolling provisions of this statute are limited to complete stays of prosecution (*i.e.*, stays that restrict all litigation activities), or whether the statute applies to all stays of prosecution, partial and complete.

---

[3] (AA 38-41; Exhibit 1 to Tripi Dec.)

Plaintiff contends, *inter alia*, that the provisions of §583.340(b) must apply to all stays of prosecution to maintain harmony and avoid anomalies with stay orders issued under *California Rule of Court* rule 3.515. This argument was rejected at the trial court level because Rule 3.515 tolls time periods during which there are stays of "proceedings," whereas C.C.P. §583.340(b) tolls time periods during which there "prosecution" has been stayed. Plaintiff asserts that the terms "proceedings" and "prosecution" have analogous meanings and the use of these different words in the statute and rule is without distinction. These legislative history materials confirm this argument by revealing that the Legislature used the terms "prosecution," "proceeding" and "proceedings" interchangeably and without difference or distinction.

Fundamental rules of statutory construction mandate that C.C.P. §583.340(b) be interpreted in a manner which averts anomalies with CRC Rule 3.515. As this Court instructed in *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089:

> "Finally, and perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided.

See also, State of South Dakota v. Brown (1978) 20 Cal.3d 765, 775 ("It is a fundamental rule of statutory construction that statutes should be construed to

avoid anomalies.")

Judicial notice of the requested materials is essential to show the integrated and harmonious system of law concerning tolling due to stays, and thus confirms the correctness of the Court of Appeal's determination that the tolling provisions of C.C.P. §583.340(b) apply to all stays of prosecution, partial and complete.

(2) **Legal basis.** In *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7, this Court instructed:

> "[I]t is well established that reports of legislative committees and commissions are part of a statutes legislative history and may be considered when the meaning of a statute is uncertain."

Reports of the Committee on Judiciary are routinely considered by appellate courts in discerning legislative intent. *See, e.g., Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 166, fn. 12; *In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 309, fn.3.

(3) **History of request**[4]. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

---

[4] This statement is provided in conformance with the requirements of CRC Rule 8.252(a)(2)(B).

b. Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as amended 2/14/84).[5]

(1) **Relevance.** These legislative history materials, like the preceding materials, confirm that the Legislature used the terms "prosecution," "proceeding" and "proceedings" interchangeably when discussing C.C.P. §583.340(b) and that the use of these different words is a difference without distinction. This fact is essential to determination of Legislative intent re: the meaning and scope of C.C.P. §583.340(b).

(2) **Legal basis.** As noted above, reports of legislative committees and commissions are part of a statute's legislative history and may be considered in divining a statute's meaning and intent. *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7. Further, reports of the Committee on Judiciary are routinely considered by appellate courts in discerning legislative intent. *See, e.g.*, *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 166, fn. 12; *In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 309, fn.3.

(3) **History of request.** These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

---

[5] (AA 42-46; Exhibit 2 to Tripi Dec.)

c. Senate Republican Caucus analysis of SB 1366.[6]

(1) Relevance. These legislative history materials, like the two preceding materials, confirm that the Legislature used the terms "prosecution," "proceeding" and "proceedings" interchangeably when discussing C.C.P. §583.340(b) and that the use of these different words is a difference without distinction. This fact is essential to determination of Legislative intent re: the meaning and scope of C.C.P. §583.340(b).

(2) Legal basis. Analyses by legislative party caucuses are part of a statute's legislative history and are routinely considered by the courts in determining a statute's meaning and intent. *See, e.g.*, *People v. Allen* (2001) 88 Cal.App.4th 986, 995, fn. 16; *Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 691-692.

(3) History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

2. Legislative history materials of the California Law Revision Commission.

In *Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249 (disapproved on other grounds), this Court commented,

"Reports of commissions which have proposed statutes that are

[6] (AA 47-48; Exhibit 3 to Tripi Dec.)

subsequently adopted are entitled to substantial weight in construing the statutes."

In *Davis v. Cordova Recreation & Park Dist.* (1972) 24 Cal.App.3d 789, 796, the court stated,

> "[I]nterpretative comment of the Law Revision Commission on this section is enlightening. Such comments are well accepted sources from which to ascertain legislative intent."

In *Rittenhouse v. Superior Court* (1981) 235 Cal.App.3d 1584, 1589, the court admonished that the Law Revision Commissions's comments are to be taken not merely as expressions of the Commissions's understanding, but also as statements of legislative intent.

a. Cal.Law Rev.Com.Memorandum "81-14" (2/27/82).[7]

(1) Relevance. This is the most critical document which exists concerning the historical background of C.C.P. §583.340(b). It reveals that in 1978, the Legislature authorized the CLRC to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. To do this, the CLRC retained a consultant, Garrett H. Elmore, who studied the law and prepared a report which included proposed statutory provisions. Mr. Elmore wrote the language which comprises C.C.P. §583.340. These materials show that when drafting §583.340(b), Mr. Elmore was aware of the provisions of CRC rule 1514,

---

[7] (AA 2-35; Exhibit 4 to Tripi Dec.)

and did not intend to create any anomaly between the proposed statute (C.C.P. §583.340) and Rule 1514. As other materials to this motion reveal, Mr. Elmore's proposed language was adopted and used by the CLRC in its published recommendation to the Legislature which, in turn, was added by the Legislature into law as C.C.P. §583.340.

Without an understanding of the historical background of C.C.P. §583.340, its intended meaning and scope cannot be properly determined. For this reason, judicial notice of these materials is imperative.

(2) Legal basis. Three sets of materials comprise CLRC Memorandum 81-14: (i) the memorandum of Nathaniel Sterling, the Assistant Executive Secretary of the CLRC,[8] (ii) copies of the then-existing law re: dismissal (C.C.P. §§581a and 583, and CRC rule 203.5), and (iii) the study of Garrett H. Elmore re: "Revision of California Statutes Relating To Dismissal Of Civil Actions For Lack Of Prosecution."[9]

As an initial matter, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. *Davis v. Cordova Recreation & Park*

8

In *Hall v. Hall* (1990) 222 Cal.App.3d 578, 585, the court relied upon a report prepared by the Assistant Executive Secretary of the CLRC.

9

Mr. Elmore is a consultant who was retained by the CLRC to study/evaluate the need for possible revision of California's statutes relating to dismissal for lack of prosecution.

Dist. (1972) 24 Cal.App.3d 789, 796. This Court has not limited its consideration of CLRC to official, published reports. To the contrary, this honorable Court has cited preliminary CLRC materials such as tentative recommendations, correspondence, staff memoranda and drafts, and consultant reports in support of their construction/interpretation of statutes. Thus, for example, in *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 418-419, this Court considered and relied upon a recommendation of the CLRC, a tentative recommendation of the CLRC, an early draft of proposed provisions the CLRC circulated for comment and an accompanying comment, a CLRC Staff Draft of final recommendations, correspondence, and staff memorandum, and comments of the Cal. State Bar's Committee on Administrative Justice. In *Estate of Joseph* (1998) 17 Cal.4th 203, 210, fn.1, this Court considered ands relied upon a tentative recommendation of CLRC and a report of consultant retained by the Commission. *See also*, *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 502, 503 (report of CLRC which contained several background studies of a consultant retained by the Commission).

These materials of the CLRC, particularly the appended report of the CLRC's retained consultant, Garrett Elmore, are essential to understanding and interpreting the provisions of C.C.P. §583.340(b). As in *Estate of Joseph*, *supra*, the very language of the statute - §583.340(b) - found its source in the materials

(report) of the Commission's expert consultant, who drafted language virtually identical to that which would subsequently be enacted. Failure to judicially notice Mr. Elmore's report would be to turn a blind eye to the historical background of the statute. And, this Court stated in *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844,

> "In the present instances both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in diving the statutory purpose."

(3) History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

b. Cal. Law Rev. Com. "Staff Draft Tentative Recommendation Relating To Dismissal For Lack Of Prosecution" (5/82).[10]

(1) Relevance. These legislative history materials, like the first three sets of materials, confirm that the Legislature used the terms "prosecution," "proceeding" and "proceedings" interchangeably when discussing C.C.P. §583.340(b) and that the use of these different words is a difference without distinction. This fact is essential to determination of Legislative intent re: the meaning and scope of C.C.P. §583.340(b).

(2) Legal basis. In *Rojas v. Superior Court* (2004)

---

[10] (ARA 76; Exhibit 5 to Tripi Dec.)

33 Cal. 4th 407, 418-419, our Supreme Court considered and relied upon a recommendation of the CLRC, a tentative recommendation of the CLRC, an early draft of proposed provisions the CLRC circulated for comment and an accompanying comment, a CLRC Staff Draft of final recommendations, correspondence, and staff memorandum, and comments of the Cal. State Bar's Committee on Administrative Justice.

(3) History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

c. *Recommendation relating to Dismissal for Lack of Prosecution* (9/82) 16 Cal. L. Revision Com. Reports 2234.[11]

(1) Relevance. The language which comprises C.C.P. §583.340 was written and proposed by a consultant, Garrett H. Elmore, who was retained by the CLRC. These materials reveal that the language proposed by Mr. Elmore was adopted and used by the CLRC in its published recommendation to the Legislature. This document is critical to establishing the historical background of C.C.P. §583.340 which, in turn, reveals its intended meaning and scope.

(2) Legal basis. Interpretative comments of the

---

[11] (AA 38-41; Exhibit 6 to Tripi Dec.)

Law Revision Commission are well accepted sources from which the courts ascertain legislative intent. *Davis v. Cordova Recreation and Park District* (1972) 24 Cal.App.3d 789, 796. *See also, New West Fed. Savings & Loan Assn. v. Superior Court* (1990) 223 Cal.App.3d 1145, 1153.

(3) History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

d. *Revised Recommendation relating to Dismissal for Lack of Prosecution* (6/83) 17 Cal. L. Revision Com. Reports 905.[12]

(1) Relevance. As noted above, the language which comprises C.C.P. §583.340 was written and proposed by a consultant of the CLRC, Garrett H. Elmore. The previous document shows that the language proposed by Mr. Elmore was adopted and used by the CLRC in its initial published recommendation to the Legislature. The current document reveals that in June 1983, the CLRC issued a revised recommendation to the Legislature in which the CLRC renumbered as Section 583.340, the text of former proposed Section 583.350, and it changed the word, "shall" to "must" where shown in bold, as follows:

"583.340. Computation of time

---

[12] (AA 49-121; Exhibit 7 to Tripi Dec.)

> 583.340. In computing the time within which an action **must** be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
> (a) The jurisdiction of the court to try the action was suspended.
> (b) Prosecution or trial of the action was stayed or enjoined.
> (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."
> (Bold added.)

No other changes were made to §583.340, which was then added into law by Statutes 1984, Chapter 1705, §5, Senate Bill 1366 (Keene). This document is critical to establishing the historical background of C.C.P. §583.340 which, in turn, reveals its intended meaning and scope.

(2) **Legal basis.** As instructed in *Davis v. Cordova Recreation and Park District* (1972) 24 Cal.App.3d 789, 796, interpretative comments of the Law Revision Commission are well accepted sources from which the courts ascertain legislative intent.

These very materials were judicially noticed by the court in *New West Fed. Savings & Loan Assn. v. Superior Court* (1990) 223 Cal.App.3d 1145, 1153.

(3) **History of request.** These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

e. **Cal. Law Rev. Com. Memorandum "81-20" (6/4/81).**[13]

(1) **Relevance.** Plaintiff contends that the trial court erred not only in failing to exclude from the 5-year dismissal time computation, various time periods under C.C.P. §583.340(b), but also various time periods under C.C.P. §583.340(c). The Second District Court of Appeal agreed with Plaintiff and held that various time periods should have been, but were not, excluded from the five-year dismissal time computation. These materials reveal the intended policy considerations underlying C.C.P. §583.340(c), namely that the courts are to give the excuse of "impossibility, impracticability and futility" a liberal interpretation and make "a reasonable allowance for the time of delay caused by 'special circumstances that hindered the plaintiff."

(2) **Legal basis.** In *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 418-419, this Court considered and relied upon a recommendation of the CLRC, a tentative recommendation of the CLRC, an early draft of proposed provisions the CLRC circulated for comment and an accompanying comment, a CLRC Staff Draft of final recommendations, correspondence, and staff memorandum, and comments of the Cal. State Bar's Committee on Administrative Justice.

(3) **History of request.** These materials were not

---

[13] (ARA 71; Exhibit 8 to Tripi Dec.)

presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

f. Cal. Law Rev. Com. "Staff Draft Recommendation Relating To Dismissal For Lack Of Prosecution" (9/82).[14]

(1) Relevance. These legislative history materials, like the first three sets of materials, confirm that the Legislature used the terms "prosecution," "proceeding" and "proceedings" interchangeably when discussing C.C.P. §583.340(b) and that the use of these different words is a difference without distinction. This fact is essential to determination of Legislative intent re: the meaning and scope of C.C.P. §583.340(b).

(2) Legal basis. In *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 418-419, this Court considered and relied upon a recommendation of the CLRC, a tentative recommendation of the CLRC, an early draft of proposed provisions the CLRC circulated for comment and an accompanying comment, a CLRC Staff Draft of final recommendations, correspondence, and staff memorandum, and comments of the Cal. State Bar's Committee on Administrative Justice.

(3) History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the

---

[14] (ARA 101; Exhibit 9 to Tripi Dec.)

Second Appellate Division, Division Five, in connection with this appeal.

B. Legislative history and historical background of CRC Rule 3.515.[15]

1. Relevance. As noted above, the most critical issue in this appeal is whether the tolling provisions of C.C.P. §583.340(b) apply to all stays of prosecution - partial and complete - or whether it is limited to complete stay of prosecution (*i.e.*, stays that restrict all litigation activities). Plaintiff contends, *inter alia*, that the provisions of §583.340(b) must apply to all stays of prosecution to maintain harmony and avoid anomalies with stay orders issued under *California Rule of Court* rule 3.515. Defendants contend to the contrary and assert that the time-exclusion provisions of Rule 3.515 only apply to 'complete' stays. The rule making history of Rule 3.515 directly refutes Respondents' argument and, conversely, confirms Plaintiff's interpretation of Rule 3.515, and by necessary implication, C.C.P. §583.340(b).

2. Legal basis. In *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 344-345, the court noted,

> "[T]he cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation. [Citations omitted.] This rule has been extended to construction of administrative regulations."

In *Conservatorship of Coombs* (1998) 67 Cal.App.4th 1395, 1398, the

---

[15] (ARA 4; Exhibit 10 to Tripi Dec.)

court admonished:

> "The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court."

And, the courts examine the administrative record/rule making history when construing a regulation/rule. See, *e.g.*, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1528.

3. History of request. These materials were not presented to the trial court but *were* judicially noticed and considered by the Second Appellate Division, Division Five, in connection with this appeal.

III. Conclusion.

Each of the documents/materials for which judicial notice is sought constitute admissible evidence of legislative history. Individually and collectively, the documents/materials reveal the intent behind C.C.P. §583.340, the historical circumstances of its enactment, and explain its intended public policy. To enable informed and correct interpretation of §583.340, the court is urged to grant this motion.

Respectfully submitted,

DATED: November 27, 2009 LAW OFFICES OF KEVIN M. TRIPI

By: Kevin M. Tripi
Attorneys for Plaintiff-Appellant

Declaration of Kevin M. Tripi

I, Kevin M. Tripi, declare,

1. I am an attorney duly licensed to practice law before all courts of the State of California and I am counsel of record for Plaintiff and Appellant, Dana Bruns, in this lawsuit. The matters stated in this declaration are based upon my personal knowledge and, if called to testify, I could and would competently testify to the matters stated herein.

2. The facts stated in the attached memorandum of points and authorities are true and correct. Good cause exists for the Court to take judicial notice of each of the documents/materials listed in this declaration and the attached motion.

3. Attached to this declaration as Exhibit 1 is a true copy of a Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366.

4. Attached to this declaration as Exhibit 2 is a true copy of a Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as amended February 14, 1984).

5. Attached to this declaration as Exhibit 3 is a true copy of a Senate Republican Caucus analysis of SB 1366.

6. Attached to this declaration as Exhibit 4 is a true copy of Cal. Law Rev. Com. Memorandum "81-14" (2/27/82).

7. Attached to this declaration as Exhibit 5 is a true copy of Cal. Law Rev. Com. "Staff Draft Tentative Recommendation Relating To Dismissal For Lack Of Prosecution" (5/82).

8. Attached to this declaration as Exhibit 6 is a true copy of *Recommendation relating to Dismissal for Lack of Prosecution* (9/82) 16 Cal. L. Revision Com. Reports 2234.

9. Attached to this declaration as Exhibit 7 is a true copy of *Revised Recommendation relating to Dismissal for Lack of Prosecution* (6/83) 17 Cal. L. Revision Com.Reports 905.

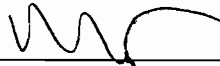
10. Attached to this declaration as Exhibit 8 is a true copy of Cal. Law Rev. Com. Memorandum "81-20" (6/4/81).

11. Attached to this declaration as Exhibit 9 is a true copy of Cal. Law Rev. Com. "Staff Draft Recommendation Relating To Dismissal For Lack Of Prosecution" (9/82).

12. Attached to this declaration as Exhibit 10 is a true copy of the Judicial Council of California's "Report and Recommendation concerning Rule for Coordination of Civil Actions Having Common Questions of Fact or Law" (10/23/73).

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 27th day of November, 2009

at Irvine, California.



Kevin M. Tripi

Legislative Research Incorporated

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

Authentication of the Records and Annotated Index

Legislative History Research Report[1] Regarding:
CALIFORNIA CODE OF CIVIL PROCEDURE § 583.340 (b)
As Added By Statutes of 1984, Chapter 1705, § 5, SB 1366 – Keene

I, Lisa Hampton, declare that this report includes:

- *Historical documents surrounding the adoption of the above enactment.* These documents were obtained by the staff of Legislative Research, Incorporated and are true and correct copies of the originals obtained from the designated official, public sources in California unless another source is indicated, with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, paging and relevant identification have been inserted.

  Legislative Research, Incorporated was established in 1983 (formerly Legislative Research Institute), and is a firm which specializes in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible ...." Legislative Research, Incorporated has been cited by name as the source of records relied upon by the court in *Redlands Community Hospital v. New England Mutual Life Insurance Co,* 23 Cal. App.4th 899 at 906 (1994).

- *An annotated index of the documents.* This index cites the sources of the documents and provides points and authorities in endnote form to assist in gaining judicial notice as necessary. These are provided for general information only and are not intended to supply legal advice or an exhaustive summary of the law with respect to the courts' use of the various records provided herein. Furthermore, use of same does not create an attorney-client relationship and LRI assumes no liability whatsoever in connection with their use.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed September 14, 2007, in Sacramento, California.

Lisa Hampton, Research Director

Legislative Research Incorporated

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

Documents Generated During Senate Deliberations

Legislative Research Incorporated hereby certifies that the accompanying record/s is/are true and correct copies of the original/s obtained from one or more official, public sources in California unless another source is indicated, with the following exceptions : In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, for ease of reference, paging and relevant identification have been inserted.

SENATE COMMITTEE ON JUDICIARY
Barry Keene, Chairman
1983-84 Regular Session

SB 1366 (Keene)
As introduced
Code of Civil Procedure/Revenue and Taxation Code
PAW

S
B
1
3
6
6

DISMISSAL OF CIVIL ACTIONS

HISTORY

Source: California Law Revision Commission

Prior Legislation: None

Support: Unknown

Opposition: No Known

KEY ISSUE

SHOULD THE STATUTES REQUIRING DISMISSAL OF A CIVIL ACTION FOR LACK OF PROSECUTION BE CLARIFIED?

PURPOSE

Existing law provides for the dismissal of civil actions if: 1) the summons is not served and returned within three years after the action is commenced; 2) the action is not brought to trial within five years after it is commenced; 3) in its discretion, the court believes that there is lack of jurisdiction, if the case is not brought to trial within two years; 4) the plaintiff fails to

(More)

bring an action within three years after a new trial is granted; and 5) the plaintiff fails to take a default within three years of the service of the summons.

This bill would: 1) clearly state the policy that a plaintiff shall proceed with reasonable diligence in the prosecution of an action; 2) specify mandatory time for service of summons and mandatory time for bringing action to trial; and 3) allow for the court's discretion to dismiss an action for delay in prosecution.

The purpose of this bill is to clarify ambiguities in the law, to bring the statutes into conformity with case law interpreting them, and to reconcile discrepancies in the statutes and cases.

COMMENT

1. Public policy statement

The court has stated, "It is the policy of the law, as declared by the courts, that when a plaintiff exercises reasonable diligence in the prosecution of his action, the action should be tried on the merits. This policy is counter-balanced, however, by the policy declared by the Legislature and the courts that when a plaintiff fails to exercise reasonable diligence in the prosecution of his action it may be dismissed by the trial court." Black Bros. Co. v. Superior Court (1968) 265 Cal. App 2d 501, 505.

Certainly the state has an interest in assuring that lawsuits are prosecuted

(More)

expeditiously. As a result, plaintiffs are required by statutes to use reasonable diligence in bringing lawsuits to trial. Hocharian v. Superior Court 28 Cal. 3d 714, 721.

This bill would state the public policy in favor of reasonable diligence in prosecution of an action, but would also assert that the policy favoring disposition on the merits is to be preferred over dismissal on procedural grounds.

2. Mandatory time for service of summons

This bill would make clear that the service requirement was mandatory, and would provide expressly that the courts could not develop exceptions and excuses not prescribed by statute. If service was not made in an action within the time prescribed, the action would not be further prosecuted and the action would be dismissed.

(More)

3. Mandatory time for bringing action to trial

This bill would establish a five year period in which an action would have to be brought to trial. If a new trial was granted in the action because of a mistrial or an appeal, the trial would have to commence within three years after the order was entered.

The parties would be allowed to extend that time by written or oral stipulation. The time could also be extended for six months if the proceeding were stayed, if bringing the trial to action was impossible, or if the jurisdiction of the court was suspended.

An action would be dismissed by the court if it was not brought to trial within the time prescribed in this article.

4. Discretionary dismissal for delay

Under existing law, an action may be dismissed for lack of prosecution in the discretion of the court if the action has not been brought to trial within two years after it has been commenced.

The sponsors of this bill claim that two year period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calenders. The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

****

Provided by Legislative Research Incorporated (800) 530-7613

SENATE COMMITTEE ON JUDICIARY
Barry Keene, Chairman
1983-84 Regular Session

SB 1366 (Keene)
As amended February 14, 1984
Code of Civil Procedure/Revenue and Taxation Code
PAW

S
B

1
3
6
6

DISMISSAL OF CIVIL ACTIONS

HISTORY

Source: California Law Revision Commission

Prior Legislation: None

Support: Unknown

Opposition: Farmers Insurance Group (oppose unless amended)

KEY ISSUE

SHOULD THE STATUTES REQUIRING DISMISSAL OF A CIVIL ACTION FOR LACK OF PROSECUTION BE CLARIFIED?

PURPOSE

Existing law provides for the dismissal of civil actions if: 1) the summons is not served and returned within three years after the action is commenced; 2) the action is not brought to trial within five years after it is commenced; 3) the case has not been brought to trial within two years and the court finds want of prosecution; 4)

(More)

the plaintiff fails to bring an action within three years after a new trial is granted; and 5) the plaintiff fails to take a default within three years of the service of the summons.

This bill would: 1) clearly state the policy that a plaintiff shall proceed with reasonable diligence in the prosecution of an action; 2) specify mandatory times for service of summons and for bringing action to trial; and 3) allow for the court's discretion to dismiss an action for delay in prosecution.

The purpose of this bill is to clarify ambiguities in the law, to bring the statutes into conformity with case law interpreting them, and to reconcile discrepancies in the statutes and cases.

COMMENT

1. Public policy statement

The court has stated, "It is the policy of the law, as declared by the courts, that when a plaintiff exercises reasonable diligence in the prosecution of his action, the action should be tried on the merits. This policy is counter-balanced, however, by the policy declared by the Legislature and the courts that when a plaintiff fails to exercise reasonable diligence in the prosecution of his action it may be dismissed by the trial court." Black Bros. Co. v. Superior Court (1968) 265 Cal. App 2d 501, 505.

Certainly the state has an interest in assuring that lawsuits are prosecuted

(More)

expeditiously. As a result, plaintiffs are required by statutes to use reasonable diligence in bringing lawsuits to trial. Hocharian v. Superior Court (1981) 28 Cal. 3d 714, 721.

This bill would state the public policy in favor of reasonable diligence in prosecution of an action, but would also assert that the policy favoring disposition on the merits is to be preferred over dismissal on procedural grounds.

2. Mandatory time for service of summons

This bill would make clear that the service requirement was mandatory, and would provide expressly that the courts could not develop exceptions and excuses not prescribed by statute. If service was not made in an action within the time prescribed, the action would not be further prosecuted and would be dismissed.

Return of the summons would not be required within the time that service would have to be made unless it was relevant to a motion to dismiss.

Opponents argue that this would leave the defendant with no way to verify plaintiff's claim of service after the three years had lapsed without filing a motion to dismiss or asking the plaintiff if service was made.

(More)

3. Mandatory time for bringing action to trial

This bill would establish a five year period in which an action would have to be brought to trial. If a new trial was granted in the action because of a mistrial or an appeal, the trial would have to commence within three years after the order was entered.

The parties would be allowed to extend that time by written or oral stipulation. The time could also be extended for six months if the proceeding were stayed, if bringing the trial to action was impossible, or if the jurisdiction of the court was suspended.

An action would be dismissed by the court if it was not brought to trial within the time prescribed in this article.

4. Discretionary dismissal for delay

Under existing law, an action may be dismissed for lack of prosecution in the discretion of the court if the action has not been brought to trial within two years after it has been commenced.

The sponsors of this bill claim that two year period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

(More)

Opponents argue that extending the time in which an action could be brought to trial from 2 to 3 years would serve no purpose except to extend the time a plaintiff could sit back and do nothing about getting a trial date.

5. Author's amendments

As a result of discussions with several insurance company representatives, the sponsors have suggested a minor, clarifying amendment. The author has agreed to accept this amendment.

On page 7, line 30, after "requires" insert: dismissal for failure to proceed with

****

SENATE REPUBLICAN CAUCUS

SENATOR JOHN SEYMOUR, Chairman

POSITIONS:

SOURCE: Cal Law Revision Commission

OPPOSED: Farmers Insurance Group (3/6/84)

BILL NUMBER: SB 1366

AUTHOR: Keene

AMENDED COPY: 2/14/84

MAJORITY VOTE

Committee Votes:

COMMITTEE: Judiciary		
BILL NO.: SB 1366		
DATE OF HEARING: 3-6-84		
SENATORS:	AYE	NO
Doolittle		
Lockyer	✓	
Marks	✓	
Petris	✓	
Presley	✓	
Richardson		
Roberti	✓	
Torres	✓	
Watson		
Davis (V. Chair.)		
Keene (Chairman)	✓	
TOTAL:	7	0

Senate Floor Vote:

Assembly Floor Vote:

DIGEST

This bill is a comprehensive revision of the statutes governing dismissal of civil actions for delay in prosecution. The major purpose of the bill is to clarify ambiguities in the law, to bring the statutes into conformity with case law interpreting them, and to reconcile discrepancies in the statutes and cases. The bill also makes a number of modest substantive changes to improve the operation of the statutes.

FISCAL EFFECT: Appropriation, no. Fiscal Committee, no. Local, no.

COMMENTS

Existing law provides for the dismissal of civil actions if: 1) the summons is not served and returned within three years after the action is commenced; 2) the action is not brought to trial within five years after it is commenced; 3) the case has not been brought to trial within two years and the court finds want of prosecution; 4) the plaintiff fails to bring an action within three years after a new trial is granted; and 5) the plaintiff fails to take a default within three years of the service of the summons.

This bill would: 1) clearly state the policy that a plaintiff shall proceed with reasonable diligence in the prosecution of an action; 2) specify mandatory times for service of summons and for bringing action to trial; and 3) allow for the court's discretion to dismiss an action for delay in prosecution.

The purpose of this bill is to clarify ambiguities in the law, to bring the statutes into conformity with case law interpreting them, and to reconcile discrepancies in the statutes and cases.

1 Various courts have made statements emphasizing the need for diligence
2 by a plaintiff in pursuing his action.
3
4 This bill would state the public policy in favor of reasonable
5 diligence in prosecution of an action, but would also assert that the
6 policy favoring disposition on the merits is to be preferred over
7 dismissal on procedural grounds.
8
9 Mandatory time for service of summons
10
11 This bill would make clear that the service requirement was mandatory,
12 and would provide expressly that the courts could not develop
13 exceptions and excuses not prescribed by statute. If service was not
14 made in an action within the time prescribed, the action would not be
15 further prosecuted and would be dismissed.
16
17 Return of the summons would not be required within the time that
18 service would have to be made unless it was relevant to a motion to
19 dismiss.
20
21 Opponents argue that this would leave the defendant with no way to
22 verify plaintiff's claim of service after the three years had lapsed
23 without filing a motion to dismiss or asking the plaintiff if service
24 is made.
25
26 Mandatory time for bringing action to trial
27
28 This bill would establish a five year period in which an action would
29 have to be brought to trial. If a new trial was granted in the action
30 because of a mistrial or an appeal, the trial would have to commence
31 within three years after the order was entered.
32
33 The parties would be allowed to extend that time by written or oral
34 stipulation. The time could also be extended for six months if the
35 proceeding were stayed, if bringing the trial to action was
36 impossible, or if the jurisdiction of the court was suspended.
37
38 An action would be dismissed by the court if it was not brought to
39 trial within the time prescribed in this article.
40
41 Discretionary dismissal for delay
42
43 Under existing law, an action may be dismissed for lack of prosecution
44 in the discretion of the court if the action has not been brought to
45 trial within two years after it has been commenced.
46
47 The sponsors of this bill claim that two year period is
48 unrealistically short in view of contemporary pleading, discovery, and
49 other pretrial procedures and court calendars. The proposed law
50 changes the dismissal period for failure to bring to trial to a more
51 realistic period of three years after the action is commenced.
52
53 Opponents argue that extending the time in which an action could be
54 brought to trial from 2 to 3 years would serve no purpose except to
55 extend the time a plaintiff could sit back and do nothing about
56 getting a trial date.

Legislative Research Incorporated

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

Authentication of the Records and Annotated Index

Legislative History Research Report[1] Regarding:
CALIFORNIA CIVIL CODE OF PROCEDURE § 583.340 (b)
As Added By Stats. 1984, c. 1705, § 5, SB 1366 – Keene
California Law Revision Commission Unpublished Study File Materials

I, Carolina Rose, declare that this report provides supplemental information to the primary research report on the above enactment assembled by Legislative Research, Inc. (LRI).

This supplemental report consists primarily of materials from the California Law Revision Commission's (CLRC) unpublished study files which were supplied to LRI via email from the California Law Revision Commission, 400 Middlefield Road, Room D-1, Palo Alto, CA 94303. The documents were supplied by an email link by Vicki Matias, (650) 494-1335 http://www.clrc.ca.gov and were located in their Study File J-600 (Dismissal for Lack of Prosecution). True and correct copies of said documents are provided in this report with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Also, for ease of reference, paging and relevant identification have been inserted. Excerpts from the CLRC's published study on the subject are also included in this report and were obtained from the California State Library in Sacramento, California.

LRI was established in 1983 (formerly Legislative Research Institute), and is a firm which specializes in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible ...." Legislative Research, Incorporated has been cited by name as the source of records relied upon by the court in *Redlands Community Hospital v. New England Mutual Life Insurance Co,* 23 Cal. App.4th 899 at 906 (1994).

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed October 10, 2007, in Sacramento, California.

Carolina C. Rose, President

Memorandum 81-14

Subject: Study J-600 - Dismissal for Lack of Prosecution (Policy Issues)

Background

Statutes requiring dismissal of a case for lack of diligent prosecution serve a number of functions. They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on clogged calendars.

At present, the law places the burden on the plaintiff to move expeditiously to bring a cause of action to trial. Statutes of limitation are the principal means by which the law enforces the requirement that the plaintiff act diligently. If the plaintiff fails to commence suit on the cause of action within the time prescribed by statute, the plaintiff is thereafter precluded from suing the defendant.

If the plaintiff satisfies the statute of limitation by timely commencement of suit (i.e., by filing a complaint), there is still no assurance that the plaintiff will move the suit diligently to trial. Statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit along to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the complaint. See, e.g., Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 105 Cal. Rptr. 339, 503 P.2d 347 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

The California System

The California statutes governing dismissal for lack of prosecution are found in Code of Civil Procedure Sections 581a and 583, and in Rule 203.5 of the Rules of Court, copies of which are attached to this memorandum as Exhibit 1. The major effect of these statutes, in brief, is that:

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 148 of 326

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.

(2) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.

(4) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.

(5) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.

One might well ask why a plaintiff who had filed a complaint might not have summons served or get the case to trial within the statutory periods. The reasons are innumerable. Many of them appear to be excusable--the litigation was complex and the parties were gathering evidence, witnesses were unavailable, the plaintiff's damage had not stabilized, settlement negotiations were in progress, the courts were so congested it was not possible to get to trial. Others appear to be inexcusable--the plaintiff had an unmeritorious case and either abandoned it or hoped to force a settlement or that a key witness might become unavailable; perhaps the plaintiff's attorney was negligent or had other things to do. It may be stated as a general rule that the statutes and case law have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law, however. In fact, since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes. Moreover, there are discernable trends in the way the courts and the Legislature have dealt with dismissal for failure to prosecute. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a continuing liberalization of the statutes to create exceptions and excuses. Beginning in

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 149 of 326

the late 1960's, in Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and cases following the courts were strict in requiring dismissal. In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal which the Judicial Council has done in Rule 203.5. Then in 1970, beginning with Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970), the courts did an abrupt about-face and began an era of liberal allowance of excuses that continues to this day. The current attitude is summed up by the Supreme Court in Denham: "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds." 2 Cal.3d at 566.

The Commission's Study

The Law Revision Commission was authorized in 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The reasons for the authorization were the failure of the statutes to accurately reflect the exceptions and excuses and the existence of court discretion, the confusing interrelation of the statutes, and the generally unsatisfactory state of the law, requiring frequent appellate decisions for clarification.

The Commission retained Garrett H. Elmore as a consultant to prepare a study of this area of the law. Mr. Elmore was formerly counsel for the State Bar Committee on Administration of Justice and has been involved in legislative amendments of the dismissal for lack of prosecution statutes. He also was involved in the drafting of Rule 203.5, which states criteria for the exercise of the court's discretion in dismissing cases. A copy of Mr. Elmore's study, which analyzes existing law and suggests revisions is attached.

Some Relevant Considerations

The forces at work in this area of the law are fundamental and strong. On one hand is the drive for efficient administration of justice and on the other hand is the right of a person to have a legitimate claim ajudicated. Related is the question whether a client should be

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 150 of 326

penalized for the attorney's neglect. Personal injury cases, for some reason, are frequently caught up in dismissal fights. As a consequence, legislative activity tends to align trial lawyers in favor of liberality in the dismissal laws against insurance companies in favor of strict dismissal requirements.

To put the problem in some perspective, at present approximately 8,900 or 1.8% of superior court cases (exclusive of probate), 7,800 or 1.9% of municipal and justice court cases, and 14,600 or 3.2% of small claims cases are dismissed for lack of prosecution annually. In superior court, approximately 2,500 personal injury cases are dismissed annually for lack of prosecution, which represents 2.7% of all personal injury cases filed and 28.1% of all cases dismissed for lack of prosecution. (Personal injury filings are about 90,000 annually, or 18.4% of the approximately 488,300 total Superior court filings exclusive of probate.) These figures are supplied by the Judicial Council for 1978-1979.

Alternative Systems for Dealing with Delay

The California system of statutory limitations periods to enforce diligent prosecution is not the only available means of dealing with delay.

Federal model. Mr. Elmore refers to the system used in the federal courts, in which one judge supervises a case from the start, with the discretionary sanction of dismissal available but with no fixed time limits. In the Northern District of California, for example, a status conference is held about ninety days after the complaint is filed and periodically thereafter, at which the judge will review the activity on the case and will dismiss if necessary. Under this system a case is always calendared for something--status conference, pretrial conference, trial, etc. In the Northern District of California, the average case is disposed of within seven or eight months after filing. Mr. Elmore believes the California system of time limits is preferable to a system based on court discretion because of the diversified nature of civil litigation filed in California courts, because it is more economical for courts and litigants, and because it tends to provide uniformity statewide.

New York model. Mr. Elmore also discusses the New York system which, like the federal system, has no time limits and is based on court

Provided by Legislative Research Incorporated (800) 530-7613

discretion. The New York system also permits lesser penalties such as an award of costs payable by counsel for delay, in recognition of the drastic nature of dismissal. Mr. Elmore believes that the New York system is not suited to California. The staff also notes that penalizing counsel does not appear to be a particularly effective remedy and does nothing to help a defendant whose case has been prejudiced by the delay.

Inactivity model. A number of states have a system that requires dismissal if there is no activity on the case for a period of time, typically six months or twelve months. This system is similar to California's in imposing statutory time limits for prosecution. However, it is considerably more restrictive than California's in that the case must be moving forward at all times, whereas under the California system the case may be quiescent at times so long as it goes to trial within the statutory period. The flexibility of the California system appears preferable to the staff.

Resolution of Policy Questions

The Commission must address at this time three policy questions--(1) whether to recommend that California adopt some other system for dealing with delay or that California keep and improve its existing provisions requiring dismissal for lack of prosecution; (2) assuming the Commission recommends that the California system be retained, whether fundamental changes should be made in the system; (3) apart from fundamental shifts, what specific clarifying changes should be made in the California statutes.

Keep basic California system. The discussion above of alternate methods of dealing with delay indicates Mr. Elmore's belief that the alternate methods are inappropriate for California. The staff agrees with this position. Although the federal system has much to commend it and many California practitioners will be already familiar with the system, it presupposes a lighter case-load per judge than California has the luxury to afford. Moreover, we cannot justify abandoning an existing and functioning system for one that is not demonstrably superior.

Fundamental change in statutes? Assuming it is the Commission's decision to recommend that the existing California system of dismissal

Provided by Legislative Research Incorporated (800) 530-7613

for lack of prosecution be kept and improved, should the statutes be revised to be substantially more liberal (or more strict), or should the status quo be maintained? The conflicting policies of preserving the plaintiff's right and protecting the defendant from prejudice have already been mentioned, as well as use of the dismissal statutes as a tool to clean out clogged calendars. As we have noted, there appear historically to be trends both ways on the resolution of these conflicts, and the current status in California is one of liberality to protect the plaintiff's rights.

The staff has no strong feelings on this point, although we do admit to a bias for stricter interpretation of the statutes and in favor of dismissal where the plaintiff is dilatory. We see no reason why a person shouldn't be able to serve summons in three years, and even with clogged calendars five years seems more than adequate at least to have the case at issue even if not brought to trial. We suspect that many cases that run up against the dismissal statutes are unmeritorious or they would have been diligently prosecuted from the start. Some cases may be meritorious, however, and run afoul of the dismissal statutes for reasons such that the litigation was complex and it was impossible to serve all parties and prepare the case on time, the plaintiff and defendant were negotiating and ran out of time, the parties made a stipulation for time that was inadequate, the calendars were too clogged to get to trial, or the plaintiff's attorney was simply negligent. A plaintiff who loses a cause of action due to an attorney's neglect will have a cause of action against the attorney, for what it is worth.

Mr. Elmore strongly favors liberality. He points out that when the dismissal for lack of prosecution statutes were first promulgated it was simple to serve summons and obtain a place on the trial calendar and that the very process of application of the involuntary dismissal statutes consumes undue time of the bench and bar. Mr. Elmore states that the defendant should be as responsible as the plaintiff to see that cases get heard on their merits; the burden should not be on the plaintiff. He sees the dismissal statutes as a technical trap for the plaintiff by which a defendant can avoid a meritorious claim. He points out that the existing law fails to achieve any sort of predictability and is difficult

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 153 of 326

to apply. He believes the best policy is one that favors affording an opportunity for trial on the merits over dismissal on procedural grounds, and that this policy should be effectuated by liberalizing the existing statutes. In essence, he would permit the existing time limits to be extended for six months to a year at a time upon affidavit of the plaintiff or order of the court. Mr. Elmore's specific proposals and his arguments in their favor appear at pages 10-12 of his study.

Clarifying changes. Whether or not the Commission decides to liberalize or tighten the basic California statutory scheme, there are a number of specific problems and possible clarifying changes the Commission should address. Mr. Elmore raises 20 issues involving the existing statutes at pages 12-24 of his study. We plan to go through each of these issues individually at the meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Provided by Legislative Research Incorporated (800) 530-7613

EXHIBIT 1

§ 581a. Dismissal; lack of prosecution; effect of motion as appearance

(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

(b) No action heretofore or hereafter commenced by cross-complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross-complaint is served within three years after the filing of the cross-complaint or unless, if a summons is required, the summons on the cross-complaint is served and return made within three years after the filing of the cross-complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.

(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.

(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.

(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.

§ 583. Dismissal; lack of prosecution; failure to bring action to trial

(a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

(c) When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).

(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.

(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.

(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.

Provided by Legislative Research Incorporated (800) 530-7613

Rule 203.5. Motion to dismiss

(a) A party seeking dismissal of a case pursuant to subdivision (a) of Section 583 of the Code of Civil Procedure shall serve and file a notice of motion therefor at least 45 days before the date set for hearing of such motion, and the party may, together with his memorandum of points and authorities, serve and file an affidavit stating facts in support of his motion. The filing of the notice of motion shall not preclude the opposing party from further prosecution of the case to bring it to trial.

(b) Within 15 days after service of the notice of motion, the opposing party may serve and file his written opposition thereto, together with a memorandum of points and authorities and a supporting affidavit stating facts showing why the motion should be denied. The failure of the opposing party to serve and file his written opposition may be construed by the court as an admission that the motion is meritorious and the court may grant the motion without a hearing on the merits.

(c) Within 15 days after service of the written opposition, if any, the moving party may serve and file a response thereto, together with a supplemental memorandum of points and authorities and an affidavit stating facts in support of his motion.

(d) Within five days after service of the response, if any, the opposing party may serve and file a reply thereto.

(e) In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and supporting date submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; the extent to which the parties engaged in any settlement negotiations or discussions; the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case: the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; the nature of any extensions of time or other delay attributable to either party; the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case or by imposing conditions on its dismissal or trial; and any other fact or circumstance relevant to a fair determination of the issue.

(f) The court may grant or deny the motion or, where the facts warrant, the court may continue or defer its ruling on the matter pending performance by either party of any conditions relating to trial or dismissal of the case that may be required by the court to effectuate substantial justice.

Provided by Legislative Research Incorporated (800) 530-7613

REVISION OF CALIFORNIA STATUTES RELATING TO DISMISSAL OF CIVIL ACTIONS FOR LACK OF PROSECUTION*

*This study was prepared for the California Law Revision Commission by Garrett H. Elmore. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Revision Of California Statutes Relating To Dismissal Of Civil Actions For Lack Of Prosecution

\- - - - - -

Background Report of Garrett H. Elmore,
Consultant

\- - - - - -

INTRODUCTORY

Section 581a and Section 583 of the Code of Civil Procedure are the principal California statutes relating to involuntary dismissal of civil actions for lack of prosecution. The purpose of this report is to review these code sections and decisions interpreting them, to determine whether they should be revised and, further, whether an alternate statutory scheme or schemes should be adopted.[1]

Basically, the pattern of Section 581a is that summons on the complaint in the civil action must be served upon the defendant and return of summons made within three years after the action has been commenced or the action shall be dismissed. Certain exceptions are stated (a filed stipulation in writing of the parties that the time may be extended, a general appearance of the defendant and exclusion from the three years of the time the defendant was not amenable to the jurisdiction of the court).[2] In addition, decisional law indicates that under appropriate circumstances principles of estoppel or waiver may prevent application of the limitation.

Section 581a also states a time limit of three years for the entry of a default judgment after service of summons or general appearance of the defendant. Certain exceptions are stated (a filed stipulation in writing that the time may be extended and exclusion from the three years

---

1. Hon. Philip M. Saeta, judge of the superior court, Los Angeles, suggested the "failure to prosecute" sections of the Code of Civil Procedure be reviewed in a letter to the Commission dated March 26, 1976. Section 581a and Section 583 in particular were cited.

2. Code Civ. Proc. § 581a, subdvision (a), (d).

Provided by Legislative Research Incorporated (800) 530-7613

of the time the defendant was not amenable to the jurisdic[illegible] of the court).[3] In addition, decisional law indicates implied exc[illegible]ions exist such as where entry of judgment is impossible due to a stay. Even where judgment is entered after the period, earlier case law has ruled such action as "error" and correctable only by appeal or timely motion to vacate the "default" under Section 473 of the Code of Civil Procedure. Finally, in present form the three-year limitation appears intended as a "cut off" or limitation upon routine time to plead extensions that the parties might otherwise agree upon. To this extent, the provisions are more than provisions imposing a time limit upon obtaining a true default judgment.

Basically, the pattern of Section 583 provides that the trial court, in its discretion, may dismiss a civil action if not brought to trial within two years after it was filed. The procedure for obtaining the dismissal shall be in accordance with rules prescribed by the Judicial Council.[4] Certain exceptions are stated (exclusion from the two-year period of the time during which the defendant was not amenable to the process of the court and of the time during which the jurisdiction of the court to try the action is suspended). The rules adopted by the Judicial Council under this part of Section 583 state that in ruling on a defendant's motion to dismiss the trial court shall "consider" various matters, when they appear from the parties' motion and opposition or the court file. These include "whether the interests of justice are best served by dismissal or trial... or by imposing conditions on its dismissal or trial."[5]

Section 583 also provides that the civil action shall be dismissed unless it is brought to trial within five years after it was filed. Certain exceptions are stated (a filed stipulation in writing that the time may be extended and exclusion from the time period of the time during which the defendant was not amenable to the process of the court and the time the jurisdiction of the court to try the action is suspended).[6]

---

3. Code Civ. Proc. § 581a, subdivision (c), (d).

4. Code Civ. Proc. § 583, subdivision (a).

5. Cal. Rule of Court 203.5, subdivison (e).

6. Code Civ. Proc. § 583(b), (d).

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 160 of 326

Decisional law adds the implied exception of excluding the time during which it was impracticable, impossible or futile to bring the action to trial. Decisional law currently indicates that a waiver or estoppel may be present under certain circumstances.

Section 583 also provides in substance that on new trial, the action must be brought to trial within a three-year period. The same exceptions are stated as are mentioned in the preceding paragraph,[7] except that no provision is made for a written filed stipulation of the parties extending time when the new trial results from or is affirmed by action of the appellate court.

Judicial Council rules governing particular procedures affecting civil actions, such as coordination of civil actions pending in different trial courts and judicial arbitration, sometimes provide for "time period" exclusions from the statutory time period.[8] The time for bringing a small claims court action to trial anew in the superior court by reason of appeal is entirely regulated by Judicial Council rules governing such appeals. The time periods and other provisions differ from those specified in Section 583.[9]

Some special proceedings provided by statute have their own provisions as to dismissal for failure to bring the proceeding to trial.[10]

In addition to the foregoing statutes and rules of court, California decisional law has recognized the inherent power of a trial court to dismiss an action for want of prosecution. However, statutes on the subject are generally followed.[11]

---

7. Code Civ. Proc. § 583(c), (d).

8. See, e.g., Cal. Rule of Court 1514(f), Cal. Rule of Court 1601(d), referring to the time period of Section 583. Compare Cal. Rule of Court 1233 (family law act) incorporating both code sections.

9. See Cal. Rule of Court 157(c) (fixing the normal time for bringing the action to trial as one year but providing that by written stipulation or upon a showing of the exercise of reasonable diligence by the appellant to bring the case to trial the time may be extended up to three years).

10. See, e.g., Civil Code § 3147 (discretionary dismissal of mechanic's lien action after two years), Rev. & Tax. § 3638 (contest of tax sale or tax deed, one year period to bring action to trial).

11. See Weeks v. Roberts (1968) 68 Cal.2d 802 (two-year discretionary dismissal statute limits court's power to order earlier dismissal),

LRI
Provided by Legislative Research Incorporated (800) 530-7613

The pattern of the present California statutory law is one that has existed for many years.[12] Section 581a and Section 583 have been amended frequently but in general the changes have not affected the basic structure. A possible exception is the 1969 amendment that authorized the Judicial Council to prescribe the procedure for a party to obtain a dismissal under the two-year discretionary dismissal provisions of Section 583(a).[13]

The Federal Rules of Civil Procedure do not contain time limits but state: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may have dismissal of an action or of any claim against him."[14] Consequently, dismissals are largely ad hoc, dependent upon the circumstances.[15] The federal courts have inherent authority to dismiss for delay in prosecution, and may do so without notice or hearing in an aggravated case, where no local rule requires notice or hearing.[16] Federal district courts sometimes have local rules stating time periods for service of summons[17] or providing

---

Oberkotter v. Spreckels (1924) 64 Cal. App. 470 (statute not in point), compare Blue Chip Enterprises, Inc. v. Brentwood Savings and Loan Assn. (1977) 71 Cal. App.3d 706.

12. As to the three-year period for serving and making return of summons in present Section 581a, see former subdivision 7 of former Section 581 of the Code of Civil Procedure (1889 Cal. Stats. ch. 259, p. 398). As to the two-year and five-year dismissal provisions of Section 583, see 1905 Cal. Stats. ch. 244. As to the three-year period for entry of judgment where no answer is on file, see 1933 Cal. Stats. ch. 744, Section 89.

13. See 1969 Cal. Stats. ch. 958. Rule 203.5 lists numerous matters that may "temper" a dismissal but the trial court is only required to "consider" them, where applicable. See Lopez v. Larson (1979) 91 Cal. App.3d 383, Blue Chip Enterprises, Inc. v. Brentwood Savings and Loan Assn, supra, note 11.

14. F.R.C.P. 41(b).

15. See G. Wright and Miller, Federal Practice and Procedure (1971) § 2370 particularly at p. 204.

16. Link v. Wabash R. Co. (1962) 370 U.S. 626.

17. See Pearson v. Dennison 353 Fed.2d 24 (1965-9 cir.) (order fixing time to serve alias summons), Adams v. Jarka Corporation 8 Fed. R.D. 571 (1948- S. Dist., N.Y.) (summons to be served within three months but ex parte extension could be obtained).

Provided by Legislative Research Incorporated (800) 530-7613

for dismissal by the clerk of cases in which the file shows no activity for a stated period.[18]

In federal district courts where cases are assigned to individual judges from the outset, the opportunity exists for informal judicial supervision of the progress of the case by the judge. One federal district judge has observed: "I think the individual calendar (system) is much more demanding because it's your obligation to process the cases and see that they are brought to a conclusion."[19]

In one jurisdiction, award of costs to the adverse party are considered a lesser sanction that may be appropriate to impose upon counsel, instead of dismissing the client's cause of action. Moreover, rules prevent dismissal for failure to file a "note of issue" (to obtain a trial date) unless the case was at issue for one year and unless a notice is given to the plaintiff requiring a note of issue to be filed within 45 days, and stating that default in complying with the demand will serve as the basis for a motion for dismissal for unreasonably neglecting to proceed.[20] A procedure in New York permits a defendant by motion to seek a dismissal if the plaintiff has delayed in serving the complaint upon the defendant after the latter's appearance and demand.[21]

I

THE INADEQUACY OF PRESENT SECTION 581a AND SECTION 583

A. General

Section 581a and Section 583, as supplemented by Rule 203.5, provide inadequate, conflicting and sometimes complex standards. Moreover, in the light of modern concepts of fairness in litigation, the

---

18. Sykes v. United States 290 Fed.2d 555 (1961-9 cir.) (six months), Burns Mortgage Co. v. Stoudt 2 Fed. R.D. 219 (1942, E.D. Pa.) (no proceeding has been taken for a period of three consecutive years), see C. Wright and Miller, supra, note 15, § 2370, at p. 202.

19. News interview with Hon. Howard B. Turrentine, former judge of the superior court and currently judge of the United Stated District Court, Southern District of California, Los Angeles Daily Journal, April 18, 1980, page 1.

20. See New York CPLR 3216, Cohn v. Borchard Affiliations (1969) 250 N.E.2d 690 (N.Y. Ct. App.), Moran v. Rynar (1972) 332 N.Y.S.2d 138.

21. McAuliffe v. Baley (1972) 322 N.Y.S.2d 134. Under New York practice the complaint is not served with the initial process.

Provided by Legislative Research Incorporated (800) 530-7613

present statutory provisions may be viewed, first, as undesirably promoting "gamesmanship" in civil litigation, second, as unduly favoring one party by presumptions of prejudice and what amounts to a shifting of the burden of proof, and, third, as undesirably disposing of civil claims on the basis of technical rules, rather than on the merits.

Apart from the scope of amendment or revision (see Part II, infra), the need for statutory change is indicated by the conflicts in and uncertainties as to rulings. In one recent case, where the motion to dismiss was directed to failure to serve summons in a period shorter than the statutory period, the trial court, upon motion for reconsideration, granted the motion to dismiss, saying it had changed its mind on the original motion "seven times." The ruling of the appellate court affirming the dismissal of the cause of action noted several appellate court decisions that on the facts had declined to uphold or grant discretionary dismissals for delay.[22]

Recent decisions of courts of appeal take opposite approaches on the effect of Rule 203.5 and of guidelines as to discretionary dismissals stated by the California Supreme Court.[23] The high court in 1970 disapproved a line of court of appeal cases decided in the late 1960's that in effect declared that it was the duty of the trial court to grant a motion for dismissal for delay beyond the two-year period unless the opposite party made an "adequate showing" of diligence or cause for delay. The decision notes that the discretion vested in the trial court could be based on judicial notice, that there was not an "entire absence" of "any showing constituting cause" in the case, that the policy of preventing unreasonable delays in litigation is less powerful than that which seeks to dispose of litigation on the merits rather than on technical grounds, and that denial of the motion for discretionary dismissal (made

---

22. Lopez v. Larson (1979) 91 Cal. App.3d 383.

23. Upholding dismissal under the "discretionary" provisions of Section 583 are such cases as Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App.3d 17, followed in Kunzler v. Karde (1980) 109 Cal. App.3d 683, Lopez v. Larson, supra, note 22; reversing or denying dismissal are such cases as Garza v. Delano Union School District (1980) 110 Cal. App.3d 303 United Farm Workers v. Intern. Bro. of Teamsters (1978) 87 Cal. App.3d 225, City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App.3d 543.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 164 of 326

about 4-3/4 years after the action was filed) was not an abuse of discretion.[24] The high court's ruling was re-affirmed in 1971 in a decision reversing a dismissal for failure to file promptly an at issue memorandum coupled with the opposing party's failure to make an "adequate" showing of cause for the delay. In reversing, the decision noted that the court had previously in certain decisions "called an abrupt halt" to a certain line of court of appeal decisions (favoring dismissal).[25]

The effect of an "open" stipulation between the parties that (after service of summons) the defendant's time to answer or otherwise respond to the complaint was extended without date, subject to termination by the plaintiff on ten-days written notice, is unclear. By four to three decision, a majority of the high court concluded that such a stipulation while in effect excused diligence on the part of the plaintiff and constituted a "general appearance" within the three-year "mandatory" time limit for filing return of summons unless a general appearance is made. The decision notes that the parties by the terms of Section 581a are permitted to file a written stipulation that the "mandatory" time limit be extended. Hence, it concluded, the policy of encouraging diligence is subordinate to the parties' own agreement in writing. In the minority view, treating the "open stipulation" as excusing diligence by the plaintiff while it was in effect defeats the purpose of the statutes requiring diligence in prosecution.[26]

The case law on waiver is unclear in various settings, because of the basic policy conflict as to strict or lenient enforcement of the statutes against delay in prosecution.[27]

---

24. Denham v. Superior Court (1970) 2 Cal.3d 557, see also Martindale v. Superior Court (1970) 2 Cal.3d 568.

25. Woolfson v. Personal Travel Service, Inc. (1971) 3 Cal.3d 909.

26. General Insurance Co. of America v. Superior Court (1975) 15 Cal.3d 449, followed in Meraia v. McCann (1977) 83 Cal. App.3d 239.

27. Compare Regan Distributors, Inc. v. Yurosek and Son, Inc. (1979) 88 Cal. App.3d 924 (open extension of time for hearing on demurrer granted to plaintiff's counsel by defendant's counsel excused a two-year delay in procedural phase in a discretionary dismissal proceeding) with Hastings v. Superior Court (1955) 131 Cal. App.2d 255 (stipulation to reset trial for convenient date because of conflict of trial date for both counsel, construed as not an extension beyond five-year dismissal date).

Provided by Legislative Research Incorporated (800) 530-7613

B. Specific Inadequacies

Section 581a and Section 583 are placed in a chapter headed "Judgments in General" in a title headed "Trial and Judgments in Civil Actions." Preferably, a separate chapter should cover the subject matter. Moreover, the provisions of the two code sections could be reorganized and stated in an integrated manner. For example, the two-year discretionary dismissal provisions that are stated in terms of "trial," by judicial construction, apply to delay in service of summons, at least where the two-year period has elapsed.[28] Wording differences in the two code sections exist in respect of cross-complaints and exclusion of time when the defendant was not amenable to the process of the court or the jurisdiction of the court to try the case is suspended.[29]

Various other points for clarification or improvement of procedure or for granting the trial court greater flexibility in permitting the opportunity for trial on the merits are discussed, infra, under Part III.

II

POLICY QUESTIONS AS TO THE BASIS OF AMENDMENTS

First. Should the present California framework be replaced by a new method of regulating delay in civil actions?

In the opinion of the writer, the present California framework (with or without substantive revision) is better suited to California trial courts than other systems.

The California framework is based on statements of time limits with provisions for discretionary and mandatory dismissals. In some respects, the time limits are jurisdictional. The doctrines of implied exceptions, waiver and estoppel as declared in recent decisions give flexibility. As later noted, in theory, at least, perhaps more should

28. See Black Bros. Co. v. Superior Court (1968) 265 Cal. App.2d 501 (disapproved in other respects in Denham v. Superior Court, supra, note 24), City of San Jose v. Wilcox (1944) 62 Cal. App.2d 224.

29. As to cross-complaints, compare subdivision (b) of Section 581a with subdivision (e) of Section 583; as to exclusion of time, compare subdivision (d) of Section 581a with subdivision (f) of Section 583.

Provided by Legislative Research Incorporated (800) 530-7613

be done in exploring the feasibility of local rules to be used by courts and not litigants for ferreting out on a "mass" basis and disposing of "sleeper" actions, namely, those that have been instituted but for which enthusiasm has been lost.

The federal district court practice is based upon the court's discretionary authority under F.R.C.P. 41(b) and its inherent power. This is supplemented, as indicated, by local rules providing for special calendars for cases in which the file shows no movement.[30] Also, the assignment of cases to particular judges from the beginning permits informal supervision for expedition.

Federal court civil litigation and civil litigation in the superior, municipal and justice courts differ. For reasons based on the diversified types of civil litigation filed in California state courts, a system with time limits (even though flexible) is more desirable than one based on the court's discretion, supplemented by aids supplied by local rules or practice. The "time limit" system is more economical for courts and litigants. Moveover, it tends to provide a uniform statewide system in basic provisions.

The New York practice has features that in effect serve as "brakes" on the trial court's discretionary authority to dismiss. Thus, the defendant may not make a motion to dismiss for unreasonable neglect to proceed until the case has been at issue for one year and also until plaintiff has been given a written notice to file a "note of issue" within 45 days, failing which a motion to dismiss could be made. As to delay in the service of a complaint, the New York procedure as to the beginning stage of a civil action differs from that of California. However, a defendant who is before the court through service of a precipe can move the court to require plaintiff to take the next step by serving the complaint within a specified time.[31] There are, however, no overall time limits for bringing the action "to trial."

The New York system also recognizes the drastic nature of a dismissal and permits imposition of lesser penalties such as a fine payable by

---

30. See, supra, notes 17, 18.

31. See, supra, notes 20, 21.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 167 of 326

counsel for delay. However, the system basically depends upon the discretion of the court, within the foregoing limits.

In the writer's opinion, neither the federal nor the New York system is suited for civil cases in California trial courts.

Second. Should proposals of radical departure from past concepts be included in the contemplated measure?

Specifically, should the concept that the burden is upon plaintiff to exercise diligence at every step of the proceeding under risk of suffering dismissal of the action be re-examined, and the involuntary dismissal rule substantially curtailed?

Two assumptions are behind this suggestion. First, when the concept originated it was comparatively simple to make service of summons within this state and to obtain a place on the trial calendar. Now, the civil action itself is more complex with liberality as to parties and pleadings. In congested trial courts, the state is not able to provide a reasonably early trial date for civil litigation. In such courts the procedure for proceeding to trial is exacting under normal rules. The special motion to advance the trial date to avoid an involuntary dismissal is not well understood. Second, it is questionable whether the present law in this state on involuntary dismissal can be applied without undue expenditure of time and effort.

In general outline, the proposal for "radical departure" is:

The present 5-year period for bringing an action (by complaint or cross complaint) to trial would be required to be extended for all purposes when (i) the plaintiff or cross-complainant files an affidavit (or certificate under penalty of perjury) in prescribed statutory form, or (ii) the court, upon application of a party, orders the period extended. An extension would be for not less than six months nor more than a year. The end of the extension period would be the end of the 7th year. Granting a trial date and an available court within the period of extension would be mandatory unless the plaintiff or cross-complainant without cause did not bring the case on for trial on a date assigned under a previous extension. The extension could be by affidavit or order filed before or after the five-year period provided no order of dismissal was outstanding.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 168 of 326

The time for serving summons could be extended for up to one year (after expiration of the 3-year statutory period) by a similar procedure.

The time for bringing a case to trial after order for new trial or jury disagreement could be similarly extended (3-year statutory period plus one year).

A motion for discretionary dismissal could be made after two years if directed to failure to bring on the case for trial. The time could be extended for up to one year by a similar procedure unless the court upon a noticed motion by a defendant (or cross-defendant) determined either of the following: (i) that the moving party had previously requested the plaintiff (or cross-complainant) in writing to proceed with particular steps in the action and plaintiff (or cross-complainant) had not done so prior to the notice of motion, or (ii) that the moving party was suffering prejudice of a specified kind by the delay in proceeding with the action.

If directed to service of summons, the motion for discretionary dismissal could be made after one year but the time for service could be extended up to one year by similar procedure subject to the qualifications stated in the preceding paragraph.

Other provisions would include those discussed infra under Part III that provide for greater flexibility in ruling on motions for dismissal, for local rules to ferret out "sleeper" cases upon a mass basis, and for a statement of "policy" as to providing litigants with an opportunity for trial on the merits, instead of dismissing cases upon procedural grounds.

In support of a "radical" approach that "minimizes" the "defense" of "failure to prosecute," it may be urged: First, the concept that because the plaintiff brings the action, the burden rests upon the plaintiff to excercise diligence at every step does not appeal to one's sense of fairness. For example, in many cases plaintiff is compelled to take this action because of the prospective defendant's conduct or position. Moreover, it is more consistent with today's litigation realities that responsibility be placed upon the parties jointly to bring a civil case to a conclusion. Second, present law on involuntary dismissal has several aspects and is difficult to forecast or apply. Third, the burden of a rule requiring review of the history of particular

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 169 of 326

litigation and assessment of "fault" as between plaintiff and defendant for delay is a substantial one. Simplification is needed.[32] Fourth, the "radical" approach outlined does not purport to take away the right of the adverse party to move for a discretionary dismissal. However, it imposes a duty to make an advance request or to show that specific prejudice is being suffered.

Against the "radical" approach it may be argued: First, the system encourages delay whereas the emphasis should be on expedition. Second, the savings in court time and litigation expense, if any, are conjectural. Third, the present system represents a proper balance between the competing interests.

In the writer's opinion, the "radical" approach is one that is justified from the long range point of view. Moreover, it can be adopted on a "limited life" basis, if there are doubts as to its workability.

III

AMENDMENTS OF A CLARIFYING OR TECHNICAL NATURE WITH LIMITED SUBSTANTIVE CHANGES

Note: The amendments for consideration are stated only generally. They appear under "General," "Section 581a" and "Section 583." They are numbered arbitrarily. This report does not consider the format of a measure.

General

No. 1. Policy As To Trial On Merits. Should the statute contain a policy statement such as the following: "The Legislature hereby declares that it is the policy of this State that the party asserting a civil cause of action or claim for relief shall proceed with reasonable diligence in its prosecution but that all parties shall cooperate in bringing such litigation to trial or other disposition; further, in case of conflict, the policy favoring the right of parties to make stipulations in their own interests and favoring a trial on the merits is generally to be preferred over the policy that requires diligence in prosecution."

---

32. Examples of simplification in civil procedure are found in the automatic disqualification of judge legislation, standard procedures for filing claims against public entities or employees, and substitution of request for inspection of records for motion for such inspection in the state's civil discovery act.

Provided by Legislative Research Incorporated (800) 530-7613

Comment. Such a type of provision has sometimes been used where judicial thinking is sharply divided on an important procedural statute, e.g., subdivision (g) of Section 2016 of the Code of Civil Procedure relating to "work product." Such a provision would be proper only where the conclusion reached on the "policy" issue favors less stringent enforcement of "diligence" statutes than declared by some decisions.

No. 2. Conditions Upon Granting Or Denial Of Motion. Should the statute contain a provision like the following: The court may impose conditions upon

(a) the granting of a motion to dismiss, and

(b) the denial of a motion to dismiss?

Comment. See Rule 203.5, Cal. Rule of Court, to the above effect. The court should have flexibility to condition a denial upon payment of expenses and counsel fees to the adverse party when such result from unreasonable delay. Conversely, it may be equitable to require the plaintiff to make a limited waiver of the statute of limitations, to permit re-filing. The statute itself should be more explicit in these respects, if the principle is approved.

No. 3. Imposition Of Civil Penalty Upon Party Or Counsel. Should the statute contain a provision like the following: The court may, as an alternate to dismissal of the action, impose a civil penalty upon the party or the party's counsel, or both, for unreasonable delay in the prosecution of the action?

Comment. See New York Practice. Sanctions of this nature generally have not worked well because of procedural challenges or the feeling that they are not capable of being applied on a fairly uniform basis. However, such provisions vindicate the authority of courts generally to control their calendars and manner of conducting judicial business.

No. 4. Matters To Be Considered In Determination Of Motion. Should the statute contain provisions that state in substance that the Judicial Council shall prescribe by rule the procedure for a motion for dismissal, either mandatory or discretionary, and the criteria to be considered by the court in the determination of the motion?

Provided by Legislative Research Incorporated (800) 530-7613

Comment. Under present law, only Section 583(a), relating to discretionary dismissal, gives authority to the Judicial Council, and then, only in terms of "procedure." See Rule 203.5, Cal. Rules of Court. Expanding the rules to apply to other than "discretionary" dismissals appears unnecessary and possibly unwise. However, the present statutory authority of the Judicial Council should be expanded to include: "criteria to be considered in determination of a motion pursuant to (appropriate section)."

No. 5. Vacation Of Order Of Dismissal. Should the statute contain provisions that state in substance that the (trial court) shall retain jurisdiction for a period of 60 days after order of dismissal to grant reconsideration upon its own motion or motion of a party with or without new evidence.

Comment. Generally, such a provision serves the interests of justice, since it permits the "late" filing of such matters as return of summons and additional information as to reasons for delay. The general rule on reconsideration is not satisfactory in this setting.

No. 6. Court Dismissal Under Local Rule. Should the statute contain a section outlining a way for a court, under local rule, to use procedures to dispose of dormant cases, after notice given on a "mass" basis? For example: "A superior, municipal or justice court, by local rule, may provide for periodic lists of civil actions in which the files of the court disclose no activity for a period of more than one year and the lapse of two years since commencement of the action, for obtaining information by questionnaire or otherwise from counsel or, if none, or if counsel does not make timely response, from the party, if practical, as to the intent of the party that the action shall proceed, for compilation of a list known as a tentative dismissal list, by computer or otherwise, for service of such list by mail by the clerk of court upon counsel or the party, if not represented by counsel, with a notice by such clerk that the cases thereon will be dismissed by the court on its own motion, without prejudice, within 60 days from the date of mailing as shown on the list, unless information is timely given to the court in writing objecting to such dismissal with reasons for such objection, for

Provided by Legislative Research Incorporated (800) 530-7613

dismissal of the cases as to which no timely objection was made, on or after the date stated in the notice, and for setting aside the dismissal and restoration of the case to its former status by the court upon its own motion or application of a party upon a showing of mistake or inadvertence or any cause deemed sufficient by the court."

Comment. On principle, the above suggestion seems to have merit in clearing the files of cases that have been settled or dropped or in which the plaintiff or cross-complainant has lost interest. The proposal for mass notice by mail though perhaps unusual is not unlike published notices of bank accounts and other funds about to be paid over to the State under abandoned property law. The Mullane case involved a published notice to beneficiaries of common trust funds. Mullane v. Central Hanover Bank and Trust Co. (1950) 339 U.S. 306. If there is a reasonable doubt as to the validity of such notice individual notices might come from a computer. Those who are active in the field of judicial administration at state or local level should be contacted if this proposal is to be followed up.

Section 581a

No. 7. Time For Filing Return Of Summons. Should the statute be amended to relax provisions for making return of summons within the three-year period?

Comment. Decisional law generally applies the statute as written, namely, that both service and return must be made within the time limit. See, e.g., Kaiser Foundation Hospitals v. Superior Court (1975) 49 Cal. App.3d 523, Bernstein v. Superior Court (1969) 2 Cal. App.3d 700, Beckwith v. Los Angeles County (1955) 132 Cal. App.2d 377. See also Highlands Inn, Inc. v. Gurries (1969) 276 Cal. App.2d 694 (risk of loss in mail on plaintiff). This case law is unduly severe. The trial court should be required to receive proof of service at any time before dismissal and upon reconsideration granted within 90 days after dismissal order.

No. 8. Stipulation Of Parties Extending Time. Should wording referring to a "filed" stipulation of the parties extending time be

Provided by Legislative Research Incorporated (800) 530-7613

changed to read: "except where the parties have filed or present to the court a stipulation in writing that the time may be extended."

Comment. The new wording will make it clear that an "unfiled" stipulation will be recognized. It must be brought to the court's attention. The manner of doing so varies and in part involves "time" questions. The amendment suggested is therefore intentionally devoid of detail, leaving questions for each situation, or "policy" decisions of the appellate courts.

No. 9. Broadening General Appearance Exception. Should wording as to a "general appearance" in place of service of summons be amended, in substance, as follows: "or (unless) the party... has ~~made a general appearance~~ filed an answer or other document or entered into a stipulation in writing or done other acts that constitute a general appearance."

Comment. The purpose of the suggested change is to give notice in the statute that the "general appearance" excusing service and return of summons within three years is not confined to documents filed in the action commonly regarded as a "general appearance." The change would codify the decision in General Insurance Co. of America v. Superior Court (1975) 15 Cal.3d 449 (majority). See also Botsford v. Pascoe (1979) 94 Cal. App.3d 62.

No. 10. Exclusion Of Certain Time Periods. Should a broader "exclusion" than the "amenability to process" exclusion be stated for subdivisions (a) and (b) of Section 581a (time for service of summons or cross-complaint)? Following is a rough draft:

"There shall be excluded from such three years, on a non-duplicative basis, the time within such three years during which

(i) The defendant secreted himself, within or without the state, to avoid the service of process.

(ii) The whereabouts of the defendant were unknown to the plaintiff and could not be ascertained by the exercise of due diligence.

(iii) A statute, rule, regulation or court order stayed the prosecution of the action or particular proceedings therein affecting the service of process.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 174 of 326

(iv) The validity of purported service of process on the defendant was being litigated by the parties.

(v) The service of summons, for any other reason, was impossible, impracticable or futile."

Comment. Subparagraph (i) is based on an exception in Section 581a from 1907 until 1970 when "amenability to the process of the court" was substituted. Subparagraph (ii) reflects problems caused by increased mobility throughout the United States and the world of families and individuals. Work or pleasure may involve constant shifting of locale or substantial periods of travel. It probably is desirable to add a limitation on this exclusion to prevent it from being overly broad (e.g., the period of exclusion under this subparagraph shall not exceed six months). Subparagraph (iii) is intended as a specific statement of the "stay" situation. However, here also the draft wording may require limitation (e.g., substitute for "affecting the service of process" the words "and service of summons would violate or probably violate such statute, rule, regulation or court order"). Subparagraph (iv) is intended as a specific exclusion. For example, it may be held on a motion to quash proceeding or in a proceeding to set aside a default or default judgment that service was technically defective under one or more of the applicable statutory methods for serving summons. It seems an unnecessarily harsh rule that requires valid service within the three years. Under this proposed exclusion, only the time of litigation is excluded. Normally, the party knows of the action and complaint at this stage. Again, the wording is subject to review. For example, it may limit an exclusion that seems sound in principle, i.e., the period during which a default judgment based on an apparently valid service remains unchallenged by the defendant. It has been held that plaintiff cannot obtain an "exclusion" for the time the default judgment is on file when no actual service was made and it was found the process server had filed a fraudulent return. See Ippalito v. Municipal Court (1977) 67 Cal. App.3d 682. On principle, the wording could refer to an "apparently valid" service or "purported service made in good faith." This would modify the Ippalito opinion that charged the plaintiff with

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 175 of 326

responsibility for the wrongful acts of the process server. Subparagraph (v) is based on the "implied" judicial exceptions stated in appellate decisions. Since some are probably covered by subparagraphs (iii) and (iv), it is necessary in subparabraph (v) to refer to "for any other reasons."

No. 11. Discretionary Dismissal For Failure To Serve Summons. Should there be a reference in the statute to the use of a discretionary dismissal motion (in terms directed to bringing the case to trial within two years) to seek a dismissal for failure to serve summons?

Comment. In the writer's opinion, this would be desirable. Case law recognizes subdivision (a) of Section 583 can be so used, since section 581a expresses only a maximum time limit. However, the general form of amendments will determine placement and wording.

No. 12. Requirement For Notice Of Motion For Dismissal. Should provisions be added to subdivision (a) and subdivision (b) of Section 581a that state in substance that, except as provided in Section _______ (relating to "mass" dismissals under local rule), a dismissal may be ordered only upon noticed motion by the defendant or by the court acting upon its own motion.

Comment. Though this appears to be the practice, for mandatory as well as discretionary dismissals, Section 581a is silent. The computation of the three-year mandatory period may be subject to differences of opinion. There should be opportunity for hearing. Also, notice of motion may be valuable to aid the plaintiff to assemble evidence that amounts to a "general appearance" by the defendant or that tends to show waiver by or estoppel of the defendant. As to the length of notice, a discretionary dismissal motion under Rule 203.5 normally requires 45 days' notice. To avoid inconsistency, a reference should be made in the case of discretionary dismissals to rules of the Judicial Council. As to mandatory dismissals, it is the writer's view that no special notice of motion provisions should be included.

No. 13. Repeal Or Narrowing Of Subdivision (c) Of Section 581a. Should subdivision (c) of Section 581a (relating to dismissal for failure

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 176 of 326

to have judgment entered three years after service or general appearance if no "answer" is on file) be repealed or narrowed?

Comment. In the writer's opinion, subdivision (c) of Section 581a is not backed by compelling reasons of orderly judicial administration. The requirement is not well understood. It should be repealed in the interests of simplifying procedural law. If subdivision (c) is repealed, the problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong his claim against a defaulting defendant will be left to the operation of general provisions on "failure to prosecute" such as subdivision (a) of Section 583 and the proposed "mass dismissal" procedure under local rule.

Subdivision (c) provides for a filed written stipulation of the parties that the provisions may be extended. It is believed that the bar generally does not understand the norm that a pleading must be on file or a default judgment must be entered within three years unless a filed written stipulation of the parties extends time for compliance. Moveover, this provision in the law can easily be overlooked or ignored because of inadvertence unless a law office is highly organized in the keeping of calendars and calendar dates.

The decisional law under subdivision (c) is uncertain. By a four to three decision, the California Supreme Court recently held that an unfiled "open" stipulation extending time to a defendant to answer or otherwise respond to the complaint, terminable upon 10 days' notice, excused compliance with subdivision (c). The majority opinion notes that in 1949 the Legislature permitted the parties to stipulate in writing for an extension. Thus, the policy of expedition became subordinate to the right of the parties to make agreements in their own interests. The minority opinion stresses the fact that the plaintiff could have terminated the stipulation and complied with subdivision (c). See General Insurance Company of America v. Superior Court (1978) 15 Cal.3d 449.

Earlier cases under subdivision (c) include holdings that entry of a "default" (not default judgment) within the period is insufficient (Jacks v. Lewis (1943) 61 Cal. App.2d 148), that the

Provided by Legislative Research Incorporated (800) 530-7613

parties could not stipulate to an extension of time (prior to the 1949 amendment) (Rio Del Mar Country Club v. Superior Court (1948) 84 Cal. App.2d 214), and that a judgment entered after the three-year period may not be set aside on collateral attack but may be challenged by appeal from the judgment or by timely motion to set aside the default (Phillips v. Trusheim (1945) 25 Cal.2d 913, Taintor v. Superior Court (1950) 95 Cal. App.2d 346, Pavlovich v. Watts (1941) 46 Cal. App.2d 103). More recent cases indicate that entry of a response before dismissal makes dismissal improper (Mustalo v. Mustalo (1974) 37 Cal. App.3d 580—domestic relations proceeding) and that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing (AMF Pinspotters, Inc. v. Peek (1970) 6 Cal. App.3d 443).

There are also problems in determining when time under subdivision (c) is extended because of an injunction under the Bankruptcy Act. (11 U.S.C. 32(f)). For example, it has been held that such an injunction, though preventing the plaintiff from proceeding against the bankrupt, did not prevent the plaintiff from obtaining a judgment against the bankrupt for the purpose of asserting a claim against the bankrupt's insurance carrier. The plaintiff did not obtain a default judgment against the bankrupt for this purpose within three years. The action was dismissed under subdivision (c). Matthews Cadillac, Inc., v. Phoenix of Hartford Insurance Co. (1979) 90 Cal. App.3d 393.

Practical reasons for not taking a default judgment within three years may not be held sufficient under the "implied exception" test. Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See Merner Lumber Co. v. Silvey (1939) 29 Cal. App.2d 426.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 178 of 326

No. 14. Clarification Of Subdivision (c). Alternatively, should wording of subdivision (c) be substantially amended for clarification?

Comment. In the writer's opinion, if subdivision (c) is to be retained, wording such as "if no answer has been filed" requires modernization and the entire subdivision should be recast.

No. 15. Rewording Of Subdivision (e). Should subdivision (e) that states in effect that a motion to dismiss under Section 581a and certain other acts shall not be a general appearance be amended?

Comment. Present wording does not reflect that there may be a filed extension of time for service of a cross-complaint upon which no summons is needed; that a motion to vacate a default could be pursued with a motion to dismiss (compare CCP § 418.10 (d)--motion to quash service of summons), and that a motion to quash service of summons could be pursued with the motion to dismiss. The words "general appearance" should be supplemented by "for purposes of this subdivision."

No. 16. Rewording Of Subdivision (b). Should subdivision (b) that relates to diligence in serving a cross complaint be amended?

Comment. Certain "smoothing out" seems desirable. There is no requirement proof of service of a cross complaint be filed (when the cross complaing does not require a summons). The words "unless that party ...has made a general appearance in the action" should be restricted by wording such as "for purposes of the cross complaint." Changes in wording applicable to a complaint discussed above should apply also to a cross complaint, where apt.

Section 583

No. 17. Extension Of Time--Subdivision (c) Of Section 583. Should subdivision (c) of Section 583 that relates to the three-year period for new trial be amended to provide for an extension of time by the parties in the situation where action by an appellate court was involved?

Comment. This is the only situation where the present statute does not authorize a stipulation. The time cannot be extended by agreement. Good v. State (1969) 273 Cal. App.2d 587. It is submitted

Provided by Legislative Research Incorporated (800) 530-7613

the interests of uniformity outweigh possible distinctions that could be drawn.

No. 18. Exclusion Of Certain Time Periods From Mandatory Time For Trial. Should a broader "exclusion" than "amenability to process of the court" and "suspension of jurisdiction of the court" be stated for subdivision (b) and subdivision (c) of Section 583? Following is a rough draft:

"(a) There shall be excluded from such five years (three years) on a nonduplicative basis

(i) The time during which the jurisdiction of the court to try the action was suspended.

(ii) The time during which prosecution or the trial of the action, was stayed or enjoined by order of court, operation of law, statute, rule or regulation.

(iii) A period of delay of more than ninety consecutive days, in each instance, reasonably attributable to causes beyond the control of the party, such as death, illness or necessary absence of a party or counsel for a party, cessation of law practice by counsel, disqualification of counsel, disbarment or suspension of counsel, abandonment of the interests of the client by counsel without the participation or acquiescence of the client, and by a congested trial calendar.

(iv) A reasonable allowance for delay occasioned by numerous parties or pleadings, or by the severance of a cause of action or issue for separate trial.

(v) A reasonable allowance for delay occasioned by the requirement for or pendency of arbitration.

(vi) A reasonable allowance for delay occasioned by economic desirability of awaiting determination of an issue or issues in another case.

(vii) A reasonable allowance for delay occasioned by the prior entry of judgment in the action by default or by action other than trial.

(viii) A reasonable allowance for delay during a period when, from any cause, bringing the action to trial would be impossible, impracticable, or futile.

Provided by Legislative Research Incorporated (800) 530-7613

(b) The court may make reasonable estimates of the period or periods of delay for the cause or causes specified in subdivision (a). In the interests of justice, the court, upon determination that a party has unreasonably contributed to a particular delay, may impose conditions upon such party or may decline to exclude all or part of the period in question, or both.

Comment. The above draft in rough form is intended as illustrative, and to serve as a basis for consideration. Generally, this form favors the preservation of the cause of action. To that extent it provides a legislative basis for the present "balancing" of factors under the general "impossible, impractical, or futile" test. In effect, this type of statute would make the five-year and three-year "mandatory dismissal" provisions less rigid. Subdivision (b) is intended to give the trial court some control over unreasonable delays attributed to the "client." The proposal would modify the concept generally stated that the client is bound by the attorney's inadvertencies and omissions. Further comment is deferred at this time.

No. 19. Waiver Or Estoppel. Should the proposed statute expressly incorporate or refer to the rules of waiver and estoppel?

Comment. It is a question of "policy" whether to attempt to incorporate statutory provisions on these subjects. It does not seem practicable to attempt to restate the law of estoppel and waiver in the present context. In the writer's opinion, two types of lesser provisions would clarify the statutory law. One type would refer to the law of waiver and estoppel generally. Example: "The provisions of Section ("exclusions") do not modify or otherwise affect rules pertaining to waiver and estoppel of a defendant." Another type would state in a little more detail: "The provisions of this (chapter) may be waived by a writing or other act of the defendant that manifests an intent not to rely upon the requirements (particular section or this chapter) or a particular requirement. If a defendant, by writing or other act, leads the plaintiff reasonably to believe that the provisions or this chapter or a particular provision therein need not be complied with by the plaintiff, the

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 181 of 326

defendant may not thereafter require compliance with such provisions, except upon reasonable conditions approved by the (trial) court."

No. 20. Application To Pending Cases. Should there be express provisions as to application to pending cases; if so, what type of savings clause should be considered?

Comment. In the writer's opinion, the statutory changes should have as broad effect as possible. However, there are legal problems where the time for serving summons or bringing a case to trial has apparently expired. Similarly, a question of fairness may be raised as to pending cases in which delay has occurred but as to which the opposing party has not moved for discretionary dismissal. Until the nature of the changes becomes better defined, the writer makes no recommendation as to form of "saving" clause. Tentatively, the writer believes that as a matter of drafting and simplicity in operation, first, the new statute should not have a postponed operative date, second, cases in which orders of dismissal have been entered at the effective date should be excluded, and, third, a comparatively short period, such as 90 days should be given for a party or the court to give notice of motion to dismiss under grounds available under former law (including statutes, rules and decisions).

Respectfully submitted, February, 1981

Garrett H. Elmore
Consultant

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 182 of 326

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.[1] The major effect of these statutes is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.[2]

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.[3]

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.[4]

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.[5]

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.[6]

The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit along to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint

---

1. In addition, Rule 203.5 of the California Rules of Court prescribes the procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

2. Code Civ. Proc. § 581a(a).

3. Code Civ. Proc. § 581a(c).

4. Code Civ. Proc. § 583(b).

5. Code Civ. Proc. § 583(c)-(d).

6. Code Civ. Proc. § 583(a).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 27 of 326

rather than before the plaintiff files the complaint.[7] They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on clogged calendars.[8]

The policy of the dismissal statutes conflicts with another strong public policy--that which seeks to dispose of litigation on the merits rather than on procedural grounds.[9] As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.[10] The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.[11] The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.[12] The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

---

7. See, e.g., Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 105 Cal. Rptr. 339, 503 P.2d 347 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

8. See, e.g., Ippolito v. Municipal Court, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

9. See, e.g., Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

10. See, e.g., discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. CEB 1978).

11. For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

12. Since the two dismissal statutes were first enacted around the turn of the century there has been a continuing stream of appellate

Provided by Legislative Research Incorporated (800) 530-7613

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a continuing liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.[1] In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.[2] In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.[3] The current judicial attitude has been stated by the Supreme Court:[4] "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

---

litigation interpreting, clarifying, and rewriting the statutes--hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

1. See Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and cases following.

2. See Comment, The Demise (Hopefully) of an Abuse: The Sanction of Dismissal, 7 Calif. West. L. Rev. 438, 455-456 (1971).

3. See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

4. Id., 2 Cal.3d at 566, 468 P.2d at ___, 86 Cal. Rptr. at ___.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 29 of 326

Automatic Extension of Time for Trial

If the plaintiff intends to proceed with the action but the mandatory time within which trial must be brought upon penalty of dismissal is approaching, the plaintiff will ordinarily take some action to satisfy the mandatory statute, such as move the court to advance the date for trial or swear in a witness and take testimony.[1] A plaintiff who intends to proceed with the action should have available a simpler and more direct means of avoiding dismissal in this situation. The proposed law permits the plaintiff to file an affidavit extending the time for trial an additional year. The plaintiff must state in the affidavit the belief that the action is meritorious and that the plaintiff intends to bring the action to trial before the one-year extension has expired. The automatic extension of time upon the plaintiff's affidavit will reduce court time in hearing motions to advance trial date and in "commencing" and then continuing a trial for purposes of satisfying the mandatory dismissal statute. In cases where the plaintiff's delay was due to the impossibility, impracticability, or futility of bringing the action to trial, the affidavit procedure will mitigate the need to litigate that issue.[2]

Time for Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.[1] This period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss made for failure to bring to trial two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[2] The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

---

1. See, *e.g.*, discussion in Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 105 Cal. Rptr. 339, 503 P.2d 1347 (1972).

2. See discussion under "Excuse where prosecution impossible, impracticable, or futile," below.

1. Code Civ. Proc. § 583(a).

2. See discussion under "Policy of Statute," above.

Provided by Legislative Research Incorporated (800) 530-7613

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have had to rely on their inherent powers to dismiss.[3] The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make unnecessary reliance on inherent powers and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure to serve and return summons.[4] The proposed law clarifies and codifies this rule.

Other Sanctions than Dismissal

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing upon the plaintiff a lesser sanction than dismissal.[1] This authority gives the court flexibility to condition denial of dimissal upon such terms as payment of expenses and counsel fees to the adverse party that result from unreasonable delay.[2] On the other hand, it may be equitable to require the defendant to make a limited waiver of the statute of limitations, as a condition to dismissing the action. The proposed law makes the authority of the court to impose sanctions other than dismissal explicit.

---

3. See, e.g., Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

4. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

1. Rule 203.5. See discussion in Lopez. v. Larson, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

2. See, e.g., Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

Provided by Legislative Research Incorporated (800) 530-7613

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.[1] The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,[2] that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing,[3] that a stipulation excuses compliance even if unfiled,[4] and that a judgment entered after the three-year period may not be set aside on collateral attack.[5]

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,[6] and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.[7]

The dismissal provision for failure to obtain a default is not well understood, nor does it appear to be supported by compelling reasons of

---

1. Code Civ. Proc. § 581a(c).

2. Mustalo v. Mustalo, 37 Cal. App.3d 580, ___ Cal. Rptr. ___ (1974).

3. AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, ___ Cal. Rptr. (1979).

4. General Insurance Co. of America v. Superior Court, 15 Cal.3d 449, ___ (1978).

5. Phillips v. Trusheim, 25 Cal.2d 913, _____ (1945).

6. Jacks v. Lewis, 61 Cal. App.2d 148, ___ P.2d ___ (1943).

7. Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, ___ Cal. Rptr. ___ (1979).

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 32 of 326

orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.[8] The dismissal provision should be repealed in the interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.[1] The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.[2] The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The three-year requirement for service and return of process does not apply if the defendant makes a general appearance in the action.[3] The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time

---

8. Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, e.g., Merner Lumber Co. v. Silvey 29 Cal. App.2d 426, ___ P.2d ___ (1939).

1. See discussion under "Introduction," above.

2. See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

3. Code Civ. Proc. § 581a(a)-(b).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 33 of 326

to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.[4] A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the general jurisdiction of the court.[5] The proposed law makes clear that the service and return requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service and return is a motion to dismiss for failure to timely serve and return summons.[6] The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default judgment does not transform the motion into a general appearance.[7]

Stipulation extending time. The time within which service must be made and returned, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.[8] The requirement that the stipulation be filed is unduly restrictive;[9] parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.[10] The proposed law permits an extension of time upon presentation to the court

---

4. See, e.g., Knapp v. Superior Court, 70 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

5. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

6. Code Civ. Proc. § 581a(e).

7. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 705, 209 P.2d 845 (1949) (motion to set aside default judgment and dismiss).

8. Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

9. See, e.g., Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

10. See, e.g., Obgerfeld v. Obgerfeld, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

Provided by Legislative Research Incorporated (800) 530-7613

of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.[11] However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.[12] This difference in treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a stipulation,[13] has failed to assert the statute,[14] or has acted in a manner that misleads the plaintiff.[15] The existence of the excuses of waiver and estoppel is not reflected in the dismissal statutes. The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or

---

11. Code Civ. Proc. § 583(c)-(d).

12. See, _e.g.,_ Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

13. See, _e.g.,_ Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

14. See, _e.g.,_ Southern Pacific v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962).

15. See, _e.g.,_ Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 35 of 326

futile.[16] Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.[17] The proposed law expressly recognizes an excuse for delay caused by a stay or injunction of proceedings and by litigation over the validity of service, as well as delay caused by the impossibility, impracticability, or futility of timely prosecution for other reasons.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[18] The proposed law is drafted to make clear this flexibility.

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.[19] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[20] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings that are in the nature of a civil action and adversary in character.[21]

---

16. See, e.g., Wyoming Pac. Oil v. Preston, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972).

17. See, e.g., cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

18. See, e.g., Watson v. Superior Court, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); J.A. Thompson & Sons, Inc. v. Superior Court, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1968); Fisher v. Superior Court, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

19. See, e.g., Big Bear Municipal Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

20. See, e.g., Section 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

21. See, e.g., 4 B. Witkin, California Procedures, Proceedings Without Trial § 80 (1971).

Provided by Legislative Research Incorporated (800) 530-7613

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 581 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, relating to dismissal of civil actions for lack of prosecution.

The people of the State of California do enact as follows:

SECTION 1. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1.~~ (a) By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge; provided, that affirmative relief has not been sought by the cross-complaint of the defendant, and provided further that there is no motion pending for an order transferring the action to another court under the provisions of Section 396b. If a provisional remedy has been allowed, the undertaking shall upon ~~such~~ dismissal be delivered by the clerk or judge to the defendant who may have ~~his~~ an action thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall be~~ is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

~~2.~~ (b) By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1~~ (a) and ~~2 of this section~~ (b) shall be granted unless, upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained upon order of the court after notice to ~~such~~ the attorney.

~~3.~~ (c) By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 37 of 326

amend it within the time allowed by the court, and either party moves for ~~such~~ dismissal.

~~4.~~ (d) By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

~~5.~~ (e) The provisions of subdivision ~~1, of this section~~ (a) shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ the action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ (a) , after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

~~6.~~ (f) By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.430. A dismissal for lack of prosecution is without prejudice. See, e.g., Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); Hill v. San Francisco, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial; Stephan v. American Home Builders, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

36259

SEC. 2. Section 581a of the Code of Civil Procedure is repealed.

~~518a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether~~

Provided by Legislative Research Incorporated (800) 530-7613

~~named as a party or not, unless, if a summons is not required, the cross-complaint is served within three years after the filing of the cross-complaint or unless, if a summons is required, the summons on the cross-complaint is served and return made within three years after the filing of the cross-complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.~~

~~(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.~~

~~(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such a motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.~~

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service and return) and 583.240 (mandatory dismissal). The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.220 (extension of time) and 583.230 (computation of time).

Subdivision (c) is not continued. The provision was not well understood and was subject to numerous implied exceptions in the case law.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.230 (computation of time).

The substance of subdivision (e) is continued in Section 583.210(b) (time for service and return).

Provided by Legislative Research Incorporated (800) 530-7613

CCP § 583
36263

SEC. 3. Section 583 of the Code of Civil Procedure is repealed.

583. (a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).

(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years

Provided by Legislative Research Incorporated (800) 530-7613

~~after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.~~

~~(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.~~

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.310 (time for trial), 583.320 (extension of time), and 583.350 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.330 (computation of time).

26813

SEC. 4. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110. Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes a cause of action or claim for affirmative relief.

(b) "Complaint" includes cross-complaint, petition, complaint in intervention, or other papers by which an action is brought.

(c) "Defendant" includes cross-defendant, respondent, or other party against whom an action is brought.

(d) "Plaintiff" includes cross-complainant, petitioner, complainant in intervention, or other party by whom an action is brought.

Provided by Legislative Research Incorporated (800) 530-7613

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. As used in this chapter, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), and (d) are new.

26814

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or that part of a special proceeding that is in the nature of a civil action and is adversary in character except to the extent the special proceeding provides a different rule or the application would be inappropriate.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, e.g., Big Bear Municipal Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rule 1233, Cal. Rules of Court (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inappropriate in special proceedings such as a decedent's estate. See, e.g., Horney v. Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition a special proceeding may prescribe different rules. Cf. Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

405/434

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. In the case of conflict, the policy favoring the right of parties to make stipulations in their own interests and the

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 42 of 326

policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

26815

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 is new. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, *e.g.*, Southern Pacific v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211 (1971) (estoppel to assert failure to timely serve and return summons).

26960

§ 583.150. Transitional provisions

583.150. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter.

(b) This chapter does not affect an order dismissing an action made before the effective date. A motion for dismissal made before the effective date is governed by the applicable law in effect immediately before the effective date of this chapter and for this purpose the law in effect immediately before the effective date of this chapter continues in effect.

Comment. Section 583.150 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extend practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 43 of 326

Article 2. Mandatory Time for Service and Return

§ 583.210. Time for service and return

583.210. (a) The summons and complaint shall be served upon a defendant and return or other proof of service shall be made within three years after the action is commenced against the defendant. For purposes of this subdivision an action is commenced at the time the complaint is filed.

(b) This section does not apply if the defendant enters into a stipulation in writing or otherwise makes a general appearance in the action. For purposes of this section none of the following constitutes a general appearance in the action:

(1) A stipulation extending the time within which service and return must be made pursuant to this article.

(2) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(3) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Subdivision (a) of Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. For exceptions and exclusions, see subdivision (b) (general appearance) and Sections 583.220 (extension of time) and 583.230 (computation of time). Subdivision (a) applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Subdivision (a) applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, e.g., Austin v. Mass. Bonding & Ins. Co., 56 Cal.2d 596, 15 Cal. Rptr. 817, 364 P.2d 681 (1961); Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); Warren v. A.T. & S.F. Ry. Co., 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971).

Subdivision (b) continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purposes of this chapter by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease

Provided by Legislative Research Incorporated (800) 530-7613

v. City of San Diego, 93 Cal. App.2d 705, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Subdivision (b) applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 ("action" and "defendant" defined).

999/318

§ 583.220. Extension of time

583.220. The parties may by written stipulation extend the time within which service and return must be made pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion [or proceeding] for dismissal.

Comment. Section 583.220 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive.

27237

§ 583.230. Computation of time

583.230. In computing the time within which service and return must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service and return.

(c) The validity of service or return was the subject of litigation by the parties.

(d) Service and return, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.230 continues the substance of subdivision (d) of former Section 581a. Subdivisions (b) and (d) are based on exceptions to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Provided by Legislative Research Incorporated (800) 530-7613

§ 583.240. Mandatory dismissal

583.240. If service and return are not made in an action within the time prescribed in this article:

(a) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(b) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not.

Comment. Section 583.240 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this section are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel).

28763

Article 3. Mandatory Time for Bringing Action to Trial

§ 583.310. Time for trial

583.310. An action shall be brought to trial within the later of the following times:

(a) The action shall be brought to trial within five years after the action is commenced against the defendant.

(b) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

Comment. Subdivision (a) of Section 583.310 is drawn from a portion of subdivision (b) of former Section 583. Subdivision (b) is drawn from

Provided by Legislative Research Incorporated (800) 530-7613
LRI
Page 46 of 326

portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.320 (extension of time), 583.330 (computation of time), and 583.340 (additional time upon affidavit).

36265

§ 583.320. Extension of time

583.320. The parties may by written stipulation extend the time within which an action must be brought to trial pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion [or proceeding] for dismissal.

Comment. Section 583.320 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, *e.g.*, cases cited in Good v. State, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316, _____ (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive.

36249

§ 583.330. Computation of time

583.330. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile. In making a determination pursuant to this subdivision the court shall make a reasonable allowance for the period of delay caused by special circumstances that hindered the plaintiff in bringing the action to trial within the time prescribed in this article.

Comment. Subdivision (a) of Section 583.330 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard, but prescribes a more liberal interpretation of the standard. See Section 583.130 (policy statement). Under subdivision (c) special circumstances would include such factors beyond the control

Provided by Legislative Research Incorporated (800) 530-7613

of the party as death (contrast Anderson v. Superior Court, 187 Cal. 95, 200 Pac. 963 (1921)), illness (contrast Singelyn v. Superior Court, 62 Cal. App.3d 972, 133 Cal. Rptr. 486 (1976)), or necessary absence of a party or counsel for a party (see, e.g., Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665 (1946)), cessation of law practice by counsel, disqualification, disbarment, or suspension of counsel, abandonment of the interests of the party by counsel without the participation or acquiesence of the party, loss of position on trial calendar (cf. Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958)), and congested trial calendar (see e.g., Goers v. Superior Court, 57 Cal. App.3d 72, 129 Cal. Rptr. 29 (1976)). Subdivision (c) would also enable the court to make an allowance for such matters as delay occasioned by numerous parties or pleadings (see, e.g., Brunzell Constr. Co. v. Wagner, 2 Cal.3d 545, 86 Cal. Rptr. 297, 468 P.2d 553 (1970)), severance of a cause or issue for separate trial (cf. Pasadena v. Alhambra, 33 Cal.2d 908, 207 P.2d 17 (1949)), requirement for or pendency of arbitration (see, e.g., Section 1141.17; Brown v. Engstrom, 89 Cal. App.3d 513, 152 Cal. Rptr. 628 (1979)), desirability of awaiting determination of an issue in another case (cf. Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981 (1951)), and prior entry of judgment in the action by default or by action other than trial (see, e.g., Maguire v. Collier, 49 Cal. App.3d 309, 122 Cal. Rptr. 510 (1975)).

405/848

§ 583.340. Additional time upon affidavit

583.340. (a) The time within which an action must be brought to trial pursuant to this article is extended for one year without court order or other court action if before expiration of the time the plaintiff files the affidavit prescribed in this section. An extension of time may be made pursuant to this section only once and the extension applies to all parties to the action whether or not they have joined in the affidavit.

(b) The affidavit shall state in substance all of the following:

(1) The plaintiff believes the action is meritorious.

(2) The plaintiff has not abandoned the action.

(3) The plaintiff in good faith intends to bring the action to trial within one year after expiration of the time within which the action must otherwise be brought to trial.

(4) The estimated date to which the time is extended.

(c) The plaintiff shall serve a copy of the affidavit on the other parties who have appeared in the action, together with a statement of the date the affidavit was filed. Failure to make service does not

Provided by Legislative Research Incorporated (800) 530-7613

affect the extension of time. The statements in the affidavit may not be controverted except for the statement of the estimated date to which the time is extended.

(d) Nothing in this section affects discretionary dismissal of an action pursuant to Article 4 (commencing with Section 583.410), the right of the parties to extend time by written stipulation pursuant to Section 583.320, or the computation of time before or during the extension in the manner prescribed in Section 583.330.

Comment. Section 583.340 is new.

29636

§ 583.350. Mandatory dismissal

583.350. An action shall be dismissed by the court on its own motion or on motion of the defendant if the action is not brought to trial within the time prescribed in this article.

Comment. Section 583.350 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion).

36267

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion). Section 583.410 prescribes the exclusive authority of a court to order discretionary dismissal for delay in prosecution of an action. See, e.g., Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 49 of 326

305 (1968) (two-year statute limits court's inherent power to dismiss for want of prosecution at any time). Nothing in Section 583.410 limits any applicable remedies for abuse of process by a party.

36266

§ 583.420. Time for discretionary dismissal

583.420. The court may dismiss an action pursuant to this article for delay prosecution in any of the following circumstances:

(a) Service and return are not made one year before the time within which service and return must be made pursuant to Article 2 (commencing with Section 583.210).

(b) The action is not brought to trial two years before the time within which an action must be brought to trial pursuant to Article 3 (commencing with Section 583.310).

(c) A new trial is granted and the action is not again brought to trial one year before the time within which an action must again be brought to trial pursuant to Article 3 (commencing with Section 583.310).

Comment. Subdivision (a) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service and return. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service and return) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

Subdivision (b) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (c) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, *e.g.*, Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal Rptr. 651 (1977).

36268

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may do any of the following if to do so appears to the court appropriate under the circumstances of the case:

Provided by Legislative Research Incorporated (800) 530-7613

(1) Require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(2) Require as a condition of denial of dismissal that the plaintiff or the plaintiff's attorney pay to the defendant a sum to be fixed by the court as a reasonable allowance for all or part of a defendant's costs, actual expenses and reasonable attorney's fees that have resulted from the delay.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to tentative rulings and provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement).

Subdivision (a)(1) permits the court to condition granting of dismissal on such matters as waiver by the defendant of a statute of limitations or dismissal by the defendant of a cross-complaint, and to condition denial of dismissal on such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

Subdivision (a)(2) codifies the rule that the court may condition denial of dismissal upon payment by the plaintiff or the plaintiff's attorney of the defendant's costs, expenses, and attorney's fees. See, *e.g.*, Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

36269

[Article 5. Dismissal Calendar]

[Note. This article is reserved for a procedure for the courts to weed out dormant cases on a mass basis. An example of such a procedure would be a dismissal calendar on which a case that has not been brought to trial within a certain period of time will be placed, with notice to the parties to show cause why the case should not be dismissed for lack of prosecution. Whether such a procedure should be adopted and the precise content of such a procedure has been deferred pending receipt of information from local court administrators.]

Provided by Legislative Research Incorporated (800) 530-7613

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REPORTS, RECOMMENDATIONS, AND STUDIES

Volume 16

December 1982

Cite this volume as 16 CAL. L. REVISION COMM'N REPORTS——(1982)

AUG 2 1983

CALIFORNIA
STATE LIBRARY
LAW LIBRARY

THE CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

ROBERT J. BERTON
Chairperson

BEATRICE P. LAWSON
Vice Chairperson

OMER L. RAINS
Member of the Senate

ALISTER MCALISTER
Member of the Assembly

ROSLYN P. CHASAN
Member

JAMES H. DAVIS
Member

JOHN B. EMERSON
Member

DEBRA S. FRANK
Member

BION M. GREGORY
Member

DAVID ROSENBERG
Member

COMMISSION STAFF

Legal

JOHN H. DEMOULLY
Executive Secretary

NATHANIEL STERLING
Assistant Executive Secretary

ROBERT J. MURPHY III
Staff Counsel

STAN G. ULRICH
Staff Counsel

Administrative-Secretarial

JUAN C. ROGERS
Administrative Assistant

VICTORIA V. MATIAS
Word Processing Technician

LETA M. SKAUG
Word Processing Technician

Provided by Legislative Research Incorporated (800) 530-7613

LRI
1984-1705
Page 361 of 478

PAST AND PRESENT MEMBERS OF THE LAW REVISION COMMISSION

ROGER ARNEBERGH (1968–1970)

JUDITH MEISELS ASHMANN (1978–1981)

JOHN D. BABBAGE (1954–1959)
Vice Chairperson 1954–1959

JOSEPH A. BALL (1955–1956, 1960–1968)
Vice Chairperson 1968

JOHN J. BALLUFF (1971–1977)

FRANK S. BALTHIS (1959)

F. JAMES BEAR (1967–1968)
Assembly Member

ROBERT J. BERTON (1980–)
Chairperson 1982

CLARK L. BRADLEY (1954–1963)
Assembly Member

ROSLYN P. CHASAN (1982–)

GEORGE Y. CHINN (1978–1981)

JAMES A. COBEY (1957–1966)
Senate Member

JAMES H. DAVIS (1982–)

GEORGE DEUKMEJIAN (1977–1979)
Senate Member

LEONARD J. DIEDEN (1959–1960)

JESS R. DORSEY (1954–1957)
Senate Member

JAMES R. EDWARDS (1961–1967)

JOHN B. EMERSON (1982–)

RICHARD C. FILDEW (1954–1955)

DEBRA S. FRANK (1982–)

C. BRUCE GOURLEY (1970–1971)

BION M. GREGORY (1976–)
Ex Officio Member

NOBLE K. GREGORY (1970–1975)

GEORGE G. GROVER (1959–1961)

ROY A. GUSTAFSON (1957–1960)
Chairperson 1960

ERNEST M. HIROSHIGE (1978–1980)

RICHARD H. KEATINGE (1961–1967)
Chairperson 1966–1967
Vice Chairperson 1964–1965

BARRY KEENE (1983–)
Senate Member

RALPH N. KLEPS (1954–1961)
Ex Officio Member

BEATRICE P. LAWSON (1977–)
Chairperson 1979–1981
Vice Chairperson 1977–1979, 1982

BERT W. LEVIT (1954–1957, 1957–1959)

THOMAS S. LOO (1980–1982)

JEAN C. LOVE (1977–1982)
Chairperson 1982
Vice Chairperson 1980–1981

ALISTER MCALISTER (1973–)
Assembly Member

JOHN R. MCDONOUGH (1959–1967)
Chairperson 1964–1965
Vice Chairperson 1960–1964

JOHN N. MCLAURIN (1970–1978)
Chairperson 1975–1977
Vice Chairperson 1973–1975

CHARLES H. MATTHEWS (1957–1959)

JOHN D. MILLER (1969–1978)
Chairperson 1971–1973
Vice Chairperson 1970–1971

CARLOS J. MOORHEAD (1969–1972)
Assembly Member

ANGUS C. MORRISON (1961–1964)
Ex Officio Member

GEORGE H. MURPHY (1964–1976)
Ex Officio Member

OMER L. RAINS (1979–1982)
Senate Member

DAVID ROSENBERG (1981–)

MARC SANDSTROM (1970–1977)
Chairperson 1973–1975
Vice Chairperson 1971–1973

SHO SATO (1960–1970)
Chairperson 1968–1970
Vice Chairperson 1966–1967

HERMAN F. SELVIN (1959–1967)
Chairperson 1960–1964

STANFORD C. SHAW (1955–1959)
Assembly Member 1954

JOSEPH T. SNEED (1970)

ALFRED H. SONG (1963–1973)
Senate Member 1967–1973
Assembly Member 1963–1966

VAINO H. SPENCER (1960–1961)

THOMAS E. STANTON, JR. (1954–1978)
Chairperson 1954–1960, 1970–1971
Vice Chairperson 1968–1970

WARREN M. STANTON (1979–1981)

ROBERT S. STEVENS (1973–1976)
Senate Member

JOHN HAROLD SWAN (1954–1957)

SAMUEL D. THURMAN (1954–1959)
Vice Chairperson 1959

LEWIS K. UHLER (1968–1970)

LAURENCE N. WALKER (1977–1979)

HOWARD R. WILLIAMS (1971–1979)
Chairperson 1977–1979
Vice Chairperson 1975–1977

RICHARD H. WOLFORD (1968–1970)

WILLIAM A. YALE (1968–1970)

PEARCE YOUNG (1963)
Assembly Member

Provided by Legislative Research Incorporated (800) 530-7613
LRI
1984-1705
Page 362 of 478

TABLE OF CONTENTS

	Page
Preface	IX
Government Code Sections 10300–10340 Relating to the California Law Revision Commission	XI
Annual Report (December 1981)	1
Appendix I. Legislative Action on Commission Recommendations (Cumulative)	29
Appendix II. Report of Senate Committee on Judiciary on Assembly Bill 132	41
Appendix III. Report of Senate Committee on Judiciary on Assembly Bill 329	43
Appendix IV. Recommendation Relating to Federal Military and Other Federal Pensions as Community Property	47
Recommendations Relating to Probate Law and Procedure—Missing Persons, Nonprobate Transfers; Emancipated Minors; Notice in Limited Conservatorship Proceedings; Disclaimer of Testamentary and Other Interests	101
Recommendation Relating to Holographic and Nuncupative Wills	301
Recommendation Relating to Marketable Title of Real Property	401
Recommendation Relating to Statutory Bonds and Undertakings	501
Recommendation Relating to Attachment	701
1982 Creditors' Remedies Legislation with Official Comments—The Enforcement of Judgments Law; The Attachment Law	1001
Annual Report (December 1982)	2001
Appendix I. Legislative Action on Commission Recommendations (Cumulative)	2031
Appendix II. Report of Assembly Committee on Judiciary on Assembly Bills 707 and 798	2045
Appendix III. Report of Senate Committee on Judiciary on Assembly Bills 707, 798, and 2332	2121
Appendix IV. Report of Senate Committee on Judiciary on Assembly Bills 2750 and 2751	2155
Appendix V. Report of Senate Committee on Judiciary on Assembly Bill 2331	2159
Appendix VI. Report of Senate Committee on Judiciary on Assembly Bill 2416	2161

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 363 of 478

Appendix VII. Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage 2165

Appendix VIII. Recommendation Relating to Creditors' Remedies—Amount to be Secured by Attachment; Execution of Writs by Registered Process Servers; Technical Amendments 2175

Appendix IX. Recommendation Relating to Dismissal for Lack of Prosecution 2205

Appendix X. Recommendation Relating to Conforming Changes to The Bond and Undertaking Law 2239

Appendix XI. Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity 2251

Tentative Recommendation Relating to Wills and Intestate Succession 2301

Cumulative Table of Constitutional and Statutory Provisions Affected by Commission Recommendations 2601

Provided by Legislative Research Incorporated (800) 530-7613

LRI
1984-1705
Page 364 of 478

PREFACE

This volume contains the December 1981 and the December 1982 Annual Reports of the California Law Revision Commission, recommendations made by the Commission to the 1982 and 1983 sessions of the Legislature, and the Commission's 1982 Creditors' Remedies Legislation publication. Additional recommendations submitted to the 1983 session will be included in Volume 17.

A legislative history of Commission measures enacted in the 1981 and 1982 sessions of the Legislature is contained in the annual report for the respective year. For the 1981 session, the legislative history begins on page 24. For the 1982 session, the legislative history begins on page 2024.

Although the annual reports and the recommendations contained in this volume were originally published as separate pamphlets, they were paginated with a view to their inclusion in this volume. Hence, the pagination in this volume is consecutive from beginning to end. Page omissions are indicated where they occur.

The *Cumulative Table of Constitutional and Statutory Provisions Affected by Commission Recommendations* lists all sections of the Constitution or the codified laws that were adopted, enacted, amended, or repealed upon the recommendation of the Commission. The table includes legislation enacted by the 1982 legislative session.

This volume does not contain a comprehensive index. However, the recommendations contained in this volume are listed in the table of contents beginning at page VII. References to Volume 16 found in the *Cumulative Table of Constitutional and Statutory Provisions Affected by Commission Recommendations* (indicated by a boldface "16") list the pages in Volume 16 where a recommendation relating to that code section appears.

Provided by Legislative Research Incorporated (800) 530-7613

LRI
1984-1705
Page 365 of 478

APPENDIX IX

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Dismissal for Lack of Prosecution

September 1982

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Provided by Legislative Research Incorporated (800) 530-7613

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Dismissal for Lack of Prosecution*, 16 Cal. L. Revision Comm'n Reports 2205 (1982).

Provided by Legislative Research Incorporated (800) 530-7613

LRI
1984-1705
Page 367 of 478

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306
(415) 494-1335

ROBERT J. BERTON
Chairperson
BEATRICE P. LAWSON
Vice Chairperson
SENATOR OMER L. RAINS
ASSEMBLYMAN ALISTER McALISTER
ROSLYN P. CHASAN
JAMES H. DAVIS
JOHN B. EMERSON
DEBRA S. FRANK
BION M. GREGORY
DAVID ROSENBERG

September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The Commission submits this recommendation to codify, clarify, and modestly liberalize the law governing the dismissal of civil actions for lack of prosecution.

The Commission wishes to express its appreciation to its consultant on this study, Mr. Garrett H. Elmore (Burlingame), for his substantial contribution to the development of this recommendation.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

Provided by Legislative Research Incorporated (800) 530-7613
LRI
1984-1705
Page 368 of 478

RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.[1] The major effect of these statutes is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.[2]

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.[3]

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.[4]

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.[5]

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.[6]

The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit expeditiously to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the

---

[1] In addition, Rule 203.5 of the California Rules of Court prescribes the Superior Court procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

[2] Code Civ. Proc. § 581a(a).

[3] Code Civ. Proc. § 581a(c).

[4] Code Civ. Proc. § 583(b).

[5] Code Civ. Proc. § 583(c)-(d).

[6] Code Civ. Proc. § 583(a).

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 370 of 478

complaint.[7] They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on crowded calendars.[8]

The policy of the dismissal statutes conflicts with another strong public policy—that which seeks to dispose of litigation on the merits rather than on procedural grounds.[9] As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.[10] The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.[11] The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.[12] The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to

[7] See, *e.g.*, Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 503 P.2d 347, 105 Cal. Rptr. 339 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

[8] See, *e.g.*, Ippolito v. Municipal Court, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

[9] See, *e.g.*, Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

[10] See, *e.g.*, discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. Cont. Ed. Bar 1978).

[11] For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

[12] Since the two dismissal statutes were first enacted around the turn of the century there has been continuous appellate litigation interpreting, clarifying, and rewriting the statutes—hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

Provided by Legislative Research Incorporated (800) 530-7613

create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.[13] In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.[14] In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.[15] The current judicial attitude has been stated by the Supreme Court:[16] "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

Dismissal for Failure to Make Service

Section 581a(a) requires that summons be served "and return made" within three years after the action is commenced. The requirement that a return be made within the statutory period is taken literally, even though there may be no question that service has been made.[17] The

[13] See Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and the line of cases following it.

[14] See Comment, *The Demise (Hopefully) of an Abuse: The Sanction of Dismissal,* 7 Cal. W.L. Rev. 438, 455-56 (1971).

[15] See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[16] *Id.*, 2 Cal.3d at 566. See also Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[17] See, *e.g.*, Kaiser Found. Hosp. v. Superior Court, 49 Cal. App.3d 523, 122 Cal. Rptr. 432 (1975); Bernstein v. Superior Court, 2 Cal. App.3d 700, 82 Cal. Rptr. 775 (1969); Beckwith v. Los Angeles County, 132 Cal. App.2d 377, 282 P.2d 87 (1955). See also Highlands Inn, Inc. v. Gurries, 276 Cal. App.2d 694, 81 Cal. Rptr. 273 (1969) (risk of loss in mail on plaintiff).

Provided by Legislative Research Incorporated (800) 530-7613

purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.[18] The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The proposed law eliminates the return requirement.[19]

A major problem with the three-year service requirement is that unless discovery is completed and all potential defendants identified within that time, it is not possible to serve newly-discovered defendants.[20] Recent legislation, however, provides that failure to discover relevant facts or evidence does not excuse compliance with the three-year service requirement.[21] The economics of litigation and the realities of the five-year trial date in many courts dictate that discovery and trial preparation may not reasonably be expected to occur in many cases until well past the three-year cut-off.[22] For this reason the proposed law preserves the rule that failure of discovery is not an excuse, but requires that service of summons be made within four, rather than three, years after commencement of the action.

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;[23] 1982 legislation

---

[18] Nor does the return requirement appear to shift the burden of proof of service. Whether service was in fact made within the three-year period is a question of proof. The return of summons does not help materially in this respect.

[19] The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

[20] *Cf.*, Hocharian v. Superior Court, 28 Cal.3d 714, 720-21, 621 P.2d 829, 170 Cal. Rptr. 790 (1981) ("As every litigator knows, the prosecution or defense of a lawsuit involves the difficult problem of balancing the effectiveness of any given tactic or procedure against its cost in terms of time and expense. Even the attorney who utilizes every reasonable and cost-effective discovery procedure must acknowledge the possibility that he or she will fail to discover the identity of a potential defendant within the statutory three-year period.").

[21] Code Civ. Proc. § 581a(f)(2), as enacted by 1982 Cal. Stats. ch. 600.

[22] This is particularly true in personal injury cases, which are frequently involved in disputes over dismissal for lack of prosecution. The precise extent of the injuries and amount of damages may not be possible to ascertain in such cases for several years. As a result the parties may delay discovery and other trial activities in anticipation of a possible settlement.

[23] Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

Provided by Legislative Research Incorporated (800) 530-7613

declares that it is.[24] The 1982 legislative declaration is contrary to the general principle that mandatory procedural rules are not jurisdictional.[25] Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack. The proposed law makes clear the service requirement is mandatory but not jurisdictional.[26]

Dismissal for Failure to Bring to Trial

Although Code of Civil Procedure Section 583 is clear that an action must be brought to trial within five years after it is commenced, it is unclear what acts amount to being "brought to trial" for purposes of the statute. The cases have held, for example, that impaneling a jury or swearing the first witness is sufficient to satisfy the requirement that the action be brought to trial.[27] A practice has developed that when the five-year period is about to expire an action is "brought to trial" and then immediately continued until a convenient trial date. Such a practice may be a practical necessity in congested trial courts. In recognition of this practice the statute that defines when an action is brought to trial should prescribe a procedure that does not consume judicial resources or the resources of the parties.

The proposed law adopts the rule that an action is brought to trial when it is actually called for trial in the trial court and the plaintiff signifies readiness to proceed. This provides a clear statutory statement of the time the action is brought to trial that is non-resource consuming. The statutory statement is not exclusive, however, and does not affect other acts by which an action is in fact brought to trial.[28]

---

[24] Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. 600.

[25] See, *e.g.*, 1 B. Witkin, California Procedure *Jurisdiction* §§ 3, 180, 184 (2d ed. 1970).

[26] The same rule also applies to the bringing to trial requirements.

[27] See, *e.g.*, Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

[28] See, *e.g.*, 4 B. Witkin, California Procedure *Proceedings Without Trial §§ 101 (judgment on demurrer)* and *102 (summary judgment)* (2d ed. 1971).

Provided by Legislative Research Incorporated (800) 530-7613 LRI 1984-1705 Page 374 of 478

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.[29] The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,[30] that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing,[31] that a stipulation excuses compliance even if unfiled,[32] and that a judgment entered after the three-year period may not be set aside on collateral attack.[33]

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,[34] and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.[35]

The dismissal provision for failure to obtain a default is not well understood and is unduly inflexible, nor does it appear to be supported by compelling reasons of orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.[36] The dismissal provision should be repealed in the

---

[29] Code Civ. Proc. § 581a(c).

[30] Mustalo v. Mustalo, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

[31] AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1970).

[32] General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

[33] Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25 (1945).

[34] Jacks v. Lewis, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

[35] Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

[36] Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again,

interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.[37] This period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[38] The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have relied on their inherent powers to dismiss.[39] The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make reliance on inherent powers unnecessary and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure

arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, *e.g.*, Merner Lumber Co. v. Silvey 29 Cal. App.2d 426, 84 P.2d 1062 (1938).

[37] Code Civ. Proc. § 583(a).

[38] See discussion under "Policy of Statute," above.

[39] See, *e.g.*, Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 376 of 478

to serve and return summons.[40] The proposed law clarifies and codifies this rule.

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing conditions on trial or dismissal of the action.[41] The proposed law codifies this rule.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.[42] The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.[43] The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The requirement that process be served within the statutory period does not apply if the defendant makes a general appearance in the action.[44] The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.[45] A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the

---

[40] See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

[41] Rule 203.5. See discussion in Lopez v. Larson, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

[42] See discussion under "Introduction," above.

[43] See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

[44] Code Civ. Proc. § 581a(a)-(b).

[45] See, *e.g.*, Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

Provided by Legislative Research Incorporated (800) 530-7613

general jurisdiction of the court.[46] The proposed law makes clear that the service requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service is a motion to dismiss for failure to timely serve and return summons.[47] The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default judgment does not transform the motion into a general appearance.[48]

Stipulation extending time. The time within which service must be made, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.[49] The requirement that the stipulation be filed is unduly restrictive;[50] parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.[51] The proposed law permits an extension of time upon presentation to the court of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.[52] However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.[53] This difference in

---

[46] See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr 745 (1975).

[47] Code Civ. Proc. § 581a(e).

[48] See, *e.g.*, Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss).

[49] Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

[50] See, *e.g.*, Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

[51] See, *e.g.*, Obgerfell v. Obgerfell, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

[52] Code Civ. Proc. § 583(c)-(d).

[53] See, *e.g.*, Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

Provided by Legislative Research Incorporated (800) 530-7613

treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a stipulation,[54] has failed to assert the statute,[55] or has acted in a manner that misleads the plaintiff.[56] The existence of the excuses of waiver and estoppel is not generally reflected in the dismissal statutes.[57] The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile.[58] Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.[59] Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.[60] The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of

[54] See, *e.g.*, Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

[55] See, *e.g.*, Southern Pac. v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962).

[56] See, *e.g.*, Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

[57] But see Code Civ. Proc. § 581a(f)(1), as enacted 1982 Cal. Stats. ch. 600.

[58] See, *e.g.*, Wyoming Pac. Oil v. Preston, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[59] See, *e.g.*, cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

[60] Code Civ. Proc. § 581a(f)(2), as enacted 1982 Cal. Stats. ch. 600.

Provided by Legislative Research Incorporated (800) 530-7613

impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and is applicable only to causes beyond the plaintiff's control. The excuse must be liberally construed as applied to the bringing to trial requirement. This disparity is in recognition of the fact that service is ordinarily within the plaintiff's control (particularly if the statutory limit is increased from three to four years) whereas bringing a case to trial frequently may be hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.[61] The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;[62] it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[63] The proposed law is drafted to make clear this flexibility.

---

[61] See, *e.g.*, State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

[62] See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

[63] See, *e.g.*, Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); Watson v. Superior Court, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); J.A. Thompson & Sons, Inc. v. Superior Court, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1963); Fisher v. Superior Court, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 380 of 478

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.[64] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[65] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.[66]

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 581 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, relating to civil actions.

The people of the State of California do enact as follows:

SECTION 1. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1.~~ *(a)* By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge~~; provided, that~~. *This subdivision does not apply if* affirmative relief has ~~not~~ been sought by the cross-complaint of the defendant ~~; and provided further that~~ *or if* there is ~~no~~ *a* motion pending for an order transferring the action to another court under the provisions of Section 396b. If a provisional remedy has been

[64] See, *e.g.*, Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

[65] See, *e.g.*, Code Civ. Proc. § 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

[66] See, *e.g.*, 4 B. Witkin, California Procedure *Proceedings Without Trial* § 80 (2d ed. 1971).

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 381 of 478

allowed, the undertaking shall upon ~~such~~ dismissal be delivered by the clerk or judge to the defendant who may ~~have his action~~ *enforce the liability* thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall be~~ *is* no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

~~2.~~ *(b)* By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1 and 2 of this section~~ *(a) and (b)* shall be granted ~~unless~~ *except* upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained, upon order of the court after notice to ~~such~~ *the* attorney.

~~3.~~ *(c)* By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, and either party moves for ~~such~~ dismissal.

~~4.~~ *(d)* By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

~~5.~~ *(e)* The provisions of subdivision ~~1, of this section~~ *(a)* shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ *the* action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ *(a)*, after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

~~6.~~ *(f)* By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.430. A dismissal for lack of prosecution is without prejudice. See, *e.g.*, Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); Hill v. San Francisco, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial); Stephan v. American Home Builders, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

SEC. 2. Section 581a of the Code of Civil Procedure is repealed.

~~581a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.~~

~~(b) No action heretofore or hereafter commenced by cross/complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross/complaint is served within three years after the filing of the cross/complaint or unless, if a summons is required, the summons on the cross/complaint is served and return made within three years after the filing of the cross/complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service~~

~~would otherwise have to be made has made a general appearance in the action.~~

~~(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the action may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.~~

~~(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after the motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.~~

~~(f) Except as provided in this section, the provisions of this section are mandatory and are not excusable, and the times within which acts are to be done are jurisdictional. Compliance may be excused only for either of the following reasons:~~

~~(1) Where the defendant or cross/defendant is estopped to complain.~~

~~(2) Where it would be impossible, impracticable, or futile to comply due to causes beyond a party's control. However, failure to discover relevant facts or evidence shall not excuse compliance.~~

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service), 583.220 (general appearance), and 583.250 (mandatory dismissal), but the time is changed from three years to four and return is not required within that time. The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.230 (extension of time) and 583.240 (computation of time).

Subdivision (c) is not continued. The provision was not well understood, was unduly inflexible, and was subject to numerous

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 384 of 478

implied exceptions in the case law. Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.240 (computation of time).

The substance of subdivision (e) is continued in Section 583.220 (general appearance).

The substance of subdivision (f) is continued in Sections 583.140 (waiver and estoppel), 583.240 (computation of time), and 583.250 (mandatory dismissal). The portion of subdivision (f) that declared the times to be jurisdictional is superseded by Section 583.250 (mandatory dismissal).

SEC. 3. Section 583 of the Code of Civil Procedure is repealed.

~~583. (a) The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.~~

~~(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action~~

Provided by Legislative Research Incorporated (800) 530-7613

~~must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).~~

~~(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.~~

~~(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.~~

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.320 (time for trial), 583.330 (time for new trial), 583.340 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.350 (computation of time).

SEC. 4. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure, to read:

Provided by Legislative Research Incorporated (800) 530-7613

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110 Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) "Complaint" includes a cross-complaint or other initial pleading.

(c) "Court" means the court in which the action is pending.

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced.

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced.

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. See, *e.g.*, Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981) (dismissal of cross-complaint). As used in this chapter, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), (d), and (e) are new.

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, *e.g.*, Big Bear Mun. Water Dist. v.

Provided by Legislative Research Incorporated (800) 530-7613

Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rules of Court 1233 (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inconsistent with the character of a special proceeding such as a decedent's estate. See, *e.g.*, Horney v. Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition, a special proceeding may prescribe different rules. *Cf.* Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, *e.g.*, Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981); General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 continues and expands a provision of former Section 581a(f)(1), as enacted by 1982 Cal. Stats. ch. 600. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, *e.g.*, Southern Pac. v. Seaboard

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 388 of 478

Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); Borglund v. Bombardier, Ltd., 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); Holder v. Sheet Metal Worker's Int'l Ass'n, 121 Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

§ 583.150. Relation of chapter to other law or authority

583.150. This chapter does not limit or affect the authority of a court to dismiss an action or impose lesser sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court.

Comment. Section 583.150 makes clear that although this chapter is by its terms limited in scope, it does not affect other law or authority relating to delay in prosecution. See, *e.g.*, Section 575.1 (court rules); Section 583.410 (Judicial Council rules); Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977) (inherent authority). Inherent authority of the court may not be exercised contrary to statute. See, *e.g.*, Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968). This chapter is supplemented by general provisions of law such as the right of the defendant to appear and compel discovery and the right of the defendant to set or advance trial date.

§ 583.160. Transitional provisions

583.160. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter. A motion for dismissal made before the effective date of this chapter is governed by the applicable law in effect immediately before the effective date and for this purpose the law in effect immediately before the effective date continues in effect.

(b) This chapter does not affect an order dismissing an action made before the effective date of this chapter.

Comment. Section 583.160 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extent practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 389 of 478

Article 2. Mandatory Time for Service of Summons

§ 583.210. Time for service of summons

583.210. (a) The summons and complaint shall be served upon a defendant within four years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service need not be made within the time the summons and complaint must be served upon a defendant, but whether or not so made, proof of service shall be made to the court if relevant to a motion to dismiss under this article.

Comment. Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. Unlike the former provisions, Section 583.210 requires service within four, rather than three years and does not require return of summons within that time. For exceptions and exclusions, see Sections 583.220 (general appearance), 583.230 (extension of time), and 583.240 (computation of time). Section 583.210 is consistent with Section 411.10 (civil action commenced by filing complaint) and applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Section 583.210 applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, *e.g.*, Austin v. Mass. Bonding & Ins. Co., 56 Cal.2d 596, 364 P.2d 681, 15 Cal. Rptr. 817 (1961); Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); Warren v. A.T. & S.F. Ry. Co., 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971); Lesko v. Superior Court, 127 Cal. App.3d 476, 179 Cal. Rptr. 595 (1982).

§ 583.220. General appearance

583.220. The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.220 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Section 583.220 continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purpose of this section by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, *e.g.*, Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Section 583.220 applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 ("action" and "defendant" defined).

§ 583.230. Extension of time

583.230. The parties may by written stipulation extend the time within which service must be made pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.230 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive.

§ 583.240. Computation of time

583.240. In computing the time within which service shall be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Subdivision (d) continues the substance of subdivision (f) (2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence and in light of the extension of the statutory service requirement from three to four years. See Section 583.210 (time for service). Contrast Section 583.350 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130—plaintiff must exercise diligence—and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) supersedes a portion of former Section 581a(f) (requirements jurisdictional) and codifies case law. See, *e.g.*, Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. "Brought to trial" defined

583.310. (a) If an action is called for trial and the plaintiff announces readiness to proceed, the parties may stipulate or the court may order that the action is brought to trial for the purpose of this article without further act of the plaintiff, whether or not a continuance is thereafter granted.

(b) Nothing in subdivision (a) limits any other act by which an action may be brought to trial for the purpose of this article.

Comment. Subdivision (a) of Section 583.310 is intended to provide a simple and mechanical test by which it can be ascertained whether an action has been brought to trial, short of impaneling a jury or swearing a witness, for the purpose of applying the time periods prescribed by this article.

Subdivision (b) makes clear that the procedure prescribed in subdivision (a) is not exclusive, and any other act that constitutes an action being brought to trial is sufficient for this article. See, *e.g.*, Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982) (impaneling jury); Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006 (swearing witness); 4 B. Witkin, California Procedure *Proceedings Without Trial* §§ 101 (judgment on demurrer) and 102 (summary judgment) (2d ed. 1971).

§ 583.320. Time for trial

583.320. An action shall be brought to trial within five years after the action is commenced against the defendant.

Provided by Legislative Research Incorporated (800) 530-7613

Comment. Section 583.320 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

§ 583.330. Time for new trial

583.330. (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.320.

Comment. Section 583.330 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

§ 583.340. Extension of time

583.340. The parties may by written stipulation extend the time within which an action must be brought to trial pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.340 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, *e.g.*, cases cited in Good v. State, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316 (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive.

Provided by Legislative Research Incorporated (800) 530-7613

§ 583.350. Computation of time

583.350. In computing the time within which an action shall be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.350 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.350 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.360 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice

Provided by Legislative Research Incorporated (800) 530-7613 LRI 1984-1705 Page 395 of 478

to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion).

§ 583.420. Time for discretionary dismissal

583.420. (a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

(2) The action is not brought to trial within three years after the action is commenced against the defendant.

(3) A new trial is granted and the action is not again brought to trial within the following times:

(A) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(B) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 396 of 478

(C) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

(b) The times provided in subdivision (a) shall be computed in the manner provided for computation of the comparable times under Articles 2 (commencing with Section 583.210) and 3 (commencing with Section 583.310).

Comment. Subdivision (a)(1) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

Subdivision (a)(2) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (a)(3) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, *e.g.*, Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement). The authority of the

Provided by Legislative Research Incorporated (800) 530-7613

court to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

LRI
1984-1705
Provided by Legislative Research Incorporated (800) 530-7613 Page 398 of 478

MASTER

EC#5 12/29/83

Not has read this

Comment to §583.340

20748

copy for author

APPENDIX XII

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED RECOMMENDATION

relating to

Dismissal for Lack of Prosecution

June 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Provided by Legislative Research Incorporated (800) 530-7613

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Provided by Legislative Research Incorporated (800) 530-7613

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306
(415) 494-1335

DAVID ROSENBERG
Chairperson
DEBRA S. FRANK
Vice Chairperson
SENATOR BARRY KEENE
ASSEMBLYMAN ALISTER McALISTER
ROBERT J. BERTON
ROSLYN P. CHASAN
JAMES H. DAVIS
JOHN B. EMERSON
BION M. GREGORY
BEATRICE P. LAWSON

June 2, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The Commission in 1982 submitted its *Recommendation Relating to Dismissal for Lack of Prosecution,* 16 Cal. L. Revision Comm'n Reports 2205 (1982), to codify, clarify, and modestly liberalize the law governing the dismissal of civil actions for lack of prosecution. Since then the Commission has had the opportunity to give further consideration to these matters, and herewith submits a revised recommendation that is somewhat stricter in a few key areas.

The Commission wishes to express its appreciation to its consultant of this study, Mr. Garrett H. Elmore (Burlingame), for his substantial contribution to the development of this recommendation.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

REVISED RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.[1] The major effect of these statutes is that:

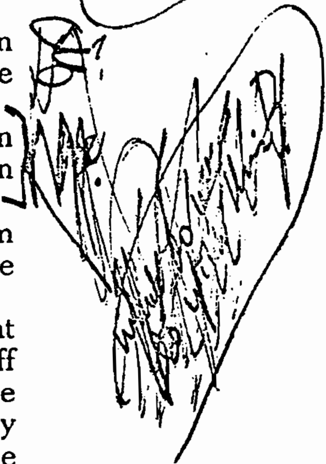
(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.[2]

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.[3]

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.[4]

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.[5]

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.[6]



The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit expeditiously to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the

---

[1] In addition, Rule 203.5 of the California Rules of Court prescribes the Superior Court procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

[2] Code Civ. Proc. § 581a(a).

[3] Code Civ. Proc. § 581a(c).

[4] Code Civ. Proc. § 583(b).

[5] Code Civ. Proc. § 583(c)-(d).

[6] Code Civ. Proc. § 583(a).

Provided by Legislative Research Incorporated (800) 530-7613

complaint.[7] They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on crowded calendars.[8]

The policy of the dismissal statutes conflicts with another strong public policy—that which seeks to dispose of litigation on the merits rather than on procedural grounds.[9] As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.[10] The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.[11] The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.[12] The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the

---

[7] See, *e.g.*, Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 503 P.2d 347, 105 Cal. Rptr. 339 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

[8] See, *e.g.*, Ippolito v. Municipal Court, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

[9] See, *e.g.*, Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

[10] See, *e.g.*, discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. Cont. Ed. Bar 1978); Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. West. L. Rev. (1982).

[11] For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

[12] Since the two dismissal statutes were first enacted around the turn of the century there has been continuous appellate litigation interpreting, clarifying, and rewriting the statutes—hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

include the dashes at beginning and end

1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.[13] In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.[14] In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.[15] The current judicial attitude has been stated by the Supreme Court:[16] "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

Dismissal for Failure to Make Service

Section 581a(a) requires that summons be served "and return made" within three years after the action is commenced. The requirement that a return be made within the statutory period is taken literally, even though there may be no question that service has been made.[17] The

[13] See Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and the line of cases following it.

[14] See Comment, *The Demise (Hopefully) of an Abuse: The Sanction of Dismissal*, 7 Cal. W.L. Rev. 438, 455-56 (1971).

[15] See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[16] *Id.*, 2 Cal.3d at 566. See also Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[17] See, *e.g.*, Kaiser Found. Hosp. v. Superior Court, 49 Cal. App.3d 523, 122 Cal. Rptr. 432 (1975); Bernstein v. Superior Court, 2 Cal. App.3d 700, 82 Cal. Rptr. 775 (1969); Beckwith v. Los Angeles County, 132 Cal. App.2d 377, 282 P.2d 87 (1955). See also Highlands Inn, Inc. v. Curries, 276 Cal. App.2d 694, 81 Cal. Rptr. 273 (1969) (risk of loss in mail on plaintiff).

Provided by Legislative Research Incorporated (800) 530-7613

purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.[18] The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The requirement has been called "a vintage anachronism in California law" that does not coincide with public policy.[19] The proposed law eliminates the return requirement.[20]

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;[21] 1982 legislation declares that it is.[22] The 1982 legislation was intended to limit the ability of the courts to develop exceptions and excuses not prescribed by statute. Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack.[23] The proposed law makes clear the service requirement is mandatory (not jurisdictional),[24] and provides expressly that the courts may not develop exceptions and excuses not prescribed by statute.

Dismissal for Failure to Bring to Trial

A significant problem with the operation of the statute governing dismissal for failure to bring an action to trial within five years is the effect of tolling or extensions on the

[18] Nor does the return requirement appear to shift the burden of proof of service. Whether service was in fact made within the three-year period is a question of proof. The return of summons does not help materially in this respect.

[19] Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. W.L. Rev. 1, 32 (1982).

[20] The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

[21] Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[22] Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. 600.

[23] This would be contrary to general principles that govern procedural rules. See, *e.g.*, 1 B. Witkin, California Procedure *Jurisdiction* §§ 3, 180, 184 (2d ed. 1970).

[24] The same rule also applies to the bringing to trial requirement.

Provided by Legislative Research Incorporated (800) 530-7613

statute. The problem arises when, within the last months before the five-year period is about to expire, an event occurs that suspends the running of the statute (for example an injunction against prosecution of the action because of pending related litigation). The running of the statute may be suspended for a time under these circumstances, but when the tolling or extension ends and the statute begins to run again, the plaintiff has only a short time to bring the action to trial. In many cases this is an unrealistic or impossible deadline to meet.

Legislation enacted in 1983 addresses this problem specifically where suspension of the dismissal statute is a result of submission of the action to judicial arbitration.[25] Under this legislation, if judicial arbitration is pending at any time during the last six months of the five-year period, the plaintiff is allowed six months after a trial de novo is requested to bring the case to trial.[26] The six-month extension is proper, and the proposed law broadens this provision to allow six months to bring the action to trial where there has been suspension of the five-year statute for any reason within the last six months of the five-year period.

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.[27] The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,[28] that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is

[25] This problem was highlighted in Moran v. Superior Court, 135 Cal. App.3d 986, 185 Cal. Rptr. 805 (1982) (hearing granted); Fluor Drilling Service v. Superior Court, 135 Cal.3d 1009, 186 Cal. Rptr. 1009 (1982); Castorena v. Superior Court, 135 Cal. App.3d 1014, 186 Cal. Rptr. 14 (1982).

[26] Code Civ. Proc. § 1141.17 (enacted 1983 Cal. Stats. ch. 123, § 3).

[27] Code Civ. Proc. § 581a(c).

[28] Mustalo v. Mustalo, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

Provided by Legislative Research Incorporated (800) 530-7613

progressing,[29] that a stipulation excuses compliance even if unfiled,[30] and that a judgment entered after the three-year period may not be set aside on collateral attack.[31]

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,[32] and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.[33]

The dismissal provision for failure to obtain a default is not well understood and is unduly inflexible, nor does it appear to be supported by compelling reasons of orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.[34] The dismissal provision should be repealed in the interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.[35] This provision has caused confusion, since it allows dismissal for failure to bring the action to trial at a

[29] AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1970).

[30] General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

[31] Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25 (1945).

[32] Jacks v. Lewis, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

[33] Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

[34] Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, *e.g.*, Merner Lumber Co. v. Silvey, 29 Cal. App.2d 426, 84 P.2d 1062 (1938).

[35] Code Civ. Proc. § 583(a).

Provided by Legislative Research Incorporated (800) 530-7613

time when service is not even required to have been made.[36] The two-year trial period is also unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[37] The proposed law changes the dismissal period for failure to bring to trial to a more consistent and more realistic period of three years after the action is commenced.

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have relied on their inherent powers to dismiss.[38] The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make reliance on inherent powers unnecessary and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure to serve and return summons.[39] The proposed law clarifies and codifies this rule.

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing conditions on trial or dismissal of the action.[40] The proposed law codifies this rule.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the

[36] See note 11, *supra*.

[37] See discussion under "Policy of Statute," above.

[38] See, *e.g.*, Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

[39] See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

[40] Rule 203.5. See discussion in Lopez v. Larson, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

Provided by Legislative Research Incorporated (800) 530-7613

California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.[41] The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.[42] The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The requirement that process be served within the statutory period does not apply if the defendant makes a general appearance in the action.[43] The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.[44] A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the general jurisdiction of the court.[45] The proposed law makes clear that the service requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service is a motion to dismiss for failure to timely serve and return summons.[46] The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default

[41] See, *e.g.*, Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. W.L. Rev. 1 (1982).

[42] See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

[43] Code Civ. Proc. § 581a(a)-(b).

[44] See, *e.g.*, Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

[45] See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

[46] Code Civ. Proc. § 581a(e).

Provided by Legislative Research Incorporated (800) 530-7613

judgment does not transform the motion into a general appearance.[47]

Stipulation extending time. The time within which service must be made, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.[48] The requirement that the stipulation be filed is unduly restrictive;[49] parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.[50] The proposed law permits an extension of time upon presentation to the court of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary. This does not affect the ability of the parties to make an oral stipulation in open court, if entered in the minutes or if a transcript is made.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.[51] However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.[52] This difference in treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a

[47] See, *e.g.*, Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss).

[48] Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

[49] See, *e.g.*, Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

[50] See, *e.g.*, Obgerfell v. Obgerfell, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

[51] Code Civ. Proc. § 583(c)-(d).

[52] See, *e.g.*, Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

Provided by Legislative Research Incorporated (800) 530-7613

stipulation,[53] has failed to assert the statute,[54] or has acted in a manner that misleads the plaintiff.[55] The existence of the excuses of waiver and estoppel is not generally reflected in the dismissal statutes.[56] The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile.[57] Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.[58] Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.[59] The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and is applicable only to causes beyond the plaintiff's control. The excuse must be liberally construed as applied to the bringing to trial requirement. This disparity is in recognition of the fact that service is ordinarily within the plaintiff's control whereas bringing a case to trial frequently may be hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be

---

[53] See, *e.g.*, Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

[54] See, *e.g.*, Southern Pac. v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962).

[55] See, *e.g.*, Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

[56] But see Code Civ. Proc. § 581a(f)(1), as enacted 1982 Cal. Stats. ch. 600.

[57] See, *e.g.*, Wyoming Pac. Oil v. Preston, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

[58] See, *e.g.*, cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

[59] Code Civ. Proc. § 581a(f)(2), as enacted 1982 Cal. Stats. ch. 600.

brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.[60] The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;[61] it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[62] The proposed law is drafted to make clear this flexibility.

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.[63] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[64] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.[65]

---

[60] See, *e.g.*, State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

[61] See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

[62] See, *e.g.*, Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); Watson v. Superior Court, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); J.A. Thompson & Sons, Inc. v. Superior Court, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1963); Fisher v. Superior Court, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

[63] See, *e.g.*, Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

[64] See, *e.g.*, Code Civ. Proc. § 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

[65] See, *e.g.*, 4 B. Witkin, California Procedure *Proceedings Without Trial* § 80 (2d ed. 1971).

Provided by Legislative Research Incorporated (800) 530-7613

Recommended Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 411.30, 581, and 1141.17 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, and to amend Section 3638 of the Revenue and Taxation Code, relating to civil actions.

The people of the State of California do enact as follows:

Code Civ. Proc. § 411.30 (technical amendment).

SECTION 1. Section 411.30 of the Code of Civil Procedure is amended to read:

411.30. (a) In any action for damages arising out of the professional negligence of a person holding a valid physician's and surgeon's certificate issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or of a person holding a valid dentist's license issued pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code, or of a person holding a valid podiatrist's certificate issued pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code, or of a person licensed pursuant to the Chiropractic Act, on or before the date of service of the complaint on any defendant, the plaintiff's attorney shall file the certificate specified in subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one physician and surgeon, dentist, podiatrist, or chiropractor who is licensed to practice and practices in this state or any other state or teaches at an accredited college or university and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is reasonable and meritorious cause for the filing of such action.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations, including the provisions of ~~Section 581a~~ *Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8*, would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after service of the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate physicians and surgeons, dentists, podiatrists, or chiropractors to obtain such consultation and none of those contacted would agree to such a consultation.

(c) Where a certificate is required pursuant to this section, only one such certificate shall be filed notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of the consequences of a medical procedure or both, and for that reason is not filing a certificate required by this section.

(e) If a request by the plaintiff for the defendant's records has been made pursuant to Section 1158 of the Evidence Code, and if the defendant has failed to produce such records within the time limits specified by that section, the time for filing the certificate of merit shall be extended for the period by which the time for furnishing records set forth in Section 1158 of the Evidence Code is exceeded by the defendant to a maximum of 60 days after which the requirement for the certificate is voided.

(f) For purposes of this section, and subject to Evidence Code Section 912, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a

privilege to refuse to disclose the identity of the physician or surgeon, dentist, podiatrist, or chiropractor consulted and the contents of such consultation. Such privilege shall also be held by the physician or surgeon, dentist, podiatrist, or chiropractor so consulted, provided when the attorney makes a claim under paragraph (3) of subdivision (b) that he was unable to obtain the required consultation with the physician and surgeon, dentist, podiatrist, or chiropractor, the court may require the attorney to divulge the names of physicians and surgeons, dentists, podiatrists, or chiropractors refusing such consultation.

(g) A violation of the provisions of this section may constitute unprofessional conduct and be grounds for discipline against the attorney.

(h) The failure to file a certificate required by this section shall be grounds for a demurrer pursuant to Section 430.10.

(i) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(j) This section shall remain in effect until January 1, 1987, and on that date is repealed unless a later enacted statute deletes or extends that date.

Comment. Section 411.30 is amended to correct a section reference.

Code Civ. Proc § 581 (amended)

SEC. 2. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1.~~ *(a)* By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge~~;~~ ~~provided,~~ ~~that~~*. This subdivision does not apply if* affirmative relief has ~~not~~ been sought by the cross-complaint of the defendant~~,~~ ~~and~~ ~~provided~~ ~~further~~ ~~that~~ *or if* there is ~~no~~ *a* motion pending for an order transferring the action to another court under the provisions of Section 396b. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall~~ ~~be~~ *is* no opening statement,

then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

~~2.~~ *(b)* By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1 and 2 of this section~~ *(a) and (b)* shall be granted ~~unless~~ *except* upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained upon order of the court after notice to ~~such~~ *the* attorney.

~~3.~~ *(c)* By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, or a motion to strike the whole of the complaint is granted without leave to amend, or a motion to strike the whole of a complaint or portion thereof is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court, and either party moves for such dismissal.

~~4.~~ *(d)* By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

~~5.~~ *(e)* The provisions of subdivision ~~1, of this section~~ *(a)* shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ *the* action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ *(a)*, after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

~~6.~~ *(f)* By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.430. A dismissal for lack of prosecution is without prejudice. See, *e.g.*, Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); Hill v. San Francisco, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial); Stephan v. American Home Builders, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

Code Civ. Proc § 581a (repealed)

SEC. 3. Section 581a of the Code of Civil Procedure is repealed.

~~581a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.~~

~~(b) No action heretofore or hereafter commenced by cross/complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross/complaint is served within three years after the filing of the cross/complaint or unless, if a summons is required, the summons on the cross/complaint is served and return made within three years after the filing of the cross/complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.~~

~~(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the action may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.~~

~~(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after the motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.~~

~~(f) Except as provided in this section, the provisions of this section are mandatory and are not excusable, and the times within which acts are to be done are jurisdictional. Compliance may be excused only for either of the following reasons:~~

~~(1) Where the defendant or cross/defendant is estopped to complain.~~

~~(2) Where it would be impossible, impracticable, or futile to comply due to causes beyond a party's control. However, failure to discover relevant facts or evidence shall not excuse compliance.~~

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service), 583.220 (general appearance), and 583.250 (mandatory dismissal), but return is not required within the three-year period. The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.230 (extension of time) and 583.240 (computation of time).

Subdivision (c) is not continued. The provision was not well understood, was unduly inflexible, and was subject to numerous implied exceptions in the case law. Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.240 (computation of time).

The substance of subdivision (e) is continued in Section 583.220 (general appearance).

The substance of subdivision (f) is continued in Sections 583.140 (waiver and estoppel), 583.240 (computation of time), and 583.250 (mandatory dismissal). The portion of subdivision (f) that declared the times to be jurisdictional is superseded by Section 583.250 (mandatory dismissal).

Code Civ. Proc § 583 (repealed)

SEC. 4. Section 583 of the Code of Civil Procedure is repealed.

~~583. (a) The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.~~

~~(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court.~~

~~Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five/year period prescribed by subdivision (b).~~

~~(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(e) For the purposes of this section, "action" includes an action commenced by cross/complaint.~~

~~(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.~~

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.310 (time for trial), 583.320 (time for new trial), 583.330 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.340 (computation of time).

Code of Civ. Proc. §§ 583.110 – 583.430 (added)

SEC. 5. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110. Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) "Complaint" includes a cross-complaint or other initial pleading.

(c) "Court" means the court in which the action is pending.

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced.

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced.

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. See, *e.g.*, Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981) (dismissal of cross-complaint). As used in this chapter, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), (d), and (e) are new.

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, *e.g.*, Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rules of Court 1233 (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inconsistent with the character of a special proceeding such as a decedent's estate. See, *e.g.*, Horney v.

Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition, a special proceeding may prescribe different rules. *Cf.* Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action in construing the provisions of this chapter.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, *e.g.*, Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981); General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 continues and expands a provision of former Section 581a(f)(1). This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, *e.g.*, Southern Pac. v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); Borglund v. Bombardier, Ltd., 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); Holder v. Sheet Metal Worker's Int'l Ass'n, 121 Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

§ 583.150. Relation of chapter to other law or authority

583.150. This chapter does not limit or affect the authority of a court to dismiss an action or impose lesser sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court.

Comment. Section 583.150 makes clear that although this chapter is by its terms limited in scope, it does not affect other law or authority relating to delay in prosecution. See, *e.g.*, Section 575.1 (court rules); Section 583.410 (Judicial Council rules); Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977) (inherent authority). Inherent authority of the court may not be exercised contrary to statute. See, *e.g.*, Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968). This chapter is supplemented by general provisions of law such as the right of the defendant to appear and compel discovery and the right of the defendant to set or advance trial date.

§ 583.160. Transitional provisions

583.160. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter. A motion for dismissal made before the effective date of this chapter is governed by the applicable law in effect immediately before the effective date and for this purpose the law in effect immediately before the effective date continues in effect.

(b) This chapter does not affect an order dismissing an action made before the effective date of this chapter.

Comment. Section 583.160 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extent practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

Article 2. Mandatory Time for Service of Summons

§ 583.210. Time for service of summons

583.210. (a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service need not be made within the time the summons and complaint must be served upon a defendant, but whether or not so made, proof of service shall be made to the court if relevant to a motion to dismiss under this article.

Comment. Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. Unlike the former provisions, Section 583.210 does not require return of summons within the time required for service. For exceptions and exclusions, see Sections 583.220 (general appearance), 583.230 (extension of time), and 583.240 (computation of time). Section 583.210 is consistent with Section 411.10 (civil action commenced by filing complaint) and applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Section 583.210 applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, *e.g.*, Austin v. Mass. Bonding & Ins. Co., 56 Cal.2d 596, 364 P.2d 681, 15 Cal. Rptr. 817 (1961); Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); Warren v. A.T. & S.F. Ry. Co., 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971); Lesko v. Superior Court, 127 Cal. App.3d 476, 179 Cal. Rptr. 595 (1982).

§ 583.220. General appearance

583.220. The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.230 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Section 583.220 continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purpose of this section by an act

outside the record that shows an intent to submit to the general jurisdiction of the court. See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, *e.g.*, Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Section 583.220 applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 ("action" and "defendant" defined).

§ 583.230. Extension of time

583.230. The parties may extend the time within which service must be made pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral agreement made in open court, if entered in the minutes of the court or a transcript is made.

Comment. Subdivision (a) of Section 583.230 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive. Subdivision (b) is consistent with Section 583.330(b) (extension of time).

§ 583.240. Computation of time

583.240. In computing the time within which service shall be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Subdivision (d) continues the substance of subdivision (f)(2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence. Contrast Section 583.340 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130—plaintiff must exercise diligence—and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject

to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) continues the substance of a portion of former Section 581a(f), making clear the meaning of "jurisdictional" as it was used in the former provision.

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. Time for trial

583.310. An action shall be brought to trial within five years after the action is commenced against the defendant.

Comment. Section 583.310 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.330 (extension of time) and 583.340 (computation of time).

§ 583.320. Time for new trial

583.320. (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310.

Comment. Section 583.320 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.330 (extension of time) and 583.340 (computation of time).

§ 583.330. Extension of time

583.330. The parties may extend the time within which an action must be brought to trial pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral agreement made in open court, if entered in the minutes of the court or a transcript is made.

Comment. Subdivision (a) of Section 583.330 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, *e.g.*, cases cited in Good v. State, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316 (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive. Subdivision (b) codifies existing case law. See, *e.g.*, Govea v. Superior Court, 26 Cal. App.2d 27, 78 P.2d 433 (1938); Preiss v. Good Samaritan Hospital, 171 Cal. App.2d 559, 340 P.2d 661 (1959).

§ 583.340. Computation of time

583.340. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.340 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This

See, e.g.: Marcus v. Superior Court, 75 Cal App 3d 204, 141 Cal Rptr 890 (1977).

difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

§ 583.350. Extension where less than six months remains

583.350. If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension.

Comment. Section 583.350 provides an extension of time for a plaintiff to bring an action to trial where a period of tolling operates in such a way that at the end of the period the plaintiff would have less than six months to obtain a trial. In this situation the plaintiff has six months within which to bring the action to trial. Section 583.350 is consistent with the rule applicable to judicial arbitration. Section 1141.17. It is intended to cure problems in other cases as well where the statutory period in which to bring the action to trial is extended pursuant to statute. See, *e.g.*, Section 583.340 (computation of time).

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

Comment. Subdivision (a) of Section 583.360 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice

to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion).

§ 583.420. Time for discretionary dismissal

583.420. (a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

(2) The action is not brought to trial within three years after the action is commenced against the defendant.

(3) A new trial is granted and the action is not again brought to trial within the following times:

(A) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(B) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

(C) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

(b) The times provided in subdivision (a) shall be computed in the manner provided for computation of the comparable times under Articles 2 (commencing with Section 583.210) and 3 (commencing with Section 583.310).

Comment. Subdivision (a)(1) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

Subdivision (a)(2) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (a)(3) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, *e.g.*, Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement). The authority of the court to condition an order granting dismissal includes but is not

limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

Code Civ. Proc. § 1141.17 (technical amendment)

SEC. 6. Section 1141.17 of the Code of Civil Procedure is amended to read:

1141.17. (a) Submission of an action to arbitration pursuant to this chapter shall not suspend the running of the time periods specified in ~~Section 583~~ *Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2,* except as provided in this section.

(b) If an action is or remains submitted to arbitration pursuant to this chapter more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in ~~subdivision (b) of Section 583~~ *Section 583.310.*

Comment. Section 1141.17 is amended to correct section references. The rule stated in Section 1141.17 is consistent with Section 583.350 (extension where less than six months remains).

Rev. & Tax Code § 3638 (technical amendment).

SEC. 7. Section 3638 of the Revenue and Taxation Code is amended to read:

3638. ~~Any proceedings heretofore or hereafter~~ *An action* commenced under this chapter shall be dismissed by the court in which ~~the same shall have been~~ *it is* commenced or to which it ~~may be~~ *is* transferred on motion of the defendant after due notice to plaintiff, or by the court upon its own motion, unless ~~such~~ *the* action is brought to trial within one year after the plaintiff has filed ~~his~~ *the* action, except where the parties have stipulated, in writing, that the time may be extended. ~~Section 583,~~ *Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2 of the* Code of Civil Procedure ~~shall~~ *does* not apply to ~~actions~~ *an action* commenced under this chapter.

Comment. Section 3638 is amended to correct a section reference. The other changes in Section 3638 are also technical.

Provided by Legislative Research Incorporated (800) 530-7613

Memorandum 81-20

Subject: Study J-600 - Dismissal for Lack of Prosecution (Draft of Tentative Recommendation)

Attached to this memorandum is a staff draft of a tentative recommendation relating to dismissal of a civil action for lack of prosecution, drafted in accordance with the Commission's decisions made at the March 1981 meeting. In general the draft keeps existing law but codifies exceptions and excuses to dismissal that are now found in case law. The draft also adopts the posture of a moderate liberalization of the dismissal statutes in the form of a policy declaration in favor of trial on the merits, discretionary dismissal for failure to bring to trial after three rather than two years, and a one-year automatic extension of time to bring to trial upon affidavit of the plaintiff. This memorandum notes a few unresolved policy questions in the draft.

§ 583.330. Computation of time. Existing law provides an excuse for failure to bring an action to trial within five years if to do so was "impossible, impracticable, or futile." Section 583.330 preserves this excuse, but gives it a liberal interpretation by providing that the court shall make a reasonable allowance for the time of delay caused by "special circumtances that hindered the plaintiff." This is not inconsistent with existing case law, but does give the court more latitude in excusing delays. The Comment gives illustrations of the types of delay that would be excused under the more liberal standard. The Commission had deferred consideration of this point at the March meeting.

§ 583.340. Additional time upon affidavit. The plaintiff can obtain a one-year extension of time within which to bring an action to trial by filing under Section 583.340 an affidavit of good cause. As drafted, this procedure would be available to any plaintiff in any court. However, its main use would appear to be in situations where due to congested court calendars the plaintiff is unable to meet the statutory deadline. The affidavit procedure will avoid the need for a motion to advance the trial date and will avoid the need to argue the defense of impossibility, impracticability, or futility in response to the defendant's motion to dismiss. We could limit the affidavit procedure to

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 1 of 326

congested courts; however, the staff sees problems in trying to define a congested court and does not see any harm in allowing the affidavit procedure in all courts.

§ 583.430. Authority of court. Section 583.430 provides alternative sanctions to discretionary dismissal by the court--the court may as an alternative to dismissal make an award of costs, expenses, and attorney's fees against the plaintiff or the plaintiff's attorney. Does this provision go too far, or not far enough, and should it be extended to the mandatory dismissal provisions?

At the March meeting the Commission approved the concept that as an alternative to discretionary dismissal the court could impose a civil penalty on the plaintiff or the plaintiff's attorney. The staff has not drafted a penalty as such, but rather an allowance of costs and attorney's fees to the defendant. The staff draft takes this approach because of the lack of any standards for assessing a civil penalty, the hostility of the courts towards civil penalties, and because a civil penalty does nothing to help a defendant who is injured by the delay. At least one case has approved the concept of awarding costs and attorney's fees for damage to the defendant caused by delay. See Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

The Commission's consultant, Mr. Elmore, is now of the opinion that it would be inadvisable to permit monetary sanctions of any kind to be assessed against the plaintiff. See Exhibit O, attached. He is concerned that rather than exercising sound discretion for or against dismissal, a court will routinely impose a large assessment against the plaintiff which will be uneconomical for the plaintiff to comply with, thus forcing dismissal in many more cases.

Assuming the Commission decides to keep alternative sanctions to dismissal, Mr. Elmore also raises the policy question whether they should be applied to mandatory dismissal situations. If plaintiff fails to serve a return summons within three years, should the plaintiff be able to pay costs and attorney's fees and gain additional time? If the plaintiff fails to bring to trial within five years, should the plaintiff be able to pay costs and attorney's fees and gain additional time? The staff does not believe alternative sanctions are necessary or desirable in these situations under the Commission's draft--the maximum prescribed

Provided by Legislative Research Incorporated (800) 530-7613 LRI
Page 2 of 326

time limits should be adequate in most cases and where they are not the liberal allowance of time for impossibility, impracticability, or futility is sufficient.

Article 5. Dismissal calendar. Pursuant to the Commission's direction, the staff has inquired of a sampling of trial courts whether procedures to enable the courts to weed out dormant civil cases on a mass basis would be useful. Specifically, we sent inquiries to 12 superior courts and 14 municipal courts, large and small, in both Northern and Southern California. So far we have received responses from five superior courts and eight municipal courts (see Exhibits 1-13, attached). The questions we asked and the responses we received are summarized below. We will supplement this memorandum as additional responses are received.

Are dormant civil cases a problem in your court? Most of the respondents felt that dormant civil cases are not a problem in their courts. Three respondents did indicate that dormant cases are a problem. In the courts where the cases are a problem, storage and microfilming of records were singled out as the major concerns. See, e.g., Exhibits 9 (Los Angeles Municipal Court) and 10 (Riverside County Superior Court).

Do you presently have a practice or local rule designed to weed out dormant civil cases? Most jurisdictions do not have a local practice or rule to weed out dormant civil cases, but some do. The Ventura County Superior Court (Exhibit 4) conducts an active program of issuing Orders to Show Cause Re Dismissal. The Central Orange County Municipal Court (Exhibit 6) purges civil cases whenever time and manpower will allow. Periodically in the Riverside County Superior Court (Exhibit 10) registers of actions are reviewed to ascertain whether a judgment or extension of time has been filed; if not, the action is listed on an order of dismissal (approximately 30 cases per order), which is approved and signed by the court, entered in the register of actions, and filed. The San Bernardino County Superior Court (Exhibit 11) routinely dismisses on its own motion cases in which the five-year statute has run.

The Oakland-Piedmont Municipal Court (Exhibit 8) in the past attempted to review the dockets to identify cases that are dormant for the purpose of creating a calendar for the judge to make an order of dismissal; this was motivated by statistical reasons for the purpose of Judicial Council

Provided by Legislative Research Incorporated (800) 530-7613

reporting, but since judicial staffing is based on filings and not dismissals, this is no longer done. The court does, however, destroy all records of a case 11 years after a judgment is entered or after filing if no judgment is entered, upon court order.

Most of the courts that have no practice or rule designed to weed out dormant civil cases cite manpower or expense as a factor, and even those courts that do have such a practice or rule note that it is implemented only as time and staffing demands permit.

Do you believe a procedure, such as a periodic dismissal calendar prepared under the direction of the court and implemented by mailed notice to the parties on a show-cause basis, would be helpful? Most respondents were negative about a dismissal calendar. A typical concern was that its cost would exceed its benefits, at public expense. See, e.g., Exhibits 3 (San Francisco Superior Court), 7 (San Diego County Superior Court), 10 (Riverside County Superior Court) and 11 (San Bernardino Superior Court). A few courts felt such a procedure would be helpful, however. See Exhibits 2 (Livermore-Pleasanton Municipal Court), 5 (West Kern Municipal Court), and 6 (Central Orange County Municipal Court), 12 (Fremont-Newark-Union City Municipal Court; "staffing would be required").

Do you believe any other tools are necessary or desirable to handle dormant cases? Our respondents came up with a variety of suggestions. The Livermore-Pleasanton Municipal Court (Exhibit 2) felt that periodic dismissal calendars should suffice; a sophisticated data-processing system could be one alternative, but would not be cost effective. The San Francisco Superior Court (Exhibit 3) suggested a substantial filing fee (e.g. $100) which would be refundable upon dismissal, trial, or other disposition; this would be an inducement to motivate parties to voluntarily clear the dockets of dormant cases. The Central Orange County Municipal Court (Exhibit 6) would like to see a reduction of the mandatory retention period of civil records from 10 years to the periods applicable to criminal cases. The Los Angeles Municipal Court (Exhibit 9) would like to see a judgment enforceable for three or four years, with the possibility of extension.

The Ventura County Superior Court (Exhibit 4) makes a number of suggestions: (1) A fully computerized court information system would

Provided by Legislative Research Incorporated (800) 530-7613

facilitate preparation of dismissal notices and calendars; they have such a system currently in development stages. (2) Microfilming of cases dismissed for lack of prosecution should not be required; rather, a note in the Register of Actions that the case is dismissed and the files destroyed should be sufficient; perhaps an attorney should be required to keep case records for a period following last activity on the case. (3) The court should be able to dismiss an action on its own motion if an at issue menorandum is not filed within two years after commencement of the action.

Based on the responses so far received, it appears that a dismissal calendar type of requirement would not be desirable due to financial considerations. The staff also believes it would be inadvisable to statutorily encourage such programs on a discretionary basis since that would lead to local differences and a lack of uniformity among the various courts.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Provided by Legislative Research Incorporated (800) 530-7613

STAFF DRAFT

RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.[1] The major effect of these statutes is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.[2]

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.[3]

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.[4]

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.[5]

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.[6]

The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit along to trial.

1. In addition, Rule 203.5 of the California Rules of Court prescribes the procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

2. Code Civ. Proc. § 581a(a).

3. Code Civ. Proc. § 581a(c).

4. Code Civ. Proc. § 583(b).

5. Code Civ. Proc. § 583(c)-(d).

6. Code Civ. Proc. § 583(a).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 263 of 326

In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the complaint.[7] They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on clogged calendars.[8]

The policy of the dismissal statutes conflicts with another strong public policy--that which seeks to dispose of litigation on the merits rather than on procedural grounds.[9] As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.[10] The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.[11] The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.[12] The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

---

7. See, e.g., Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 105 Cal. Rptr. 339, 503 P.2d 347 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

8. See, e.g., Ippolito v. Municipal Court, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

9. See, e.g., Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

10. See, e.g., discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. Cont. Ed. Bar 1978).

11. For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

12. Since the two dismissal statutes were first enacted around the turn of the century there has been continuous appellate litigation interpreting, clarifying, and rewriting the statutes--hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 264 of 326

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.[1] In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.[2] In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.[3] The current judicial attitude has been stated by the Supreme Court:[4] "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

1. See Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and cases following it.

2. See Comment, The Demise (Hopefully) of an Abuse: The Sanction of Dismissal, 7 Cal. W. L. Rev. 438, 455-56 (1971).

3. See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

4. Id., 2 Cal.3d at 566, 468 P.2d at ___, 86 Cal. Rptr. at ___. See also Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 265 of 326

Dismissal for Failure to Make Service

Section 581a(a) requires that summons be served "and return made" within three years after the action is commenced. The requirement that a return be made within the statutory period is taken literally, even though there may be no question that service has been made.[1] The purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.[2] The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The proposed law eliminates the return requirement.[3]

A major problem with the three-year service requirement is that unless discovery is completed and all potential defendants identified within that time, it is not possible to serve newly-discovered defendants.[4] Recent legislation, however, provides that failure to discover relevant facts or evidence does not excuse compliance with the three-year service requirement.[5] The economics of litigation and the realities of the five-year trial date in many courts dictate that discovery and trial

---

1. See, e.g., Kaiser Found. Hosp. v. Superior Court, 49 Cal. App.3d 523, 122 Cal. Rptr. 432 (1975); Bernstein v. Superior Court, 2 Cal. App.3d 700, 82 Cal. Rptr. 775 (1969); Beckwith v. Los Angeles County, 132 Cal. App.2d 377, 282 P.2d 87 (1955). See also Highlands Inn, Inc. v. Gurries, 276 Cal. App.2d 694, 81 Cal. Rptr. 273 (1969) (risk of loss in mail on plaintiff).

2. Nor does the return requirement appear to shift the burden of proof of service. Whether service was in fact made within the three-year period is a question of proof. The return of summons does not help materially in this respect.

3. The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

4. Cf. Hocharian v. Superior Court, 28 Cal.3d 714, 720-21, 621 P.2d 829, ___, 170 Cal. Rptr. 790, ___ (1981) ("As every litigator knows, the prosecution or defense of a lawsuit involves the difficult problem of balancing the effectiveness of any given tactic or procedure against its cost in terms of time and expense. Even the attorney who utilizes every reasonable and cost-effective discovery procedure must acknowledge the possibility that he or she will fail to discover the identity of a potential defendant within the statutory three-year period.").

5. Code Civ. Proc. § 581a(f)(2), as enacted by 1982 Cal. Stats., ch. ___ [SB 1150].

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 266 of 326

preparation may not reasonably be expected to occur in many cases until well past the three-year cut-off.[6] For this reason the proposed law preserves the rule that failure of discovery is not an excuse, but requires that service of summons be made within four, rather than three, years after commencement of the action.

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;[7] 1982 legislation declares that it is.[8] The 1982 legislative declaration is contrary to the general principle that mandatory procedural rules are not jurisdictional.[9] Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack. The proposed law makes clear the service requirement is mandatory but not jurisdictional.[10]

Dismissal for Failure to Bring to Trial

Although Code of Civil Procedure Section 583 is clear that an action must be brought to trial within five years after it is commenced, it is unclear what acts amount to being "brought to trial" for purposes of the statute. The cases have held, for example, that impaneling a

---

6. This is particularly true in personal injury cases, which are frequently involved in disputes over dismissal for lack of prosecution. The precise extent of the injuries and amount of damages may not be possible to ascertain in such cases for several years. As a result the parties may delay discovery and other trial activities in anticipation of a possible settlement.

7. Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, ___ n.3, 170 Cal. Rptr. 790, ___ n.3 (1981).

8. Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. ___ [SB 1150].

9. See, e.g., 1 B. Witkin, California Procedure, Jurisdiction §§ 3, 180, 184 (2d ed. 1970).

10. The same rule also applies to the bringing to trial requirement.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 267 of 326

jury or swearing the first witness is sufficient to satisfy the requirement that the action be brought to trial.[1] A practice has developed that when the five-year period is about to expire an action is "brought to trial" and then immediately continued until a convenient trial date. Such a practice may be a practical necessity in congested trial courts. In recognition of this practice the statute that defines when an action is brought to trial should prescribe a procedure that does not consume judicial resources or the resources of the parties.

The proposed law adopts the rule that an action is brought to trial when it is actually called for trial in the trial court and the plaintiff signifies readiness to proceed. This provides a clear statutory statement of the time the action is brought to trial that is non-resource consuming. The statutory statement is not exclusive, however, and does not affect other acts by which an action is in fact brought to trial.[2]

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.[1] The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,[2] that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing,[3] that a stipulation excuses compliance even if unfiled,[4] and that a judgment

1. See, e.g., Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

2. See, e.g., 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 101 (judgment on demurer) and 102 (summary judgment) (2d ed. 1971).

1. Code Civ. Proc. § 581a(c).

2. Mustalo v. Mustalo, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

3. AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1979).

4. General Ins. Co. of America v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1978).

Provided by Legislative Research Incorporated (800) 530-7613

entered after the three-year period may not be set aside on collateral attack.[5]

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,[6] and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.[7]

The dismissal provision for failure to obtain a default is not well understood, nor does it appear to be supported by compelling reasons of orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.[8] The dismissal provision should be repealed in the interest of simplifying procedural law.

Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.[1] This provision is unrealistic in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the

---

5. Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25 (1945).

6. Jacks v. Lewis, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

7. Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

8. Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, *e.g.*, Merner Lumber Co. v. Silvey 29 Cal. App.2d 426, 84 P.2d 1062 (1939).

1. Code Civ. Proc. § 583(a). This provision has been construed to apply to failure to serve and return summons. See, *e.g.*, Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 269 of 326

action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[2] Moreover, the discretionary dismissal provision does not apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have relied on their inherent powers to dismiss.[3]

The discretionary dismissal provision is unnecessary and is not continued in the proposed law. The mandatory periods for serving summons and bringing an action to trial are more realistic limitations on delay in prosecution under current litigation conditions.

The proposed law provides other remedies for the defendant in place of discretionary dismissal where the plaintiff is not diligent in prosecuting the action. Under the proposed law, the defendant may serve on the plaintiff a demand that summons be served within 60 days. If the plaintiff fails to so serve the defendant, the defendant may have the action dismissed.[4] This is a more certain and effective procedure for obtaining diligent prosecution than discretionary dismissal, and minimizes consumption of judicial resources. The proposed law also makes clear that the dismissal remedies are not the defendant's exclusive remedies for lack of diligent prosecution; the defendant may act at any time to bring the action to trial or advance the case for trial.[5]

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.[1] The cases have developed exceptions to the rules requiring dismissal and have added

---

2. See discussion under "Policy of Statute," above.

3. See, e.g., Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

4. This provision is based on New York CPLR § 3012(b).

5. Code Civ. Proc. § 594(1); Rules of Court 225, 513.

1. See discussion under "Introduction," above.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 270 of 326

court discretion in many cases where it appears that the delay is excusable.[2] The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The three-year requirement for service of process does not apply if the defendant makes a general appearance in the action.[3] The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.[4] A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the general jurisdiction of the court.[5] The proposed law makes clear that the service requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service is a motion to dismiss for failure to timely serve and return summons.[6] The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default judgment does not transform the motion into a general appearance.[7]

---

2. See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

3. Code Civ. Proc. § 581a(a)-(b).

4. See, e.g., Knapp v. Superior Court, 70 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

5. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

6. Code Civ. Proc. § 581a(e).

7. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 705, 209 P.2d 845 (1949) (motion to set aside default judgment and dismiss).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 271 of 326

Stipulation extending time. The time within which service must be made, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.[8] The requirement that the stipulation be filed is unduly restrictive;[9] parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.[10] The proposed law permits an extension of time upon presentation to the court of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.[11] However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.[12] This difference in treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a stipulation,[13] has failed to assert the statute,[14] or has acted in a manner that misleads the plaintiff.[15] The existence of the excuses of

8. Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

9. See, e.g., Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

10. See, e.g., Obgerfeld v. Obgerfeld, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

11. Code Civ. Proc. § 583(c)-(d).

12. See, e.g., Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

13. See, e.g., Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

14. See, e.g., Southern Pac. v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962).

15. See, e.g., Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 272 of 326

waiver and estoppel is not generally reflected in the dismissal statutes.[16] The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile.[17] Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.[18] Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.[19] The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and liberally construed as applied to the bringing to trial requirement in recognition of the fact that service is ordinarily within the plaintiff's control (particularly if the statutory limit is increased from three to four years) whereas bringing a case to trial frequently is hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory

16. But see Code Civ. Proc. § 581a(f)(1), as enacted 1982 Cal. Stats. ch. ___ [SB 1150].

17. See, e.g., Wyoming Pac. Oil v. Preston, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

18. See, e.g., cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

19. Code Civ. Proc. § 581a(f)(2), as enacted 1982 Cal. Stats. ch. ___ [SB 1150].

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 273 of 326

period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.[20] The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;[21] it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[22] The proposed law is drafted to make clear this flexibility.

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.[23] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[24] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.[25]

---

20. See, e.g., State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

21. See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

22. See, e.g., Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); Watson v. Superior Court, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); J.A. Thompson & Sons, Inc. v. Superior Court, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1968); Fisher v. Superior Court, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

23. See, e.g., Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

24. See, e.g., Section 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

25. See, e.g., 4 B. Witkin, California Procedure, Proceedings Without Trial § 80 (2d ed. 1971).

Provided by Legislative Research Incorporated (800) 530-7613

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 581 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, relating to dismissal of civil actions for lack of prosecution.

The people of the State of California do enact as follows:

SECTION 1. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1.~~ (a) By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge ~~; provided, that~~ . This subdivision does not apply if affirmative relief has ~~not~~ been sought by the cross-complaint of the defendant ~~, and provided further that~~ or if there is ~~no~~ a motion pending for an order transferring the action to another court under the provisions of Section 396b. If a provisional remedy has been allowed, the undertaking shall upon ~~such~~ dismissal be delivered by the clerk or judge to the defendant who may ~~have his action~~ enforce the liability thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall be~~ is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

~~2.~~ (b) By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1~~ (a) and ~~2 of this section~~ (b) shall be granted ~~unless,~~ except upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained , upon order of the court after notice to ~~such~~ the attorney.

~~3.~~ (c) By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 275 of 326

complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, and either party moves for ~~such~~ dismissal.

~~4.~~ (d) By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

~~5.~~ (e) The provisions of subdivision ~~1, of this section~~ (a) shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ the action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ (a) , after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

~~6.~~ (f) By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.420. A dismissal for lack of prosecution is without prejudice. See, e.g., Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); Hill v. San Francisco, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial); Stephan v. American Home Builders, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

36259/NZ

SEC. 2. Section 581a of the Code of Civil Procedure [, as amended by 1982 Cal. Stats. ch. 600,] is repealed.

~~581a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on~~

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 276 of 326

its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

(b) No action heretofore or hereafter commenced by cross-complaint shall be further prosecuted, and no further proceedings shall be had therein, and all action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross-complaint is served within three years after the filing of the cross-complaint or unless, if a summons is required, the summons on the cross-complaint is served and return made within three years after the filing of the cross-complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.

(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.

(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.

(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.

(f) Except as provided in this section, the provisions of this section are mandatory and are not excusable, and the times within which

Provided by Legislative Research Incorporated (800) 530-7613

~~acts are to be done are jurisdictional. Compliance may be excused only for either of the following reasons:~~

~~(1) Where the defendant or cross/defendant is estopped to complain.~~

~~(2) Where it would be impossible, impracticable, or futile to comply due to causes beyond a party's control. However, failure to discover relevant facts or evidence shall not excuse compliance.~~

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service and return), 583.220 (general appearance), and 583.250 (mandatory dismissal). The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.230 (extension of time) and 583.240 (computation of time).

Subdivision (c) is not continued. The provision was not well understood and was subject to numerous implied exceptions in the case law. Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.240 (computation of time).

The substance of subdivision (e) is continued in Section 583.220 (general appearance).

The substance of subdivision (f) is continued in Sections 583.140 (waiver and estoppel), 583.240 (computation of time), and 583.250 (mandatory dismissal). The portion of subdivision (f) that declared the times to be jurisdictional is superseded by Section 583.250 (mandatory dismissal).

36263/NZ

SEC. 3. Section 583 of the Code of Civil Procedure [, as amended by 1982 Cal. Stats. ch. ___,] is repealed.

~~583. (a) The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.~~

~~(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.~~

Provided by Legislative Research Incorporated (800) 530-7613

~~(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).~~

~~(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.~~

~~(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.~~

Comment. Subdivision (a) of former Section 583 is not continued. But see Sections 583.420 (dismissal after demand for service) and 583.150 (remedies not exclusive) and Comments thereto. The substance of subdivisions (b), (c), and (d) is continued in Sections 583.320 (time for trial), 583.330 (time for new trial), 583.340 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.350 (computation of time).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 279 of 326

SEC. 4. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110. Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) "Complaint" includes a cross-complaint or other initial pleading.

(c) "Court" means the court in which the action is pending.

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced.

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced.

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. See, e.g., Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981) (dismissal of cross-complaint). As used in this chapter, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), (d), and (e) are new.

26814

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, e.g., Big Bear Mun. Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 280 of 326

reference of civil procedures); Rules of Court 1233 (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inconsistent with the character of a special proceeding such as a decedent's estate. See, e.g., Horney v. Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition a special proceeding may prescribe different rules. Cf. Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

405/434

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, e.g., Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal. Rptr. 790, 621 P.2d 829 (1981); General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

26815

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 continues and expands a provision of former Section 581a(f)(1), as enacted by 1982 Cal. Stats. ch. 600. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, e.g., Southern Pac. v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); Borglund v. Bombardier, Ltd., 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); Holder v. Sheet Metal Worker's Internat. Assn., 121

Provided by Legislative Research Incorporated (800) 530-7613

Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

405/798

§ 583.150. Relation of chapter to other law or authority

583.150. This chapter does not limit or affect any of the following:

(a) The authority of a superior court to dismiss an action or impose lesser sanctions pursuant to a rule of court adopted pursuant to Section 575.1.

(b) A rule of the Judicial Council adopted pursuant to statute authorizing a court to dimiss an action or impose lesser sanctions.

(c) Dismissal of an action or imposition of lesser sanctions under inherent authority of the court in cases where this chapter does not otherwise apply and where the dismissal or sanctions are appropriate, applying the policy and principles of this chapter.

Comment. Section 583.150 makes clear that although this chapter is by its terms limited in scope, it does not affect other law or authority relating to delay in prosecution. This chapter does not deal with the general problem of delay in the various stages of litigation but only with delay in serving summons or bringing an action to trial.

This chapter does not continue provisions of former law that authorized discretionary dismissal for delay in prosecution. See former Section 583(a); Rules of Court 203.5. The former provisions are replaced by a provision enabling the defendant to demand expedition (see Section 583.410--dismissal after demand for service) and are supplemented by general provisions of law (such as the right of the defendant to set or advance trial date). Moreover, the case law recognizes, and Section 583.150 codifies, the inherent authority of the court in matters not covered by this chapter. See, *e.g.*, Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968); Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

26960

§ 583.160. Transitional provisions

583.160. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter.

(b) This chapter does not affect an order dismissing an action made before the effective date. A motion for dismissal made before the effective date is governed by the applicable law in effect immediately before the effective date of this chapter and for this purpose the law

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 282 of 326

in effect immediately before the effective date of this chapter continues in effect.

Comment. Section 583.160 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extend practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

26969

Article 2. Mandatory Time for Service of Summons

§583.210. Time for service of summons

583.210. (a) The summons and complaint shall be served upon a defendant within four years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service need not be made within the time the summons and complaint must be served upon a defendant, but whether or not so made, proof of service shall be made to the court if relevant to a motion to dismiss under this article.

Comment. Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. Unlike the former provisions, Section 583.210 requires service within four, rather than three years and does not require return of summons within that time. For exceptions and exclusions, see Sections 583.220 (general appearance), 583.230 (extension of time), and 583.240 (computation of time). Section 583.210 is consistent with Section 411.10 (civil action commenced by filing complaint) and applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Section 583.210 applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, e.g., Austin v. Mass. Bonding & Ins. Co., 56 Cal.2d 596, 364 P.2d 681, 15 Cal. Rptr. 817 (1961); Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); Warren v. A.T. & S.F. Ry. Co., 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971); Lesko v. Superior Court, 127 Cal. App.3d 476, 179 Cal. Rptr. 595 (1982).

38884

§ 583.220. General appearance

583.220. The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 283 of 326

the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.220 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Section 583.220 continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purpose of this section by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, *e.g.*, General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, *e.g.*, Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Section 583.220 applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 ("action" and "defendant" defined).

999/318

§ 583.230. Extension of time

583.230. The parties may by written stipulation extend the time within which service must be made pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.230 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive.

27237

§ 583.240. Computation of time

583.240. In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

Provided by Legislative Research Incorporated (800) 530-7613

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Subdivision (d) continues the substance of subdivision (f)(2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence and in light of the extension of the statutory service requirement from three to four years. See Section 583.210 (time for service). Contrast Section 583.350 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130--plaintiff must exercise diligence--and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

27422

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory but not jurisdictional.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 285 of 326

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) supersedes a portion of former Section 581a(f) (requirements jurisdictional) and codifies case law. See, e.g., Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, ___ n.3, 170 Cal. Rptr. 790, ___ n.3 (1981).

404/675

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. "Brought to trial" defined

583.310. (a) If an action is called for trial and the plaintiff announces readiness to proceed, the parties may stipulate or the court may order that the action is brought to trial for the purpose of this article without further act of the plaintiff, whether or not a continuance is thereafter granted.

(b) Nothing in subdivision (a) limits any other act by which an action may be brought to trial for the purpose of this article.

Comment. Subdivision (a) of Section 583.310 is intended to provide a simple and mechanical test by which it can be ascertained whether an action has been brought to trial, short of impaneling a jury or swearing a witness, for the purpose of applying the time periods prescribed by this article.

Subdivision (b) makes clear that the procedure prescribed in subdivision (a) is not exclusive, and any other act that constitutes an action being brought to trial is sufficient for this article. See, e.g., Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982) (impaneling jury); Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006 (swearing witness); 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 101 (judgment on demurrer) and 102 (summary judgment) (2d ed. 1971).

28763

§ 583.320. Time for trial

583.320. An action shall be brought to trial within five years after the action is commenced against the defendant.

Comment. Section 583.320 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

Provided by Legislative Research Incorporated (800) 530-7613

§ 583.330. Time for new trial

583.330. (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310.

Comment. Section 583.330 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

36265

§ 583.340. Extension of time

583.340. The parties may by written stipulation extend the time within which an action must be brought to trial pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.340 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, e.g., cases cited in Good v. State, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316, _____ (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive.

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 287 of 326

§ 583.350. Computation of time

583.350. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.350 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.350 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. Contrast State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

29636

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.360 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 288 of 326

Article 4. Discretionary Dismissal After Failure to Serve Summons

§ 583.410 Dismissal after demand for service

583.410. (a) A defendant who has not been served with the summons and complaint or made a general appearance in the action may serve on the plaintiff a demand that service of the summons and complaint be made within 60 days thereafter.

(b) The demand shall be in writing and shall include all of the following:

(1) A statement that if the plaintiff does not make service of the summons and complaint within 60 days after service of the demand, the defendant may move the court for dismissal of the action pursuant to this section.

(2) The business address, if any, and the residence address of the defendant and the days and hours at which the defendant may customarily be found at the address.

(3) Whether the defendant is willing to accept service pursuant to Section 415.30 of the Code of Civil Procedure.

(4) Any other information relevant to effecting service.

(c) If the plaintiff does not make service of the summons and complaint within 60 days after service of the demand, or such additional time as is allowed by the court or by the defendant, the defendant may move to dismiss the action. The court may grant or deny the motion, with or without conditions, giving due consideration to the merits of the action, the reasons for the delay in service, the presence or absence of prejudice to the defendant from the delay in service, the policy stated in Section 583.130, and such other factors as may be relevant.

(d) A demand or motion made under this section is not a general appearance in the action.

(e) In the absence of a showing of continuous and intentional failure to make service after demand, no action shall be dismissed under this section until one year after commencement of the action.

Comment. Section 583.410 replaces former Section 583(a), which was held to apply to delay in making service. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service and return) (disapproved on other grounds in Denham v. Superior

Provided by Legislative Research Incorporated (800) 530-7613 LRI Page 289 of 326

Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)). Under Section 583.410 dismissal is made only after demand by the defendant and failure of the plaintiff to make service. The demand may be made at any time after commencement of the action. Section 583.410 is derived in part from New York CPLR § 3012(b).

Provided by Legislative Research Incorporated (800) 530-7613

EXHIBIT 1

GARRETT H. ELMORE
Attorney At Law
340 Lorton Avenue
Burlingame, California 94010
(415) 347-5665

September 6. 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94306

Re: Study J-600-Dismissal For Lack of Prosecution

Dear Members, Mr. DeMoully and Mr. Sterling:

By this letter, I undertake to make several points and, in one instance, respectfully ask further consideration, as to actions on July 22-23.

1. Effect of Stirling Bill (A. B. 3784). First, this bill is an enabling bill, limited to superior courts. It is intended to have local rules designed to expedite and facilitate the business of the superior court adopting them. The rules "may" provide for the supervision and judicial management of actions from the day they are filed. Local rules are not to be inconsistent with law or with Judicial Council rules.Penalties (more properly "sanctions") are similar to those in the Civil Discovery Act with the addition of a statement of intent that "if a failure to comply with the rules is the responsibility of counsel, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense".Since some time will elapse before the shape of the "local rules" in one or more superior courts will be known, it is recommended the LRC proposed statute "make a place" for such rules, subject to possible change if the rules progress. Second, it is believed the Final Recommendation should expressly refer to the Stirling bill"s authorization and note that the rules, when adopted, published and filed, will impose other requirements for the court adopting them. Second,in Consultants opinion, A. B. 3784 itself reflects considerable background study but whether superior court committeess will be able to come up with workable rules, acceptable to the bench and bar generally,in short order seems doubtful. Again, there may be technical procedural requirements to be met in imposing "responsibility" or "penalty" upon counsel. However, the attitude of the California Supreme Court may be more favorable now.

Your Consultant, therefore, would proceed with the present Act. It must be recognized there is potential for future inconsistency.

Alternative. If consistent with your general policy, the Final Recommendation might indicate a "reserved" section or subsection for rules authorized by (the Stirling Bill) with Comment that the Commission will recommend a specific treatment of such rules, if and when their format becomes generally known.

2. Inherent Power Basis In General And Specifically. Though inherent power of a court to dismiss for unreasonable delay in serving summons, bringing the action to trial or (possibly) failing to obtain "answer" (Pleading) or default judgment within three years is an attractive idea, the present California approach seems to recognize inherent power 1-only when not inconsistent with statute; 2-when the harsh remedy of dismissal is appropriate for a rule violation, as where the case is placed on a "dismissal calendar" for failure to appear at a trial setting or other conference as required by rule, and plaintiff makes only a token showing or no showing in opposition to dismissal. There is a limited area for dismissal under inherent power where the statutes are not directly in point because of a gap; for example, will contest proceedings where there is no real attempt to proceed for almost a year.

It is believed the proposed Act should refer narrowly to inherent power. A draft section was submitted in the exhibit (Memo. 82-48, Ex. 10) attached to Mr. Sterling's report of March 31, 1982, considered at the July, 1982, meeting. However, the writer's draft wording now appears too broad. It should be disregarded.

It was the writer's intent to refer only to the use of inherent power to fill in chinks, so to speak, in the present statutory framework, and not to recognize the court's inherent power in other cases, a broad spectrum that could range from time to serve a summons, to time to serve an at issue memorandum, to failure to attend a pre-trial, trial setting or settlement conference. Also, a further draft by the writer in a recent memorandum to staff requires narrowing in wording, to confine it to "filling in the chinks" in the Act itself.

In Consultant's view, it is beyond the scope of the present study to draw a completely new statute on delay in prosecution of actions; attempting in such statute to deal with other forms of delay than the three types in present CCP 581a and CCP 583. It is unwise in the writer"s opinion to grant a "blank check" to the courts in the form of provisions in the Act that would enable the courts to govern the subject "in cases not provided for" by individual decisions (unsatisfactory) or by local rules. Also, the Stirling Bill grants rule making power (or "confirms" such power) only in a limited area-superior courts. *

---

* The writer is opposed to a "demand" procedure generally, unless carefully limited-such as "demanding" that a default judgment be taken within so many days, when plaintiff is entitled to a default

LRI
Provided by Legislative Research Incorporated (800) 530-7613

3. Proposed Repeal Of Discretionary Dismissal-CCP 583 (a) And Rule 203.5. Consultant respectfully urges the July decision to make this deletion be reviewed and changed, as follows:

First, Sec. 583 (a) and in consequence Rule 203.5, Cal. Rules of Court adopted as of 1970 by the Judicial Council pursuant to 1969 statutory authorization, should be retained but minimum time for seeking dismissal increased from 2 to 3 years after action commenced. However, the time for service of summons should not be included (contrary to present case law interpretation).

In brief, repeal of the present Sec. 583 (a) will automatically delete the "modern" rule adopted by the Judicial Council (Rule 203.5) and leave a void. Itis likely this void will be filled by attempts to use the court's inherent power. It is difficult to draft provisions that say the court may exercise inherent power in minor respects (see under 2, above) but not in an area where there is a complete void , namely, that long occupied by "discretionary dismissal" statute and, more recently, by Judicial Council rules.

It does not appear wise to rely solely upon repeal of Section 583 (a) and Comment, if the intent is to prohibit a discretionary or any involuntary dismissal short of the maximum period for bringing the action to trial.

A statement of legislative intent or a direct statutory provision that on and after January 1, 1984, discretionary dismissals are abolished would seem required, to displace inherent power (if such is the intent). The legislative reaction to such an approach seems dubious.

Lastly, retention of the discretionary dismissal serves a purpose. It permits a dismissal where there is a question as to time computation of the five year period (mandatory dismissal).

If the minimum is high enough (three years suggested), it is not likely many "early" motions will be made. Shifting the burden to the defendant to show dismissal is proper also would clarify the present law and minimize motions.

Second, New Article 2.5 (Sec. 583.410) headed "Discretionary Dismissal For Failure To Servce Summons" should be added. However, the provisions based upon a "demand" for service should be less strict than the "mandatory" staff draft. See Consultant"s draft outlined in a memorandum to Mr. Sterling of 9/2/82, pp. 5,6.

If no minimum time limit is stated (such as one year), it is likely a substantial number of cases will be dismissed after a "demand." Example: Attorney is on a trip or on trial or suffers from unreliable office assistance.

LRI
Provided by Legislative Research Incorporated (800) 530-7613

The draft wording sent to Mr. Sterling (see above) also permits alternative court orders of less than dismissal and contains some criteria to be considered; however, they are less elaborate than under Rule 203.5.

It is to be noted that the New York procedure for demanding a copy of the complaint when summons has already been served is familiar to the practicing bar. In California, there is a long history of comparatively lax requirements for service of summons. Only by interpretation is the (two year minimum) "brought to trial" statute (Sec. 583 (a)) is there authority for moving to dismiss for failure to serve summons after two years. The principal California statute has been Sec. 581a (the three year "maximum" statute).

If it is determined to recommend, as to service of summons, the mandatory "demand" statute such as the staff proposal initially drafted after the July, 1982, meeting, there should 1- be "lead time" for the Bench and Bar to become acquainted with the new practice; and 2-a "time shortening" seems clearly involved, in view of Hocharian, and a reasonable grace period should be included in the new statute to permit service under the pre-existing law (as interpreted).

4. Proposed Section 583.230 (d). Consultant respectfully suggests further study should be given to the inclusion of "beyond the plaintiff's control" in provisions relating to service of summons. The phrase is an ambiguous one, though used in a prior court of appeal case and by the minority in Hocharian. It would seem the purpose could reasonably be accomplished by the guideline of strict construction and failure to discover evidence. Does the phrase mean "plaintiff" or "plaintiff or counsel"? An answer must come to grips with the vexing question of how far a plaintiff should be charged with the attorney's errors and neglect and remitted to an often ineffective claim for attorney malpractice (that in turn requires the services of another attorney).

Consultant would not perpetuate the phrase, at least without a difficult further description, even though it is in the recent Beverly Bill that has been signed.

Respectfully submitted,

Garrett H. Elmore

Consultant

EXHIBIT 2

28276

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion). Section 583.410 prescribes the exclusive authority of a court to order discretionary dismissal for delay in prosecution of an action. See, *e.g.*, Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968) (two-year statute limits court's inherent power to dismiss for want of prosecution at any time).

28277

§ 583.420. Time for discretionary dismissal

583.420. The court may not dismiss an action pursuant to this article for delay in prosecution except in one of the following circumstances:

(a) Service is not made within two years after the action is commenced against the defendant.

(b) The action is not brought to trial within three years after the action is commenced against the defendant.

(c) A new trial is granted and the action is not again brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 295 of 326

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the retmittitur is filed by the clerk of the trial court.

Comment. Subdivision (a) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

Subdivision (b) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (c) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, e.g., Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

28282

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement). The authority of the court to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

LRI
Provided by Legislative Research Incorporated (800) 530-7613 Page 296 of 326

EXHIBIT 3

AMENDED IN SENATE AUGUST 18, 1982

AMENDED IN ASSEMBLY AUGUST 5, 1982

AMENDED IN ASSEMBLY AUGUST 2, 1982

CALIFORNIA LEGISLATURE—1981-82 REGULAR SESSION

ASSEMBLY BILL No. 3784

Introduced by Assemblyman Dave Stirling

April 15, 1982

An act to amend Section 583 of, and to add Sections 575.1 and 575.2 to, the Code of Civil Procedure, relating to trials.

LEGISLATIVE COUNSEL'S DIGEST

AB 3784, as amended, D. Stirling. Civil procedure: pretrial proceedings.

Existing law empowers every court to provide for the orderly conduct of proceedings before it.

This bill would authorize the adoption of local superior court rules, according to specified procedures, designed to expedite and facilitate the business of the court and would provide for the consequences of failure to comply with such rules. The bill would also revise the authority of a court to dismiss an action for want of prosecution and would require the Judicial Council to adopt rules for obtaining dismissals as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 575.1 is added to the Code of
2 Civil Procedure, to read:
3 575.1. The presiding judge of each superior court may

prepare with the assistance of appropriate committees of the court, proposed local rules designed to expedite and facilitate the business of the court. The rules need not be limited to those actions on the civil active list, but may provide for the supervision and judicial management of actions from the date they are filed. Rules prepared pursuant to this section shall be submitted for consideration to the judges of the court and, upon approval by a majority of the judges, the judges ~~may~~ *shall* have the proposed rules published and submitted to the local bar for consideration and recommendations. After a majority of the judges have officially adopted the rules, 61 copies shall be filed with the Judicial Council as required by Section 68071 of the Government Code and the local rules shall also be published for general distribution. Rules adopted pursuant to this section shall not be inconsistent with law or with the rules adopted and prescribed by the Judicial Council.

SEC. 2. Section 575.2 is added to the Code of Civil Procedure, to read:

575.2. *(a)* Local rules promulgated pursuant to Section 575.1 may provide that if any counsel, ~~or the~~ *a party represented by counsel, or a* party if in pro se, fails to comply with any of the requirements thereof, the court on ~~notice and motion~~ *motion of a party or on its own motion* may strike out all or any part of any pleading of that party, or, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature as ~~the court may deem just~~ *otherwise provided by law,* and may order that party or his or her counsel to pay to the moving party the reasonable expenses in making the motion, including reasonable attorney fees.

(b) It is the intent of the Legislature that if a failure to comply with these rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto.

SEC. 3. Section 583 of the Code of Civil Procedure is amended to read:

1 583. (a) The court, in its discretion, on motion of a
2 party or on its own motion, may dismiss an action for
3 want of prosecution pursuant to this subdivision if it is not
4 brought to trial within two years after it was filed. The
5 procedure for obtaining such dismissal shall be in
6 accordance with rules adopted by the Judicial Council.
7 (b) Any action heretofore or hereafter commenced
8 shall be dismissed by the court in which the same shall
9 have been commenced or to which it may be transferred
10 on motion of the defendant, after due notice to plaintiff
11 or by the court upon its own motion, unless such action
12 is brought to trial within five years after the plaintiff has
13 filed his action, except where the parties have filed a
14 stipulation in writing that the time may be extended.
15 (c) When in any action after judgment, a motion for a
16 new trial has been made and a new trial granted, such
17 action shall be dismissed on motion of defendant after
18 due notice to plaintiff, or by the court of its own motion,
19 if no appeal has been taken, unless such action is brought
20 to trial within three years after the entry of the order
21 granting a new trial, except when the parties have filed
22 a stipulation in writing that the time may be extended.
23 When in an action after judgment, an appeal has been
24 taken and judgment reversed with cause remanded for a
25 new trial (or when an appeal has been taken from an
26 order granting a new trial and such order is affirmed on
27 appeal), the action must be dismissed by the trial court,
28 on motion of defendant after due notice to plaintiff, or of
29 its own motion, unless brought to trial within three years
30 from the date upon which remittitur is filed by the clerk
31 of the trial court. Nothing in this subdivision shall require
32 the dismissal of an action prior to the expiration of the
33 five-year period prescribed by subdivision (b).
34 (d) When in any action a trial has commenced but no
35 judgment has been entered therein because of a mistrial
36 or because a jury is unable to reach a decision, such action
37 shall be dismissed on the motion of defendant after due
38 notice to plaintiff or by the court of its own motion, unless
39 such action is again brought to trial within three years
40 after entry of an order by the court declaring the mistrial

1 or disagreement by the jury, except where the parties
2 have filed a stipulation in writing that the time may be
3 extended.
4 (e) For the purposes of this section, "action" includes
5 an action commenced by cross-complaint.
6 (f) The time during which the defendant was not
7 amenable to the process of the court and the time during
8 which the jurisdiction of the court to try the action is
9 suspended shall not be included in computing the time
10 period specified in any subdivision of this section.

Legislative Research Incorporated

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

Authentication of the Records and Index
Rulemaking History Research Report Regarding:
CALIFORNIA RULES OF COURT
Rule Number 3.515(j) *Formerly* Rule Number 1514(f)
And Rule Number 3.515(h) *Formerly* Rule Number 1514(c)

I, Carolina C. Rose, declare:

The rulemaking history of the California Rules of Court, Rule Number 3.515(j) formerly Rule Number 1514(f) and Rule Number 3.515(h) formerly Rule Number 1514(c) was emailed to my firm by Gary Kitajo, Librarian, Judicial Council of California, Administrative Office of the Courts, with the following explanation:

> "We are sending the attached documents in response to your inquiry. In the interest of thoroughness, we are including all interrelated documents; that means that while a given single document may not individually address either of the specific subparagraphs that you cited, the entire constellation of documents, collectively considered as a whole, will provide all available rule-making background, along with relevant context, in the creation of the cited rules."

The following list of records were provided:

1. CRC_1500 – Report and recommendation for rules regarding stay orders
2. AOC Annual Reports from 1974 and 1975 which highlights the changes to the California Rules of Court, including rules 1501-1550
3. 1514 Amend 1 – Recommendation for amendment to rule 1514 due to references made to a former section of the Code of Civil Procedure
4. 1514 Amend 1 JC Action – Judicial Council action indicating approval of amendment
5. 1514 Amend 2 -- Recommendation for amendment to rule 1514(g)
6. 1514 Amend 2 JC Action– Judicial Council action on recommendation
7. California Rules of Court – 1989 / 2007: For comparison, copies of the rules of court as they were and are reflected in the 1989 and 2007 editions of the California Rules of Court.

Regarding these files names, Mr. Kitajo stated:

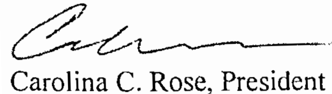
> ". . . All file names are clerical expediencies--designed to be descriptive and helpful, but not an official part of the original text.
>
> So, please rest assured that you have all of the available documents."

This report provides the documents in the order listed above. They are true and correct copies of the transmitted records, with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, paging and relevant identification have been inserted.

Legislative Research, Incorporated was established in 1983 (formerly Legislative Research Institute), and is a firm which specializes in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible ...." Legislative Research, Incorporated has been cited by name as the source of records relied upon by the court in *Redlands Community Hospital v. New England Mutual Life Insurance Co,* 23 Cal. App.4th 899 at 906 (1994).

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed May 21, 2008, in Sacramento, California.



Carolina C. Rose, President

Index of Records

CRC- 1500 Report and Recommendation 1

AOC Annual Reports from 1974 and 1975 68

1514 Amend 1 74

1514 Amend 1 JC Action 87

1514 Amend 2 90

1514 Amend 2 JC Action 104

California Rules of Court – 1989-2007 108

Legislative Research Incorporated

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

CRC1500 – Report and recommendation for rules regarding stay orders

Legislative Research Incorporated hereby certifies that the accompanying record/s is/are true and correct copies of the original/s obtained from one or more official, public sources in California unless another source is indicated, with the following exceptions : In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, for ease of reference, paging and relevant identification have been inserted.

JUDICIAL COUNCIL OF CALIFORNIA

Report and Recommendation

concerning

Rules for Coordination of Civil

Actions Having Common Questions of Fact or Law

Superior Court Committee

(Staff Draft)

October 23, 1973

(Donald B. Day) <u>Not</u> <u>for</u> <u>Release</u>

Rules for Coordination of Civil Actions Having Common Questions of Fact or Law

At its May 1973 meeting the Judicial Council, upon recommendation of the Superior Court Committee, tentatively adopted comprehensive new rules of procedure for the coordination of civil actions pending in different trial courts that share a common question of fact or law.[1/] The legislation that requires the Council to provide such rules will become operative on January 1, 1974.[2/]

The Council's approval of the proposed rules was announced in the A.O.C. Newsletter[3/] and in various legal newspapers, and the full text of the proposed rules was published with brief explanatory comments in the State Bar Journal[4/] and in the Los Angeles Daily Journal. In addition, copies of the rules were mailed to approximately 75 judges, attorneys, law professors and others who had indicated a special interest in the development of procedures for coordinating multiple civil actions. Written comments were received from seven attorneys,[5/] and the State Bar submitted its own suggested rules that were prepared by a special committee appointed by the Board of Governors to review the Judicial Council's proposed rules.[6/] The staff has continued to study this matter in light of all comments received and has recommended final adoption of the proposed rules with certain changes as explained below.

1/ Minutes of May 18-19, 1973 Judicial Council meeting, at 10-11.

2/ Code Civ. Proc. §§ 404-404.8, added by Stats. 1972, Ch. 1162.

3/ See May-June 1973 issue of A.O.C. Newsletter at 5.

4/ 48 State Bar J. 450-461 (1973).

5/ See letters from attorneys Marshall B. Grossman, Paul B. Wells, William A. Masterson, Robert D. Raven, Stuart L. Kadison and Richard T. Williams, and Marcus Mattson, attached at 33-50.

6/ See letter of July 27, 1973 from Mr. Robert M. Sweet, a copy of which is attached at 51-52.

Provided by Legislative Research Incorporated (800) 530-7613

The rules suggested by the State Bar appear to be generally in agreement with the Council's proposed rules with regard to most of the basic principles and procedures that are involved. There are, however, certain significant differences between the two sets of proposed rules. Informal discussions between the Council's staff and the State Bar's staff have narrowed the significant areas of difference to the following matters: (a) terminology; (b) applicability of local rules; (c) designation of site of hearings and trials; (d) "remand" orders; (e) liaison counsel; (f) stay orders; and (g) challenges under Code of Civil Procedure Section 170.6. The latter three topics have also been discussed by certain of the attorneys who submitted written comments upon the proposed rules.

(a) Terminology. The State Bar prefers to use the designations "assigned judge" to designate the judge who is to decide the coordination issue, and "appointed judge" for the judge who is to hear and determine the coordinated actions in lieu of the Council's terms "coordination motion judge" and "coordination trial judge," respectively (see State Bar Rule 1, p. 53).[7/] The State Bar apparently feels that its terminology is less confusing than that used by the Council. It would seem, however, that the use of the term "assigned judge" to designate only the judge who decides the motion regarding coordination might be somewhat confusing since both of these judges are "assigned" by the Chairman of the Judicial Council pursuant to the statute. Moreover, the term "appointed judge" does not appear in the statutes. The Council's terminology, therefore, would appear to be more accurate than the terminology used by the State Bar.

(b) Applicability of local rules. The State Bar's rules (see, e.g., Rule 4(a), p. 54) would provide that a coordination proceeding would be governed by the local rules of the court where the matter is being heard. The Council's rules

---

7/ The full text of the State Bar's suggested coordination rules is attached at pages 53-65.

Provided by Legislative Research Incorporated (800) 530-7613

permit the assigned judge to specify what local rules, if any, are to be followed in a particular coordination proceeding. It would seem that the flexibility permitted under the Council's proposed rules is desirable in view of the complex and novel procedural problems that may be encountered in coordination proceedings.

(c) Designation of site of hearings and trial. In its proposed Rule 16 (p. 60), the State Bar would provide that the first judge (coordination motion judge) should designate the site or sites where the coordinated actions should be heard and determined. Under the Council's rules, the second judge (coordination trial judge) would select the place or places of hearings and trials. It would seem that the judge who is to conduct the hearings and trials in the coordinated actions should be given the discretion to determine where the hearings and trials should be held. The coordination motion judge could make recommendations in this regard, but there appears to be no sound reason for restricting the second judge's authority to specify the locations of hearings and trials conducted by him.

(d) Order to remove action or claim from coordination proceeding. Under the State Bar's rules, an action ordered coordinated would remain a part of the coordination proceeding until finally concluded and could not under any circumstances be returned for normal disposition by the court where it originated. The Council's Rule 1542 would authorize the coordination trial judge to "remand" or remove a coordinated action or any severable claim or issue from the coordination proceeding and return it to the court in which the action was pending at the time coordination was ordered. It would appear that the State Bar's suggested rule would be unduly restrictive in that changed circumstances might at times require later reevaluation of a decision to coordinate an action. On the other hand, the Council's proposed rule perhaps should be made more restrictive to insure that the second judge will not arbitrarily disregard an earlier decision approving the coordination of an action. It

Provided by Legislative Research Incorporated (800) 530-7613

is recommended that appropriate changes should be made in Rule 1542 to require that prior to remanding an action to the court where it originated, a coordination trial judge must hold a hearing and must find a material change in the circumstances that are relevant to the criteria for coordination as stated in Code of Civil Procedure Section 404.1, and must find further that these changed circumstances constitute a compelling reason to modify the order granting coordination.

(e) Liaison counsel. The State Bar's proposed Rule 20 (p. 63) would provide that the judge who is to try the coordinated action may appoint liaison counsel, but only with the consent of the parties affected. The Council's rules as tentatively approved would authorize the appointment of liaison counsel to represent a party over the objection of that party. It appears that the State Bar objects very strongly to this aspect of the proposed Rule 1507, and the same objection has been vigorously presented by three of the attorneys who submitted written comments to the Council. It is not surprising that some attorneys are highly critical of the concept of liaison counsel, because many attorneys would naturally prefer to communicate directly with the court and with other counsel, rather than through a liaison. The liaison counsel concept, however, is designed in part for the benefit of the court, and it would be used only in those cases in which the parties and attorneys were so numerous that direct communication between the parties and between each attorney and the court would be impractical. It would seem likely that these cases involving many different attorneys will be relatively rare even under the new coordination procedures. Nevertheless, in view of the number of vigorous objections that have been expressed to the provision that would allow the appointment of liaison counsel over the objection of the party who is to be represented, it is recommended that the Council modify Rule 1507 so as to provide that liaison counsel may be appointed only with the prior

Provided by Legislative Research Incorporated (800) 530-7613

consent of the parties affected. If actual experience under the new procedures should demonstrate a compelling need for a rule permitting appointment of liaison counsel without the consent of all parties affected, an appropriate report and recommendation will be prepared for the Council's consideration at a future meeting.

If the Council approves the recommended change in Rule 1507 to provide that appointment of liaison counsel must be with the consent of the parties affected, it would not seem necessary to retain subdivision (b) of that rule which provides that any party who has made a written request for special notice shall be served with a copy of any document thereafter served on that party's liaison counsel. Subdivision (b) of the rule was added at the May 1973 Council meeting upon the recommendation of the Superior Court Committee to provide a partial remedy to a party who objects to the liaison counsel appointed to represent his interests in the case.

(f) Stay orders. The State Bar's proposed Rule 9 (p. 57) would prohibit issuance of an order staying further proceedings in any of the actions to be coordinated except upon written application and after a hearing held upon 10 days' notice. This suggested restriction upon the judge's power to issue a stay order would appear to be contrary to the intent of the statute, which expressly authorizes stay orders but does not contain notice or hearing requirements (Code Civ. Proc. § 404.5). Under the Council's proposed rules, an order granting a petition to coordinate actions would automatically stay all of the included actions temporarily so as to maintain the procedural status quo until the coordination trial judge commences the performance of his duties (Rule 1531). It would seem that if coordination is to be fully effective the coordination judges must have the power to issue such additional stay orders as may be required. As several of the comments received have emphasized, however, any stay of proceedings can be potentially

Provided by Legislative Research Incorporated (800) 530-7613

harmful to the litigants in the affected actions, and it is apparent that the power to order a stay should be reasonably circumscribed and should be exercised with caution. For these reasons, the Council's proposed rules require that an application for a stay order must be supported by a memorandum of points and authorities and by affidavits establishing that a stay order is "necessary and appropriate." The proposed rules also impose a 30-day time limit upon any stay order issued without a hearing if a party objects, and the party's objection may be filed at any time (Rule 1527). Nevertheless, the attention devoted to stay orders by those offering comments upon the Council's proposed rules would suggest that certain further restrictions upon stay orders should be expressed in the rules, as follows:

(1) An application for a stay order should be supported by affidavits showing that the order not only would be necessary and appropriate, but also would serve to effectuate the purposes of coordination;

(2) The rules should provide that any party filing an application for or opposition to a stay order must include a list of all related cases known to him to be pending in any California court and must state whether any stay order should apply to any such related cases;

(3) The rule regarding stays should specify standards to guide the assigned judge in determining whether a stay of an action should be ordered, including: the imminence of a trial or other proceeeding that might materially alter the status of the action as to which the stay is sought, whether a final judgment in that action would have a res judicata or collateral estoppel effect with regard to the common issues of the coordinated actions, and whether the overall interests of justice would be served by granting the stay order;

(4) The report from the coordination motion judge to the Chairman of the Judicial Council required by Rule 1529(b) when the coordination issue has not been determined

Provided by Legislative Research Incorporated (800) 530-7613

within 90 days after that judge's assignment, should include a complete report on any stay orders in effect;

(5) As suggested by Attorney Marshall Grossman in his letter of August 30, 1973 (p.33), it appears the rules should contain a provision specifying that any period during which any stay is in effect should be disregarded for purposes of applying Code of Civil Procedure Section 583 (dismissal for failure to bring action to trial). This suggested addition to the rules would prevent any possible injustice that might result from a stay of proceedings in an action that might otherwise be subject to the dismissal under this section; and

(6) With regard to stay orders issued by a trial court for the purpose of permitting a party to file a request for coordination (Rule 1520), Mr. Grossman has suggested that the rule should provide that no such stay should be granted unless all other related actions pending in the same court are similarly stayed for the same period. This suggestion would appear to have merit since it would tend to prevent "case shopping" by defendants.

(g) <u>Challenges under Code of Civil Procedure Section 170.6</u>. No specific provision is contained in either the statutes or the Council's proposed coordination rules with regard to affidavits of prejudice filed pursuant to Code of Civil Procedure Section 170.6. It appears that a rule is needed to restrict the use of this section in coordination proceedings because the effectiveness of the coordination process could be seriously impaired by a challenge to a coordination judge. For example, if an affidavit of prejudice were filed by a party to an "add-on" case who entered the proceeding long after the coordination trial judge had commenced the performance of his duties, the entire process would be disrupted and delayed and many of the benefits of coordination would be lost as a result.

The State Bar has suggested that the rules should require any Section 170.6 motion or affidavit of prejudice to be

Provided by Legislative Research Incorporated (800) 530-7613

filed within 20 days after service of the order assigning the judge to the proceeding. This suggested provision requiring the challenge to be made at the commencement of the proceeding would tend to minimize the problems that would result from such challenges, and it would appear, therefore, that the State Bar's suggestion in this regard should be incorporated into the rules.8/

It appears that the remaining differences between the Council's proposed rules and the State Bar's suggested rules are relatively insubstantial and can easily be resolved by making certain minor changes in the Council's proposed rules. It is therefore recommended that the Council approve the following changes that are suggested by the State Bar's version of the rules:

1. Remove the general "administration" provisions (Rule 1503) from the main body of the procedural rules and place them in a separate chapter to avoid possible confusion regarding the functions of the "coordination attorney" and the duties of the attorneys for the various parties, and delete subdivision (c) of that rule pertaining to matters occurring after a coordination proceeding is terminated, as unnecessary in view of Rule 1545.

2. Add an express reference to Rule 20 of the California Rules of Court in proposed Rule 1506 to emphasize that Rule 20, relating to the transfer of causes between appellate courts, is applicable to appellate court proceedings relating to coordiantion. (See State Bar Rule 16(d), p.61.)

3. Amend Rule 1510 to provide that a defendant who

8/ The State Bar has also suggested that legislation may ultimately be required to resolve the problem concerning affidavits of prejudice filed in coordination proceedings. If actual experience under the new rules demonstrates that a legislative amendment is needed, the matter will be brought to the Council's attention at an appropriate time.

Provided by Legislative Research Incorporated (800) 530-7613

has not been served may assert the lack of service as a ground for "appropriate relief" rather than "as a basis for opposing [coordination] or for moving to vacate an order coordinating the action." (See State Bar Rule 7, p. 56.)

4. Add a provision authorizing an assigned judge to designate a "document depository" where documentary exhibits, discovery papers, and other documents not required to be served on all parties would be maintained for inspection during business hours. (See State Bar Rule 11, p. 58.)

5. In Rule 1513, which specifies that factual matters pertinent to motions and applications shall be heard on "affidavits," add the words "answers to interrogatories and requests for admissions, depositions and matters that may be judicially noticed." (See State Bar Rule 4(e), p.55.)

6. Subsection (a) of Rule 1525, which provides that no action shall be ordered coordinated over the objection of any party unless a hearing has been held, should be made part of subsection (a) of Rule 1529, which deals with the notice of hearing on the petition for coordination. (See State Bar Rule 10, p. 58.)

7. Add a provision to Rule 1531 (Order Granting or Denying Coordination) specifying that a court in which a coordination action is pending may continue to exercise jurisdiction over any severable claim that has not been ordered coordinated. (See State Bar Rule 16, p.60.)

8. Renumber Rule 1528, which specifies the proceedings that may be conducted in the absence of a stay order, as a new subdivision of the rule that deals generally with the subject of stay orders. (See State Bar Rule 16, p.60.)

9. Eliminate the requirement that a copy of every paper filed in an included action must be submitted to the coordination motion judge (Rule 1528). This requirement would appear to impose an unnecessary burden upon attorneys and upon the coordination motion judge in view of the requirement that the petition for coordination must fully describe the status of each case.

Provided by Legislative Research Incorporated (800) 530-7613

10. Change the wording of Rule 1543 to clarify that the term "transfer" does not refer to the removal of an action from the coordination process. (See State Bar Rule 18, p. 61.)

11. Add specific provisions to Rule 1541 with regard to pretrial conferences, including requirements concerning preparation by counsel, proposed pretrial conference agenda, and pretrial orders. (See State Bar Rule 19, p. 62.)

12. Add specific provisions to Rule 1545 concerning the preparation and entry of judgments in the various coordinated actions. (See State Bar Rule 22, p. 64.)

13. Add a specific provision to Rule 1545 authorizing the coordination trial judge to retain jurisdiction of a coordinated action after judgment if he determines that subsequent proceedings in the action should be supervised by him. (See State Bar Rule 22, p. 64.)

Finally, the staff's continued study of this matter, along with a number of informal suggestions that have been made by interested attorneys, suggest that certain further minor modifications of the Council's proposed rules would be appropriate. These suggested changes seem noncontroversial in nature and would serve to simplify and to clarify the intent of the coordination rules:

(1) Rule 1521 should require that a petition seeking coordination of designated actions should contain a declaration that the petition lists every related action or proceeding known to the petitioner to be pending in any court of the state. Rule 1521 should also state that when the request for coordination is submitted by a presiding or sole judge, the petition should show the name of each real party in interest.

(2) Rule 1504, which states that any stipulation for an extension of time must be approved by the assigned judge, should be expressly limited to extensions involving the filing of documents required by the coordination rules (see letter from Attorney Marshall Grossman, p. 33).

(3) In Rule 1510 the requirement that a copy of the

Provided by Legislative Research Incorporated (800) 530-7613

proof of service must be sent to each party served should be deleted as unnecessary.

(4) Rule 1512, which generally requires that all memoranda must be served and submitted five days prior to any hearing, should state that it applies only to supplemental memoranda and not to papers that are covered by other rules.

(5) Rule 1524 should specify that an order assigning a coordination motion judge should be "served upon" instead of "mailed to" each party appearing in an included action.

(6) Rules 1523 and 1525(b) should be amended to eliminate the requirement of filing a separate notice of opposition to the petition for coordination and to require that any points and authorities and affidavits in opposition to the petition must be served and submitted to the coordination motion judge within 45 days after service of the notice of submission to the petition.

(7) Rule 1528(a), providing that no action shall be coordinated over the objection of any party without hearing, should also provide that no petition may be denied without a hearing.

(8) Rule 1529 should provide that prior to the hearing on the coordination issue, the coordination motion judge shall determine whether the petitioner has served appropriate notice on all parties who should receive notice of the coordination proceeding, and if he finds that any such party has not been so served, he shall order the petitioner to effect service upon such party promptly.

(9) The reference in Rule 1541(a)(2) to a timetable for filing additional pleadings should be eliminated because this section would only be operative after answers have been filed in the various coordinated actions.

(10) Rule 1543 should expressly require 10 days' notice to all parties of any motion to transfer a coordinated action and subdivision (c) of the proposed rule which specifies procedures for "retransferring" a coordinated action

Provided by Legislative Research Incorporated (800) 530-7613

should be eliminated because the "transfer" procedures would seem to cover the "retransfer" situation.

(11) In Rule 1506, relating to appellate review, the references to "Court of Appeal" and "writ of mandate" should be deleted in favor of a more general reference simply to "court" and "writ," since review proceedings might in some instances be instituted in the superior court and by petition for writ of prohibition or certiorari rather than mandate.

(12) The second and third sentences of proposed Rule 1521(c) providing that certain facts in support of the petition for coordination may be alleged on information and belief should be deleted so as to conform with motion practice generally.

Recommendation

It is recommended that the Judicial Council adopt new Rules 1501 through 1550 for the coordination of civil actions having common questions of fact or law, to be effective January 1, 1974.

The full text of the recommended new rules follows:

Attachments

Provided by Legislative Research Incorporated (800) 530-7613

PROPOSED COORDINATION RULES

TITLE FOUR. SPECIAL RULES FOR TRIAL COURTS

DIVISION II

RULES FOR COORDINATION OF CIVIL ACTIONS COMMENCED IN DIFFERENT TRIAL COURTS

CHAPTER 1. GENERAL PROVISIONS

Rule 1501. Definitions

As used in these rules, unless the context or subject matter otherwise requires:

(a) "Action" means any civil action or proceeding subject to coordination or affecting an action that is subject to coordination.

(b) "Add-on case" means an action that is proposed for coordination, pursuant to Section 404.4 of the Code of Civil Procedure, with actions previously ordered coordinated.

(c) "Assigned judge" means any judge assigned by the Chairman of the Judicial Council pursuant to Section 404 or 404.3 of the Code of Civil Procedure, including a "coordination motion judge" and a "coordination trial judge."

(d) "Clerk," unless otherwise indicated, means any person designated by an assigned judge to perform any clerical duties in accordance with these rules.

(e) "Coordinated action" means any action that has been ordered coordinated with one or more other actions pursuant to Chapter 2 (commencing with Section 404) of Title 4 of Part 2 of the Code of Civil Procedure and pursuant to these rules.

(f) "Coordination attorney" means an attorney in the Administrative Office of the Courts appointed by the Chairman of the Judicial Council to perform such administrative functions as may be appropriate under these rules, including but not limited to the functions described in Rules 1524 and 1550.

Provided by Legislative Research Incorporated (800) 530-7613

(g) "Coordination motion judge" means an assigned judge designated pursuant to Section 404 of the Code of Civil Procedure to determine whether coordination is appropriate.

(h) "Coordination proceeding" means any procedure authorized by Chapter 2 (commencing with Section 404) of Title 4 of Part 2 of the Code of Civil Procedure and by these rules.

(i) "Coordination trial judge" means an assigned judge designated pursuant to Section 404.3 of the Code of Civil Procedure to hear and determine coordinated actions.

(j) "Expenses" means all necessary costs that are reimbursable under Section 404.8 of the Code of Civil Procedure, including the compensation of the assigned judge and other necessary judicial officers and employees, the costs for any necessary travel and subsistence determined pursuant to rules of the State Board of Control, and all necessarily incurred costs of facilities, supplies, materials, and telephone and mailing expenses.

(k) "Included action" means any action or proceeding included in a petition for coordination.

(l) "Liaison counsel" means an attorney of record for a party to an included action or a coordinated action who has been appointed by an assigned judge to act in all respects as attorney of record for all parties on a side, provided that the assigned judge may direct such liaison counsel to perform only specifically designated functions as attorney of record for that side and that each attorney on that side shall serve as attorney of record for the party he represents for all purposes other than the specifically designated functions.

(m) "Party" includes all parties to all included actions or coordinated actions, and the word "party," "petitioner" or any other designation of a party includes such party's attorney of record. When a notice or other paper is required to be given or served on a party, such notice or paper shall be given to or served on his attorney of record if any.

Provided by Legislative Research Incorporated (800) 530-7613

Rule 1502. Construction of terms

(a) "Shall" is mandatory, and "may" is permissive.

(b) The past, present and future tenses shall each include the others.

(c) The singular and plural shall each include the other.

(d) Rule headings do not in any manner affect the scope, meaning, or intent of the provisions of these rules.

(e) All section references in these rules are to the Code of Civil Procedure unless otherwise specified.

Rule 1503. Requests for extensions of time or to shorten time

The time within which any act is permitted or required to be done by a party may be shortened or extended by the assigned judge upon such terms as may be just. Unless otherwise ordered, any motion or application for an extension of time to perform an act required by these rules shall be served and submitted in accordance with Rule 1501(q). No stipulation for an extension of time for the filing and service of documents required by these rules shall be allowed unless consented to by the assigned judge. If there is no assigned judge, an application for an extension of time shall be submitted to the Chairman of the Judicial Council in accordance with Rule 1511.

Rule 1504. General law applicable

(a) Except as otherwise provided in these rules, all provisions of law applicable to civil actions generally apply regardless of nomenclature to an action included in a coordination proceeding if they would otherwise apply to such action without reference to this rule. To the extent that these rules conflict with such provisions, these rules shall prevail as provided by Section 404.7 of the Code of Civil Procedure.

(b) If the manner of proceeding is not prescribed by Chapter 2 (commencing with Section 404) of Title 4 of Part 2 of the Code

Provided by Legislative Research Incorporated (800) 530-7613

of Civil Procedure or by these rules, or if the prescribed manner of proceeding cannot, with reasonable diligence, be followed in a particular coordination proceeding, the assigned judge may prescribe any suitable manner of proceeding that appears most conformable to such statutes and rules.

(c) At the beginning of a coordination proceeding, the assigned judge shall specify any local court rules to be followed in that proceeding, and thereafter all parties shall comply with such rules. Except as otherwise provided in these rules or directed by the assigned judge, the local rules of the court designated in the order appointing the assigned judge shall apply in all respects if they would otherwise apply without reference to these rules.

Rule 1505. Appellate review

If the actions to be coordinated are within the jurisdiction of more than one reviewing court, an order granting a petition for coordination shall specify, in accordance with Section 404.2 of the Code of Civil Procedure, the court in which any petition for a writ relating to any subsequent order in that coordination proceeding shall be filed. A petition for a writ relating to an order granting or denying coordination may be filed, subject to the provisions of Rule 20, in any reviewing court having jurisdiction under the rules applicable to civil actions generally.

Rule 1506. Liaison counsel

(a) An assigned judge may at any time, with the consent of the parties on a side of the included or coordinated actions, appoint an attorney of record on that side to serve as liaison counsel for that side. Unless otherwise stipulated to or directed by an assigned judge, the appointment of a liaison counsel by a coordination motion judge shall terminate upon the final determination of the issue whether coordination is appropriate. For good cause shown, the coordination motion judge, on his own

Provided by Legislative Research Incorporated (800) 530-7613

motion or on the motion of any party, may remove such counsel as liaison counsel.

CHAPTER 2. PROCEDURAL RULES APPLICABLE TO ALL COORDINATION PROCEEDINGS

Rule 1510. Service of papers

Except as otherwise provided in these rules, all papers filed or submitted under these rules shall be accompanied by proof of prior service on all other parties to the coordination proceeding, including all parties appearing in all included actions and coordinated actions. Service and proof of such service shall be made as provided for civil actions generally. Any party for whom liaison counsel has been designated may be served by serving the liaison counsel. Failure to serve any defendant with a copy of the summons and of the complaint, or failure to serve any party with any other paper or order as required by these rules, shall not preclude the coordination of the actions, but such defendant or party may assert such failure to serve him as a basis for appropriate relief.

Rule 1511. Papers to be submitted to Chairman of the Judicial Council

A copy of every petition, notice of submission of petition for coordination, notice of opposition, application for stay order, stay order, notice of hearing on a petition, order granting or denying coordination, order of remand, order of transfer, and of every order terminating a coordination proceeding in whole or in part shall be transmitted to the Chairman of the Judicial Council. Any document required to be submitted to the Chairman of the Judicial Council shall be submitted in duplicate unless such document is accompanied by proof of submission of the original or a copy thereof to the assigned judge. All papers submitted to the Chairman of the Judicial Council under these rules shall be transmitted to the San Francisco office of the Judicial Council.

Provided by Legislative Research Incorporated (800) 530-7613

Rule 1512. Points and authorities and affidavits

Unless otherwise provided in these rules or directed by the assigned judge, all memoranda of points and authorities and affidavits in support of or opposition to any petition, motion or application shall be served and submitted not later than five days prior to any hearing upon the matter at issue.

Rule 1513. Evidence presented at court hearings

All factual matters to be heard on any petition for coordination, or on any other petition, motion or application under these rules, shall be initially presented and heard upon affidavits, answers to interrogatories or requests for admissions, depositions, or matters judicially noticed. Oral testimony shall not be permitted at a hearing except as the assigned judge may permit to resolve factual issues shown by the affidavits to be in dispute. Except as otherwise permitted by the assigned judge for good cause shown, only the parties who have submitted a petition, motion or application, or a written response or opposition to such petition, motion or application, shall be permitted to appear at the hearing thereon.

Rule 1514. Stay orders

(a) An application to an assigned judge for an order pursuant to Section 404.5 of the Code of Civil Procedure staying the proceedings in any action may be included with a petition for coordination or may be served and submitted by any party at any time prior to the determination of such petition. An application for a stay order or opposition to such application shall list all known related cases pending in any California court and shall state whether the stay order should extend to any such related case. An application for a stay order shall be supported by a memorandum of points and authorities and by affidavits establishing the facts relied upon to show that a stay order is necessary and appropriate to effectuate the purposes of coordination. If the action to be stayed is not

Provided by Legislative Research Incorporated (800) 530-7613

included in the petition for coordination, copies of the application and of all supporting documents shall be served upon each party to the action to be stayed and any such party may serve and submit opposition to the application for a stay order. Any points and authorities and affidavits in opposition to an application for a stay order shall be served and submitted within 10 days after the service of such application and the assigned judge may schedule a hearing to determine whether the stay order shall issue.

(b) Any stay order issued without a hearing over the prior written objection of a party to the action stayed by such order shall terminate on the 30th day following filing of the stay order. A stay order issued in the absence of any timely written objection and without a hearing shall terminate on the 30th day following the submission by any party to the action stayed by such order of a written request for a hearing to determine whether the stay order shall remain in effect. Notice of a hearing to determine whether a stay order should be granted or terminated shall be prepared and served at the direction of the coordination motion judge. For good cause shown at such hearing, the judge may order the stay granted or extended pending determination of the petition for coordination.

(c) Unless otherwise specified in the stay order, a stay order suspends all proceedings in the action to which it applies. A stay order may be limited by its terms to specified proceedings, orders, motions or other phases of the action to which the stay order applies.

(d) In the absence of a stay order, a court receiving an order assigning a coordination motion judge may continue to exercise jurisdiction over the included action for purposes of all pretrial and discovery proceedings, but no trial shall be commenced and no judgment shall be entered in that action.

Provided by Legislative Research Incorporated (800) 530-7613

(e) In ruling upon an application for a stay order the assigned judge shall determine whether the stay will promote the ends of justice, considering the imminence of any trial or other proceeding that might materially affect the status of the action to be stayed, and whether a final judgment in that action would have a res judicata or collateral estoppel effect with regard to any common issue of the included actions.

(f) The time during which any stay of proceedings is in effect pursuant to these rules shall not be included in determining whether the action stayed should be dismissed for lack of prosecution pursuant to Code of Civil Procedure Section 583.

Rule 1515. Motions pursuant to Code of Civil Procedure Section 170.6

Any motion or affidavit of prejudice regarding an assigned judge shall be submitted in writing to the Chairman of the Judicial Council within 20 days after service of the order assigning that judge to the coordination proceeding. Unless otherwise ordered by the Chairman of the Judicial Council, all parties plaintiff in the included or coordinated actions shall constitute a side and all parties defendant in such actions shall constitute a side for purposes of applying Code of Civil Procedure Section 170.6.

CHAPTER 3. PETITION AND PROCEEDINGS FOR COORDINATION OF ACTIONS

Rule 1520. Motion filed in trial court

Any motion seeking the commencement of a coordination proceeding shall set forth the matters required by Rule 1521(a) and shall be made in the manner provided by law for motions in civil actions generally. If the presiding judge or sole judge decides to transmit the request to the Chairman of the Judicial Council he shall order the moving party forthwith to comply with the requirements of Rules 1521(b), 1522, and 1523. The court may, upon proper motion and to promote the ends of justice

Provided by Legislative Research Incorporated (800) 530-7613

in accordance with the criteria stated in Rule 1514(e), stay all related actions pending in that court for a reasonable time not to exceed 30 days to allow any party to request commencement of a coordination proceeding pursuant to these rules.

Rule 1521. Petition for coordination

(a) A request submitted to the Chairman of the Judicial Council for the assignment of a judge to determine whether the coordination of certain actions is appropriate, or a request that a coordination trial judge make such a determination concerning an add-on case, shall be designated a "Petition for Coordination" and may be made at any time after filing of the complaint. The petition shall state whether a hearing is requested and shall be supported by points and authorities and affidavits showing:

(1) the name of each petitioner, or, when the petition is submitted by a presiding or sole judge, the name of each real party in interest, and the name and address of his attorney of record, if any;

(2) the names of the parties to all included actions, and the name and address of each party's attorney of record, if any;

(3) the complete title of each included action, together with the title of the court in which such action is pending and the number of such action;

(4) the complete title of any other action known to the petitioner to be pending in a court of this state that shares a common question of fact or law with the included actions, and a statement of the reasons for not including such other action in the petition for coordination;

(5) the status of each included action, including the status of any pretrial or discovery motions or orders in that action, if known to petitioner;

(6) the facts relied upon to show that each included action meets the coordination standards specified in Section 404.1 of the Code of Civil Procedure;

Provided by Legislative Research Incorporated (800) 530-7613

(7) any facts relied upon in support of a request that a particular site or sites be selected for a hearing upon the petition for coordination.

(b) A petition for coordination shall be accompanied by proof of filing of a copy of such petition and of the notice required by Rule 1522 and by proof of prior service of copies of the notice and petition as required by Rule 1523.

(c) In lieu of proof by affidavit of any fact required by subdivision (a)(2), (3), (6) and (7), a certified or endorsed copy of the respective pleadings may be attached to the petition for coordination, provided that the petitioner shall specify with particularity the portions of the pleading that are relied upon to show such fact.

(d) The imminence of a trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition in whole or in part.

Rule 1522. Notice of submission of petition for coordination

Each petition for coordination shall be accompanied by proof of filing in each included action of a "Notice of Submission of Petition for Coordination" and of a copy of the petition for coordination. Each such notice shall bear the title of the court in which the notice is to be filed and the title and number of the included action that is pending in that court, and shall set forth: (1) the date that the petition for coordination was submitted; (2) the name and address of the petitioner's attorney of record; (3) the title and number of the included action to which the petitioner is a party; (4) the title of the court in which that action is pending; and (5) the notice required by Rule 1523(b). A copy of each such notice shall be attached to the original petition for coordination.

Provided by Legislative Research Incorporated (800) 530-7613

Rule 1523. Service of notice of submission on party

(a) The petitioner shall serve a copy of the notice of submission of petition for coordination that was filed in each included action, together with a copy of the petition for coordination and of the supporting documents, upon each party appearing in such included action.

(b) The notice shall advise each party that if he intends to oppose the petition for coordination, he must serve and submit written opposition thereto not later than 45 days after such notice is served on him. In lieu of serving copies of the petition for coordination and supporting documents on any party, the petitioner may advise such party in the notice of submission of petition for coordination served on such party that, within five days after such notice is served on him, he may request, in writing, the petitioner to furnish him with copies of such petition and of the supporting documents. The petitioner shall immediately furnish copies of the petition for coordination and supporting documents to each party who makes a timely request, in writing, for such papers.

Rule 1524. Order assigning coordination motion judge

An order by the Chairman of the Judicial Council assigning a coordination motion judge to determine whether coordination is appropriate shall bear the special title and number assigned to the coordination proceeding. A copy of such order shall be served upon each party appearing in an included action and sent to each court in which an included action is pending with directions to the clerk to file the order in the included action. The order shall specify a court address to which all subsequent documents to be submitted to the coordination motion judge shall thereafter be transmitted.

Rule 1525. Opposition to petition

Within 45 days after being served with a copy of a notice of submission of petition for coordination, any party may serve

Provided by Legislative Research Incorporated (800) 530-7613

and submit points and authorities and affidavits in opposition to the petition.

Rule 1526. Response in support of petition for coordination

Any party to an included action, within 30 days after he is served with a copy of the notice of submission as required by Rule 1523, may serve and submit a written statement in support of the petition.

Rule 1527. Notice of hearing on petition for coordination

(a) No action shall be ordered coordinated over the objection of any party, and no petition for coordination shall be denied, unless a hearing has been held on the petition as provided in these rules.

(b) When the coordination motion judge determines that a hearing is required on a petition for coordination, he shall determine the time, place and matters or issues to be heard and a notice thereof shall be served upon each party appearing in an included action. The coordination motion judge shall determine whether the petitioner has served appropriate notice on all parties who should receive notice of the coordination proceeding, and if he finds that any such party has not been so served, he shall order the petitioner to effect prompt service upon such party.

(c) If the issue whether coordination is appropriate has not been determined within 90 days after his assignment, the coordination motion judge shall promptly submit to the Chairman of the Judicial Council a written report describing: (1) the present status of the coordination proceeding, (2) any factors or circumstances that may have caused undue or unanticipated delay in the determination of the issue whether coordination is appropriate; and (3) any stay orders that are in effect.

Rule 1528. Separate hearing on certain coordination issues

When it appears that a petition for coordination may be

Provided by Legislative Research Incorporated (800) 530-7613

disposed of upon the determination of a specified issue or issues, without the necessity of conducting a hearing upon all issues raised by such petition and by any opposition thereto, the assigned judge may order that the specified issue or issues be heard and determined prior to any hearing on the remaining issues.

Rule 1529. Order granting or denying coordination

Upon the granting or denial of a petition for coordination of any action, a copy of the order shall be served upon each party appearing in that action and upon each party appearing in an included action. Another copy thereof shall be filed in each action. An order granting a petition for coordination of any action shall, upon filing in that action, automatcially stay all further proceedings in that action, except as directed by the coordination trial judge, but the court in which such action is pending may accept and file papers with proof of submission of a copy thereof to the coordination trial judge and may continue to exercise jurisdiction over any severable claim that has not been ordered coordinated. The authority of the coordination motion judge over an action shall terminate upon the filing and service of an order denying a petition for coordination of that action, and any stay that has been ordered in that action shall thereafter terminate on the 10th day following such filing.

CHAPTER 4. PRETRIAL AND TRIAL RULES FOR COORDINATED ACTIONS

Rule 1540. Order assigning coordination trial judge

Upon the granting of a petition for coordination, the Chairman of the Judicial Council shall assign a coordination trial judge to hear and determine the coordinated actions as provided by Section 404.3 of the Code of Civil Procedure. Immediately upon his assignment, the coordination trial judge

Provided by Legislative Research Incorporated (800) 530-7613

may exercise all the powers over each coordinated action of a judge of the court in which that action is pending. A copy of the assignment order shall be filed in each coordinated action and another copy thereof shall be transmitted to each party appearing in such action. The order assigning a coordination trial judge shall designate a single address to which all papers to be submitted to that judge shall be transmitted. Every paper filed in a coordinated action shall be accompanied by proof of submission of a copy thereof to the coordination trial judge at the designated address.

Rule 1541. Duties of the coordination trial judge

(a) The coordination trial judge shall hold a preliminary trial conference preferably within 30 days after issuance of the assignment order by the Chairman of the Judicial Council. Counsel and all persons appearing in propria persona shall come to the conference prepared to discuss all matters specified in the order setting the conference. At any time following the assignment of the coordination trial judge, counsel may serve and submit a proposed agenda for the conference and a proposed form of order covering such matters of procedure and discovery as may be appropriate. At such conference, the judge may:

(1) appoint liaison counsel in accordance with Rule 1506;

(2) establish a timetable for filing motions other than discovery motions;

(3) establish a schedule for discovery;

(4) provide a method and schedule for the submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions;

(5) in class actions, establish a schedule, if practicable, for the prompt determination of matters pertinent to the class action issue;

(6) establish a central depository or depositories to receive and maintain for inspection by the parties evidentiary

Provided by Legislative Research Incorporated (800) 530-7613

material and specified documents that are not required by these rules to be served upon all parties; and

(7) schedule further pretrial conferences if appropriate.

(b) The coordination trial judge shall assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay. He may, for the purpose of coordination and to serve the ends of justice:

(1) order any coordinated action transferred to another court pursuant to Rule 1543;

(2) schedule and conduct hearings, conferences, and a trial or trials at any site within this state he deems appropriate with due consideration to the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; and the calendar of the courts; and

(3) order any issue or defense to be tried separately and prior to the trial of the remaining issues when it appears the disposition of any of the coordinated actions might thereby be expedited.

Rule 1542. Remand of action or claim

The coordination trial judge, upon the stipulation of all parties to a coordination proceeding or upon the basis of evidence received at a hearing ordered on his own motion or on the motion of any party to any coordinated action, may at any time remand a coordinated action or any severable claim in that action to the court in which the action was pending at the time the coordination of that action was ordered, provided that no action or severable claim in that action shall be remanded over the objection of any party unless the evidence demonstrates a material change in the circumstances that are relevant to the criteria for coordination as stated in Code of Civil Procedure Section 404.1, and these

Provided by Legislative Research Incorporated (800) 530-7613

changed circumstances are found to constitute a compelling reason to modify the order granting coordination.] If the order of remand requires that the action be transferred, the provisions of Rule 1543(b) shall be applicable to the transfer.

Rule 1543. Transfer of action or claim

(a) The coordination trial judge, on his motion or on the motion of any party to any coordinated action, may order any coordinated action or severable claim in that action transferred from the court in which it is pending to another court for a specified purpose or for all purposes. No action or claim shall be transferred over the objection of any party unless a hearing has been held upon 10 days' written notice served upon all parties to that action. At any hearing to determine whether an action or claim should be transferred, the court shall consider the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; and any other relevant matter.

(b) The order transferring the action or claim shall designate the court to which the action is transferred and shall direct that a copy of the order of transfer shall be filed in each coordinated action. The clerk of the court in which the action was pending shall immediately prepare and transmit to the court to which the action is transferred a certified copy of the order of transfer and of the pleadings and proceedings in that action and shall serve a copy of the order of transfer upon each party appearing in that action. The court to which the action is transferred shall file the action as if the action had been commenced in that court. No fees shall be required for such transfer by either court. If it is necessary to have any of the original pleadings or

Provided by Legislative Research Incorporated (800) 530-7613

other papers before the coordination trial judge, the clerk of the court from which the action was transferred shall, upon written request of a party to that action or of the coordination trial judge, transmit such papers or pleadings to the court to which the action is transferred, a certified copy thereof being retained. Upon receipt of an order of transfer, the court to which the action is transferred may exercise jurisdiction over the action in accordance with the orders and directions of the coordination trial judge, and no other court shall exercise jurisdiction over that action except as provided in this rule.

Rule 1544. Add-on cases

(a) A request to coordinate an add-on case shall conform to the requirements of Rule 1520 through 1523, except that such request shall be submitted to the coordination trial judge pursuant to Section 404.4 of the Code of Civil Procedure, with proof of mailing of one copy thereof to the Chaiman of the Judicial Council and with proof of service as required by Rule 1510. Within 10 days after such service any party may serve and submit a notice of opposition to such request. Thereafter, within 15 days after submitting his notice of opposition, the party shall serve and submit his points and authorities and affidavits in opposition to the request. Failure to serve and submit such points and authorities and affidavits may be a ground for granting the request to coordinate an add-on case.

(b) The coordination trial judge may order a hearing to be held on the request to coordinate an add-on case as provided by Rules 1527 and 1528 and may allow the parties to serve and submit additional written materials in support of, or in opposition to, the request. At any such hearing, the court shall consider the relative development of the actions and the work product of counsel, in addition to any other relevant matter. Any application for an order staying the

Provided by Legislative Research Incorporated (800) 530-7613

add-on case shall be made to the coordination trial judge in the manner provided by Rule 1514.

(c) An order granting or denying a request to coordinate an add-on case shall be prepared and served as provided by Rule 1529 and an order granting such request shall, upon filing, automatically stay all further proceedings in the add-on case as provided in Rule 1529.

Rule 1545. Termination of action

The coordination trial judge may terminate any coordinated action by settlement or final dismissal, summary judgment, or judgment, or may transfer such action so that it may be dismissed or otherwise terminated in the court where the action was pending when coordination was ordered. A certified copy of any order dismissing or terminating the action and of any judgment shall be transmitted to: (1) the clerk of the court in which the action was pending when coordination was ordered, who shall promptly enter any judgment and serve notice of entry of the judgment upon all parties to the action, and (2) the appropriate clerks for filing in each pending coordinated action. The judgment entered in each coordinated action shall bear the title and number that would be applicable to that action without regard to the coordination proceeding. Until the judgment in a coordinated action becomes final, all further proceedings in that action to be determined by the trial court shall be determined by the coordination trial judge; thereafter, unless otherwise ordered by the coordination trial judge, all such proceedings shall be conducted in the court where the action was pending when coordination was ordered. The coordination trial judge shall also specify the court in which any ancillary proceedings shall be heard and determined. For purposes of this rule, a judgment is final when it is no longer subject to appeal.

Provided by Legislative Research Incorporated (800) 530-7613

CHAPTER 5. ADMINISTRATION

Rule 1550. General administration by Administrative Office of the Courts

(a) Except as otherwise provided in these rules, all necessary administrative functions under this division shall be performed at the direction of the Chairman of the Judicial Council by a coordination attorney in the Administrative Office of the Courts. The coordination attorney shall at all times maintain for the Chairman of the Judicial Council a list of active and retired judges who are qualified and currently available to conduct coordination proceedings. The coordination attorney shall maintain at the San Francisco office of the Judicial Council a register of all coordination proceedings and a file for each such proceeding for public inspection during regular business hours.

(b) Each coordination proceeding shall be given a special title and number assigned by the coordination attorney, and thereafter all papers in that proceeding shall bear such title and coordination proceeding number.

Provided by Legislative Research Incorporated (800) 530-7613

LEON S. ALSCHULER
BENJAMIN F. SCHWARTZ
MELVYN B. FLIEGEL
MARSHALL B. GROSSMAN
IRVING L. HALPERN
DAVID C. BOGERT
BARRY L. COLLEN
W. Z. JEFFERSON BROWN
GERALD B. KAGAN
ALAN G. BUCKNER
BRUCE WARNER
BRIAN KAUFMAN
LESLIE S. KLINGER
FRANK M. KAPLAN

LAW OFFICES OF
SCHWARTZ & ALSCHULER
1880 CENTURY PARK EAST, SUITE 1212
CENTURY CITY
LOS ANGELES, CALIFORNIA 90067

OF COUNSEL
RICHARD H. MILLEN
BURNETT L. ESSEY

TELEPHONES
(213) 277-1226
(213) 879-1226

CABLE ADDRESS
SAGELAW

OUR FILE NO.

August 30, 1973

RECEIVED
AUG 30 1973
ADMINISTRATIVE OFFICE
OF THE COURTS (S. F.)

Ralph N. Kleps, Director
Judicial Council of California
Administrative Office of the Courts
4200 State Building
San Francisco, California 94102

Re: Proposed Coordination Rules

Dear Mr. Kleps:

Thank you for your letter of May 30, 1973, and for the opportunity of commenting upon the proposed coordination rules. My comments are as follows:

1. Rule 1504, at page 9, states:

> "No stipulation for an extension of time shall be allowed unless consented to by the assigned judge."

I assume that this statement refers to an extension of time to perform acts required by these rules. If so, it should be so stated. If not, then I believe that the rules are too strict and it will impede attorneys from extending to one another the ordinary courtesies when time deadlines may not be met.

2. Rule 1507(a), at page 10, implies in the second sentence that liaison counsel may be appointed by the "coordination motion judge". I think this is a serious mistake. The function of the coordination motion judge should be to determine as expeditiously as possible whether coordination is appropriate, thus permitting an assignment to the coordination trial judge. Selection of liaison counsel in the absence of agreement by the parties, is often one of the most sensitive and difficult decisions facing the trial judge. Placing this responsibility, even preliminarily, on the coordination motion judge is likely to detract him and delay

Provided by Legislative Research Incorporated (800) 530-7613

him in the making of his principal decisions. Furthermore, no good purpose appears to be served by requiring the appointment of liaison counsel prior to the determination of the coordination question. Appointment of a San Diego attorney as liaison counsel by the coordination motion judge in the face of actions which are likely to be assigned to Sacramento makes little sense. In summary, appointment of liaison counsel should only be made by the coordination trial judge. The rule should so state.

3. Rule 1510, page 12, the last sentence seeks to cure the problem with an inappropriate remedy. It is stated that the failure to serve may give rise to a basis for opposing coordination or moving to vacate an order of coordination. If one is in a position to oppose coordination, then presumably he has adequate notice whether or not he has been served. To interject this as a ground for opposing coordination makes little sense. And giving such a party the right to vacate a previously made order of coordination seems too strong a remedy. It would seem to me to make far more sense to give the coordination motion judge the authority to order dismissed, without prejudice, any defendant who has not been served in the absence of a showing of excuse for such non-service. My primary concern, frankly, is that once the coordination motion judge has made his decision, that decision should be respected and grounds for vacating it should not be lightly created.

4. Rule 1520, page 14, speaks of a motion seeking commencement of coordination proceedings being filed in the trial court. Rule 1521, page 14, speaks of the petition for coordination being submitted to the Chairman of the Judicial Council. As I read the rules, these procedures are cumulative. In other words, if the presiding judge or sole judge declines to transmit the request to the Chairman of the Judicial Council, a litigant still has the remedy of filing a petition for coordination under Rule 1521. Or, a petition for coordination under Rule 1521 could be filed in the absence of a motion in the trial court. I hope that this is an accurate construction. My concern is that a party have the right to petition for coordination even if the presiding judge or sole judge declines to transmit the request to the Chairman of the Judicial Council.

5. Rule 1520, page 14, gives the court the opportunity of staying "an action" for up to thirty days. This

Provided by Legislative Research Incorporated (800) 530-7613

sentence is fraught with problems. I have no objection to a stay for a maximum period of thirty days (the shortness of the stay obviates much of the danger of a blanket staying order) but I believe this power should be exercised within certain conditions. For one, no such stay should be granted unless all other related actions pending in the same court are similarly stayed for the same thirty day period. This will avoid "case shopping" by defendants. Furthermore, such a stay or stays should not affect ancillary remedies. Many times it is necessary to obtain an injunction to prevent the destruction, alteration, or disposal of books and records. The presiding judge or sole judge should have the discretion to entertain ancillary remedies consistent with the staying of the various lawsuits.

6. Rule 1521(d), page 15, speaks to the problem of a petition for coordination being filed as a delaying tactic. I believe there should be some affirmative statement requiring the filing of a petition for coordination as soon as practicable following the existence of grounds giving rise to the right to file such a petition. A petition filed during the active discovery of pre-trial stages of a lawsuit may be just as disruptive, if not more so, as a petition filed on the eve of trial.

7. Rule 1527, page 18, recognizes the importance of placing some limitations and restrictions upon stay orders. Stay orders are potentially dangerous. They are easy to grant and often difficult to lift. The ability of the motion judge to extend stay orders pending determination of the petition for coordination creates the potential for delay in making the coordination decision. I strongly suggest that additional restrictions upon the utilization of stay orders be written into the rules and that it expressly be stated that stay orders should be issued with extreme caution and restraint.

8. Rule 1531, page 20, which provides that an order granting a petition for coordination of any action shall automatically stay all further proceedings in that action, apparently fails to take into consideration the impact of the five year dismissal rule. (California Code of Civil Procedure §583(b).) Perhaps the matter could best be handled by having the rules provide that participation by any party in any coordination proceedings shall be deemed to constitute their stipulation for an extension of the five year period contemplated by §583(b) for a period of time

Provided by Legislative Research Incorporated (800) 530-7613

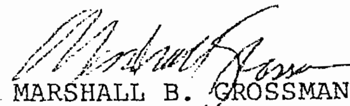
equal to the time that the particular action is stayed under any provision of the coordination rules. This would preclude the inadvertent dismissal with prejudice of one of these lawsuits. Perhaps some portion of the law would have to be changed or made more specific to make it clear that the time period contemplated by §583 begins to run from the date coordination is ordered and a coordination judge assigned. I must confess that I have not fully thought out all of the ramifications of this problem. I am, however, concerned that the five year period might run on one of these cases when the matter is, in fact, being diligently prosecuted in the coordination proceedings. It appears to be a trap for the unwary, particularly when the subject action has been stayed in deference to the coordination proceedings.

9. Rule 1541, page 22, omits to state, what I trust is implicit, namely, that the coordination trial judge is empowered to try the cases.

10. No mention is made of the filing of affidavits of prejudice under §170.6. I think it would be appropriate to address the question of the timeliness of such an affidavit when directed to the coordination motion judge or the coordination trial judge. Perhaps an amendment to §170.6 would be appropriate.

Thank you again for the opportunity to be of some assistance in this project.

Respectfully yours,



MARSHALL B. GROSSMAN

MBG:fb

Provided by Legislative Research Incorporated (800) 530-7613

LAW OFFICES OF
PROCOPIO, CORY, HARGREAVES AND SAVITCH
NINETEENTH FLOOR
SOUTHERN CALIFORNIA FIRST NATIONAL BANK BUILDING
530 B STREET
SAN DIEGO, CALIFORNIA 92101
TELEPHONE 238-1900

ALEC L. CORY
HARRY HARGREAVES
EMMANUEL SAVITCH
JOHN H. BARRETT
GERALD E. OLSON
PAUL B. WELLS
RONALD R. HOUSE
GERALD M. DAWSON
TODD E. LEIGH
JEFFREY ISAACS
WILLIAM R. POTTER
ROBERT JAMES BERTON
RICHARD B. MUNKS
DENNIS HUGH McKEE

AREA CODE 714
TELEPHONE 238-1900

A.T. PROCOPIO
OF COUNSEL

September 13, 1973

Judicial Council of California
4200 State Building
San Francisco, California 94102

Re: Proposed Coordination Rules: Title 4. Special Rules for Trial Courts: Division II: Rules for Coordination of Civil Actions Commenced in Different Trial Courts

Gentlemen:

On pages 450 through 461 of the California State Bar Journal, Volume 48, No. 4 (July/August, 1973), the proposed court rules for coordinating civil actions pending in different trial courts are published for comment by members of the Bar.

In light of my considerable emphasis upon civil litigation invovling multiple parties since my admission to the Bar in 1960, I am taking the liberty to comment on the proposed rules, most particularly proposed Rule 1507 "Liaison Counsel".

I have been involved in a number of cases in which an attorney for one party, usually a defendant, has accepted a designation as "Liaison Counsel" for the parties on his side of the case. Often that attorney is expected to act as spokesman for his side, as well as performing the functions of a printer and mail clerk.

In my opinion, the use of counsel for a party to relieve the court and other counsel, particularly counsel for the other side or for parties who have adverse interests to that of the client of the Liaison Counsel, is most unwise and very probably improper. First, each attorney owes his undivided loyalty to his client and to his client alone, consistent with his obligations as an officer of the court. He should not

Provided by Legislative Research Incorporated (800) 530-7613

be placed in a position where he might have to sacrifice a legitimate interest of his client to the expediency of having a single spokesman for multiple parties with similar but rarely identical interests. His client has not retained him and should not be required to pay him to be a representative of any party other than the client or to be a functionary of the court. Necessarily, however, any attorney must pass on to his client the costs of his representation of all of the parties as well as the incidental costs of his office overhead involved in the paper shuffling which inevitably accompanies the position of Liaison Counsel.

The comment to Rule 1507 states that one of the purposes of the appointment of Liaison Counsel is to "relieve the petitioner of the burden of serving numerous papers in cases involving multiple parties". No explanation is given as to why that burden should be shifted from the petitioner to any other party. I know of no reason why the party who causes a great many other parties to appear in court, either through the filing of a complaint naming multiple defendants or a counterclaim naming multiple third parties, should be privileged by having a significant portion of his burden borne by his unwilling adversaries. I am presently involved in representing a defendant in a class action in which in excess of 150 defendants were named for no good reason. Approximately one year after the complaint was filed plaintiffs voluntarily dismissed all but seventeen of the defendants. If the plaintiff's attorneys had been able to shift the paper work burden to the other side, I have no doubt but that all of the defendants would remain in what appears to be a completely meritless case at great, great expense to the defendants and the courts.

I also question the power of a court to appoint counsel to in any way act on behalf of a party who has retained its own counsel and does not desire to have any other attorney act in its behalf. I further believe that an attorney who accepts an appointment as Liaison Counsel, whether willingly or unwillingly, lays himself and his partners open to malpractice claims from the other parties on his side of the litigation in amounts and numbers far in excess of any which he would wittingly be exposed to.

Provided by Legislative Research Incorporated (800) 530-7613

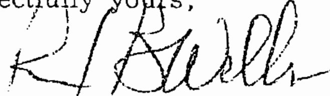
I understand that it is most convenient for a court or a party to be able to communicate with a single attorney as representative for multiple parties and thus shift significant burdens to that attorney. I do not believe that such convenience forms a sufficient basis for the imposition upon an unwilling attorney of the extremely onerous burdens which I have attempted to outline above.

In my opinion, proposed Rule 1507 will directly cause the institution of numerous actions naming great numbers of defendants for no particular reason other than the desire for publicity or to obtain cost of defense settlements or both. It is a rare corporation that would not pay $1,000.00 or $1,500.00 at the outset of what appears to be complex and extended litigation in order to avoid the necessity of defense of even meritless claims. To facilitate the naming of hundreds of corporate defendants in order to seek large numbers of small settlements is clearly undesirable.

It has been my experience in most multi-party cases in which I have been involved that counsel will voluntarily work out methods to lighten the court's burden insofar as is possible consistent with their obligations to their clients. Often, counsel including myself have voluntarily worked out procedures which include Liaison Counsel for some purposes. In all such cases, the discretion to institute a liaison or other system has been retained with counsel and those who for any reason did not wish to participate in the joint effort were not and could not be required to do so. That is the only fair and proper means to handle multiple party situations.

I should not have devoted as much time as I have to this comment if I did not feel very strongly about it. I urge that the Judicial Counsel eliminate those portions of proposed Rule 1507 which purport to give a judge the right to appoint Liaison Counsel over the objection of any party.

Respectfully yours,



PAUL B. WELLS, of
Procopio, Cory, Hargreaves
and Savitch

PBW: vc

cc: Mr. Herbert Rosenthal,
State Bar of California

Provided by Legislative Research Incorporated (800) 530-7613

J. STANLEY MULLIN
GEORGE R. RICHTER, JR.
GORDON F. HAMPTON
MYRL R. SCOTT
FRANK SIMPSON, III
WILLIAM A. MASTERSON
WESLEY L. NUTTEN, III
DAVID A. MADDUX
MERRILL R. FRANCIS
STEPHEN C. TAYLOR
JOHN D. NUSSEY
THOMAS R. SHEPPARD
JOHN A. STURGEON
DON T. HIBNER, JR.
PAUL M. REITLER
PIERCE T. SELWOOD
THOMAS C. WATERMAN
RICHARD L. LOTTS
JOSEPH G. GORMAN, JR.
WILLIAM M. BURKE
PRENTICE L. O'LEARY

SHEPPARD, MULLIN, RICHTER & HAMPTON
ATTORNEYS AT LAW
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
(213) 620-1780
CABLE SHEPLAW

MICHAEL W. RING
CHARLES E. McCORMICK
DAVID J. REBER
DAVID S. BRADSHAW
ROBERT JOE HULL
TERENCE M. MURPHY
JOEL R. OHLGREN
ALLAN I. GROSSMAN
FINLEY L. TAYLOR
EDWARD J. THOMAS
JOHN D. BERCHILD, JR.
LAURENCE K. GOULD, JR.
CHARLES H. MACNAB, JR.
CARLTON A. VARNER
RONALD M. BAYER
TERRY G. TAYLOR
ROY G. WUCHITECH
THOMAS C. NELSON
JOHN J. MOLLOY, III
JOSEPH M. MALINOWSKI

JAMES C. SHEPPARD
(1898-1964)

September 19, 1973

RECEIVED
SEP 24 1973
ADMINISTRATIVE OFFICE
OF THE COURTS (S. F.)

No. 6966

Mr. Ralph N. Kleps, Director
Judicial Council of California
Administrative Office of the Courts
4200 State Building
San Francisco, California 94102

Re: Proposed Coordination Rules

Dear Mr. Kleps:

I have your letter of May 30, 1973 with the request that I comment on the enclosed Coordination Rules.

My comments are limited to the matters contained on page 14 of the Proposed Rules, specifically Rules 1520 and 1521.

In my opinion, Rule 1520 vests too much discretion in the presiding judge or sole judge on the issue of transmitting a request for coordination to the Chairman of the Judicial Council. While I would be hesitant to impose a mandatory requirement that all such motions for coordination be transmitted to the Chairman of the Judicial Council, I would prefer to see the following language utilized in lieu of the first phrase of the second sentence of Rule 1520:

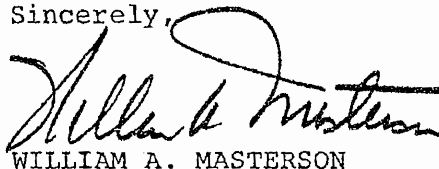
> "Upon receipt of any such motion, the presiding judge or sole judge may transmit the request to the Chairman of the Judicial Council and shall order the moving party forthwith . . . "

Provided by Legislative Research Incorporated (800) 530-7613

It may be that my concern is needless if the procedures contemplated by Rules 1520 and 1521 are cumulative. To put it another way, my understanding of the Rules is that if the presiding judge or sole judge declines to transmit a coordination request to the Chairman of the Judicial Council, a Petition for Coordination may still be filed under Rule 1521. If such is the case, then the language suggested above may be unnecessary. However, if the procedures of Rules 1520 and 1521 are not cumulative, then I would respectfully request that the suggested language above be inserted.

Thank you for the opportunity to comment on the Rules.

Sincerely,



WILLIAM A. MASTERSON

WAM/dnc

Provided by Legislative Research Incorporated (800) 530-7613

LAW OFFICES OF
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK
CROCKER PLAZA
ONE POST STREET
SAN FRANCISCO 94104
TELEPHONE
AREA CODE 415
986-1310
CABLE "MORELO"
TELEX: 34-0154

WILLIAM L. HOLLOWAY
ROBERT D. RAVEN
GIRVAN PECK
GEORGE F. CLINTON
DOUGLAS C. WHITE
L. MARTIN BLAHA
MELVIN R. GOLDMAN
THOMAS D. TERRY
JOHN M. KELLY
THOMAS A. LEE, JR.
JAMES J. GARRETT
NOEL W. NELLIS
HALEY J. FROMHOLZ
STEPHEN D. RICHARDS
GERALD V. NIESAR
F. BRUCE DODGE
PRENTISS WILLSON, JR.
MARC P. FAIRMAN
L. RICHARD FISCHER
CARL J. SENEKER, II
JAMES B. HODGE
ARTHUR J. SHARTSIS
STEPHEN S. DUNHAM
MICHAEL J. GREENE
CHARLES R. FARRAR, JR.
STUART J. OFFER
CHARLES B. CRAVER
JOHN PAGE AUSTIN
FRANKLIN C. LATCHAM
MARSHALL L. SMALL
WILLIAM R. BERKMAN
DAVID E. NELSON
PAUL E. HOMRIGHAUSEN
JAMES C. PARAS
STANLEY A. DOTEN
RICHARD S. KINYON
ROLAND E. BRANDEL
DAVID E. BAUDLER
JAMES E. MERRITT
ALEXANDER B. AIKMAN
CARL A. LEONARD
GRANTLEN E. RICE
RALPH C. ALLDREDGE
JAMES H. DeMEULES
NED A. FINE
MARK REUTLINGER
ROBERT G. WERNER
JOSEPH E. TERRACIANO
RAYMOND L. WHEELER
LEE M. MODJESKA
CARY L. KLAFTER
ELLEN S. GEORGE
MICHAEL A. HAINES
WILLIAM H. ALSUP

A. F. MORRISON (1881-1921)
J. F. SHUMAN (1909-1961)
ROLAND C. FOERSTER (1916-1961)
HERBERT W. CLARK (1917-1964)
EDWARD HOHFELD (1907-1966)

J. HART CLINTON
W. T. FITZGERALD
C. COOLIDGE KREIS
J. W. McCRYSTLE
COUNSEL

October 3, 1973

Judicial Council of California
4200 State Building
San Francisco, California 94102

Gentlemen:

I wish to comment on the proposed court rules for coordinating civil actions. I note from the article in the State Bar Journal discussing the rules that comments were due by October 1. I hope the tardiness of my response will not preclude consideration of my remarks.

The proposed rules of course have a great deal in common with Section 1407 of Title 28 of the United States Code dealing with multidistrict litigation. It is my experience with cases being pretried pursuant to the provisions of that section which prompts my remarks. I am concerned with what I believe is an overly broad definition of liaison counsel, contained in proposed Rule 1501(l). I am troubled by the language which I have italicized in Rule 1501(l):

> "'*Liaison counsel' means an attorney of record for a party to an included action or a coordinated action who has been appointed by an assigned judge to act in all respects as attorney of record for all parties on a side*, provided that the assigned judge may direct such liaison counsel to perform only specifically designated functions as attorney of record for that side and that each attorney on that side shall serve as attorney of record for the party he represents for all purposes other than the specifically designated functions."

Provided by Legislative Research Incorporated (800) 530-7613

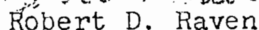
Federal judges generally have been very careful, in my opinion, to confine narrowly the duties of liaison counsel. Usually liaison counsel's duties have been limited to receiving service of papers or communications from opposing counsel or the court. Federal judges have appreciated that defense counsel ordinarily are placed at the same counsel table not by their choice or their client's choice but, rather, because plaintiff has filed an action in which he has joined the defendants together, often alleging a conspiracy among them. Although defendants are forced to present a common defense, normally there are conflicts among them. It is necessary, therefore, that defendants be separately represented in multi-defendant cases. By necessity, and as a concession to the shortness of life, each counsel in a multi-defendant case will have to "give up" some of the representation of his client. All defense counsel are not going to present argument on each motion, although each probably would make a better argument for his client than can be made by one defense attorney for all defendants collectively. But such restrictions should be minimized and result from consent of all counsel on a side rather than coercion by the court.

Of course, it is easier for the court to deal with one attorney than to deal with several. Consequently, the judge will be tempted to centralize control in the liaison counsel. I fear that the overly broad definition of liaison counsel in Rule 1501 (1), when coupled with the temptation referred to above, will result in the undue restriction of an attorney's right and duty to represent his client and, more importantly, the right of a client to be represented by counsel of his choice who owes the client his undivided loyalty.

I enclose a copy of an article by Miles G. Seeley entitled, "Procedures For Coordinated Multi-District Litigation: A Nineteenth Century Mind Views With Alarm." This article appears in 14 Antitrust Bulletin 91 (1969. Mr. Seeley, an outstanding Chicago trial lawyer, expresses far better than I can the need to guard against "depersonalizing the profession of advocacy and rendering increasingly difficult effective communication by parties with the courts in which their rights are adjudicated."

I suggest that Rule 1501(1) be redrawn to limit narrowly the duties of liaison counsel.

Sincerely,



Robert D. Raven

RDR:vc
cc: Herbert Rosenthal, Esq.

KADISON, PFAELZER, WOODARD, QUINN & ROSSI
LAWYERS
611 WEST SIXTH STREET · TWENTY-THIRD FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 625-1251

MORRIS PFAELZER
STUART L. KADISON
ALAN R. WOODARD
JOHN J. QUINN
THOMAS J. McDERMOTT, JR.
RUSSEL I. KULLY
ANTHONY J. ROSSI
JOSEPH A. MURRAY, JR.
RICHARD S. COHEN
J. A. URIBE
RICHARD L. BACON
KEITH H. GILL
RICHARD C. SMITH
RICHARD K. SIMON
SAMUEL G. JACKSON, JR.
PAUL R. WALKER
RICHARD T. WILLIAMS
ELLEN B. FRIEDMAN
J. W. MALSBURY
NORMAN L. WILKY, JR.
STEWART S. MIMS
WILLIAM VETTER
STEVEN J. STANWYCK
OF COUNSEL
MILES FLINT

October 8, 1973

Hon. Donald R. Wright, Chairman
Judicial Council of the State
of California
4200 State Building
455 Golden Gate Avenue
San Francisco, California 94102

Re: Proposed Rules for Coordination of Civil Actions Commenced in Different Trial Courts

Our Dear Mr. Chief Justice:

Please forgive the tardiness of these comments on the proposed Rules for Coordination of Civil Actions. By and large, the scheme of the Rules appears excellent, though overdue. In two respects, however, we believe the Rules may prove deficient.

Proposed Rules 1507 and 1510 provide for the appointment of liaison counsel. The duties of liaison counsel are nowhere specified in the proposed Rules. From Rule 1510, we infer that the liaison counsel is to duplicate and serve upon all his co-counsel whatever papers may be served upon him by opposing parties. In a typical class action, with numerous defendants and extensive preliminary proceedings, the burden upon liaison counsel may assume monumental proportions. Not only must counsel find time to represent his own client adequately, he must duplicate lengthy memoranda, affidavits, motions, and interrogatories. Despite the number of pages to be reproduced, he must be prompt in their delivery to co-counsel in order to minimize his incursion upon their time to respond to opposing parties.

Necessarily, the burdens of time and expense upon liaison counsel will make lawyers hesitant to accept the post, and clients will be justifiably concerned at the dilution of their representation when counsel take on this burden. Certainly, this has been our experience with federal class actions.

Provided by Legislative Research Incorporated (800) 530-7613

We think it would be preferable if each party were responsible for serving on every other party all papers. The role of liaison counsel should be limited to communications with the Court. For example, if stipulated extensions of time to respond to motions were necessary, liaison counsel would coordinate circulation and presentation of the stipulations; or, if the Court wished to consult with counsel in changing a hearing date, it might contact liaison counsel. He would then be responsible for communications with other co-counsel. This is a smaller role for liaison counsel than is contemplated under the proposed Rules. We suggest it is a more practicable role, and a role that will cause less anxiety to clients.

Perhaps equally important, a smaller role for liaison counsel may lead to a savings of time in litigation. It has been our experience in federal multidistrict actions that the delay in funneling service of all memoranda through one counsel's beleaguered reproduction and mailing facilities results in stretching out the time for hearing motions and resolving problems of discovery in extraordinary fashion. The delay mounts almost logorithmically if several memoranda and affidavits must be reproduced within the same few short days. It is our belief that if each party is responsible for the service of its papers on all other counsel the proceedings will move more swiftly and without bottlenecks.

Our second concern is with the method for "adding on" other cases to actions that have already been "coordinated" pursuant to proposed Rule 1544. The procedure for "adding on" cases is similar to that for "coordination" with two significant exceptions: The time for filing opposition papers is shorter, and a hearing is not mandatory.

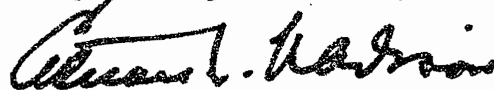
This disparity in procedures may lead to abuse. If counsel in case A wished the coordination of cases A, B, C, and D, but sensed opposition might arise in case D, he might move for the coordination of cases A, B, and C only. In due course, the petition for coordination would be granted, wholly without notice to counsel in case D. Sometime later, the same counsel might move to "add on" case D, and the angry opposition would have far less time to prepare itself to resist the motion and, may have no opportunity to argue its position in a hearing. If the procedure for "adding on" were the same as for "coordination," the incentive for abuse would be reduced to a minimum.

Provided by Legislative Research Incorporated (800) 530-7613

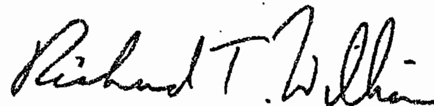
Hon. Donald R. Wright
October 8, 1973
Page Three

We appreciate your consideration of these comments.

Respectfully submitted,



STUART L. KADISON



RICHARD T. WILLIAMS

SLK/RTW/spp

cc: Herbert Rosenthal

Provided by Legislative Research Incorporated (800) 530-7613

MARCUS MATTSON
J. PHILLIP NEVINS
REED A. STOUT
R. F. OUTCAULT, JR.
ROBERT HENIGSON
RICHARD D. DELUCE
THOMAS E. WORKMAN, JR.
LEO J. PIRCHER
JOHN G. WIGMORE
CHARLES L. ROGERS
KENNETH B. WRIGHT
H. NEAL WELLS III
JOHN J. BARDET
ALEXIS A. FAFENRODT
RICHARD L. FRUIN, JR.
ANTHONIE M. VOOGD
ORVILLE O. ORR, JR.
WILLIAM K. DIAL
PAUL R. CAUSEY
DOLORES J. WATSON
EDWIN W. DUNCAN
STEPHEN T. SWANSON
BRUCE R. CORBETT
WILLIAM A. PLOURDE, JR.
JOHN F. BUSETTI
ROBERT P. MALLORY
J. RICHARD MORRISSEY
ALAN I. WHITE
WILLIAM E. PRACHAR
F. JOHN NYHAN
KENNETH K. OKEL
PETER W. HANSCHEN

LAW OFFICES OF
LAWLER, FELIX & HALL
800 STANDARD OIL BUILDING
605 WEST OLYMPIC BOULEVARD
LOS ANGELES, CALIFORNIA 90015
TEL. (213) 620-0060

CABLE ADDRESS
"OSLAW"
OSCAR LAWLER
1898-1968
MAX FELIX
1922-1964
OF COUNSEL:
JOHN M. HALL
BRENTON L. METZLER

October 10, 1973

RECEIVED
OCT 15 1973
ADMINISTRATIVE OFFICE
OF THE COURTS (S. F.)

Mr. Herbert M. Rosenthal
State Bar of California
601 McAllister Street
San Francisco, California 94102

Re: Proposed Judicial Council Rules Under
CCP 404 - 404.8

Dear Herb:

Though I have been looking for their anticipated publication, these proposed rules (State Bar Journal July - August 1973, page 450) only came to my attention within the last few days. I write to suggest that any rules to implement C.C.P. 404 - 404.8 deserve careful scrutiny, perhaps to a greater extent than the legislation received prior to its enactment.

While it was presented to the Legislature as approved "in principle" by the Judicial Council, the legislation itself never received explicit approval of the Judicial Council. The Bar generally was never notified that the legislation was pending. I remain unconvinced of the necessity for the legislation or the wisdom of it.

Basically, Sections 404 - 404.8 and the proposed rules seem to proceed upon the premise that where several actions are conglomerated and justice dispensed "wholesale", litigation should proceed unencumbered with the usual procedural safeguards. It is said (State Bar Journal page 451) that the intent is to give "coordination" judges "the maximum permissible authority and discretion to adopt any reasonable procedure which may be appropriate in actually disposing of coordinated actions", in order that "a trial judge may liberally determine the best means of handling" the coordinated actions, all apparently without prescribed standards or safeguards except those which the judge at the moment feels are "reasonable" or "best." Too often this kind of a situation results in pressures which are deemed desired to promote the "likelihood of settlement" which the legislation (Section 404.1) mentions.

While I doubt that the Legislature or the Governor appreciated the fact, the proposed rules now seem to make it clear that what is called for is the creation of a new statewide "coordination court" (or a superior, superior court) composed of "qualified" judges on a list to be maintained by

Provided by Legislative Research Incorporated (800) 530-7613 COPY Page 50 of 111

the "coordination attorney" under Rule 1503(a). There is no specification as to how the judges' qualifications are to be determined. Perhaps it is intended that the judges on the list will be those who are most inclined to "liberally determine" what rules are to be applied in the handling of the cases.

The "coordination court" will have uncommon freedom in determining where the cases will be tried, the procedures to be followed before and at the trial, and what reviewing court will handle the appeal. In addition, unless the parties agree, the court will have unlimited authority to appoint "liaison counsel ... to act in all respects as attorneys of record for all parties." (Rules 1501(l) and 1507)

In discussing considerations like those used for the purpose of justifying these proposals, Judge Medina in the Eisen case decided May 1, 1973, said:

> "But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical

Provided by Legislative Research Incorporated (800) 530-7613 COPY Page 51 of 111

fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach."

And he continued in a footnote:

"The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists." Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." ... Justice Frankfurter also remarked that "fairness of procedure is 'due process in the primary sense ....' It is ingrained in our national traditions." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005.

Sincerely,

MARCUS MATTSON

cc: Mr. Ralph N. Kleps
Thomas M. Jenkins, Esq.
Richard R. Rogan, Esq.
William J. Schall, Esq.
Forrest A. Plant, Esq.

Provided by Legislative Research Incorporated (800) 530-7613

COPY

THE STATE BAR OF CALIFORNIA

LEONARD S. JANOFSKY, *President*
LIONEL B. BENAS, *Vice-President*
RICHARD A. MCCORMICK, *Vice-President and Treasurer*
JACK M. MCPHERSON, *Vice-President*
WILLIAM J. SCHALL, *Vice-President*
JOHN S. MALONE, *Secretary*
SAN FRANCISCO
F. LAMAR FORSHEE, *General Counsel*
SAN FRANCISCO
LILY BARRY, *Assistant Secretary*
LOS ANGELES
MARY G. WAILES, *Assistant Secretary*
SAN FRANCISCO
KARL E. ZELLMANN, *Assistant Secretary*
SAN FRANCISCO

1230 WEST THIRD STREET
LOS ANGELES 90017
TELEPHONE 482-8220
AREA CODE 213

BOARD OF GOVERNORS
BRENT M. ABEL, *San Francisco*
LIONEL B. BENAS, *Oakland*
JOSEPH W. COTCHETT, *San Mateo*
MICHAEL DI LEONARDO, *Sunnyvale*
JOANNE M. GARVEY, *San Francisco*
ARTHUR N. HEWS, *Santa Ana*
GEORGE R. HILLSINGER, *Los Angeles*
SETH M. HUFSTEDLER, *Los Angeles*
LEONARD S. JANOFSKY, *Los Angeles*
HENRY H. KILPATRICK, *Vallejo*
RICHARD A. MCCORMICK, *Fresno*
JACK M. MCPHERSON, *Chico*
MARK P. ROBINSON, *Los Angeles*
WILLIAM J. SCHALL, *San Diego*
HOWARD B. WIENER, *West Covina*

July 27, 1973

Mr. Richard Frank
Deputy Director
Administrative Office of the Courts
4200 State Building
San Francisco, California 94102

Subject: Proposed Rules of Procedure for Coordination of Civil Actions Having Common Questions of Fact or Law, Pending in Different Courts

Dear Dick:

Herewith a revised version (dated July 27, 1973) of the "State Bar Proposed Rules of Procedure for Coordination of Actions Under CCP Sections 404-404.7". This is the product of a special reviewing committee appointed by the Board of Governors after the Judicial Council published its proposed rules for comment in May. The enclosure supercedes the May 4, 1973 version forwarded with Mr. Rosenthal's letter of May 10 to Mr. Kleps.

As you will note in reviewing the enclosure, many concepts and provisions have been borrowed from the Judicial Council's proposed rules. New language is underscored and where Judicial Council material is involved, the number of the section from which it was taken follows in brackets. The changes appear at the following places:

Rule 2, p. 3 (entirely new - succeeding rules renumbered)

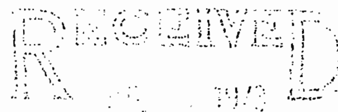
Rule 4(e), p. 8

Rule 7(a)&(d), pp. 11-12

Rule 8(b), p. 13

Rule 11, p. 16

Rule 15(a)&(b), p. 20



RECEIVED 1973
ADMINISTRATIVE OFFICE OF THE COURTS

Rule 16(d)&(e), pp. 21-22

Rule 17(b), p. 23

Rule 19(g), p. 27 (deleted - following subdivisions renumbered)

Rule 20, p. 28 (entirely new - succeeding rules renumbered)

Rule 21(b), p. 29

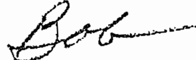
Rule 22, p. 30

Rule 23, pp. 31-32 (entirely new)

As I told you in our telephone conversation yesterday, I have been authorized to forward the enclosure directly to you prior to review by the Board of Governors, with the request that a meeting be arranged between the members of the State Bar committee (Everett B. Clary, Ferdinand F. Fernandez, Morris Pfaelzer and Peter J. Samuelson) and representatives of the Council's Superior Court Committee. It would be the purpose of the meeting to review and synthesize the State Bar and Judicial Council proposals and attempt to reach agreement as to any areas of difference.

I would appreciate your letting me know as soon as you can whether the idea of a meeting is acceptable. If it is, we may then arrange a time and place convenient to those involved.

Sincerely,



Robert M. Sweet
Staff Attorney

RMS:pf
Enclosure
cc: Herbert M. Rosenthal, Esq. - w/enc.

Provided by Legislative Research Incorporated (800) 530-7613

C O P Y July 27, 1973

STATE BAR PROPOSED
RULES OF PROCEDURE FOR COORDINATION
OF ACTIONS UNDER CCP SECTIONS 404-404.7

Rule 1. Definitions

As used in these rules, the following terms have the following meaning:

(a) All references in these rules to Section numbers are to the numbered sections of the Code of Civil Procedure.

(b) The term "Originating Court" means a court that makes a request for coordination pursuant to Section 404 or 404.4, or in which a party moves the court to make such a request.

(c) The term "Assigned Judge" means the judge assigned pursuant to Section 404 to determine whether an action should be coordinated.

(d) The term "Appointed Judge" means the judge assigned pursuant to Section 404.3 to hear and determine the coordinated actions. An appointed judge shall also hear requests for coordination made pursuant to Section 404.4.

(e) The term "Complaint" includes any cross-complaint filed in an action.

(f) The term "Plaintiff" includes any cross-complainant if there be a cross-complaint on file in the action.

(g) The term "affidavit" includes declarations.

(h) The term "designated clerk" means the clerk of the superior court of the county in which the site or sites designated for hearing the coordinated actions are located. If such sites are located in more than one county, the "designated clerk" shall be the clerk designated by the "Appointed Judge."

Rule 2. General Law Applicable Unless Otherwise Provided

Except as otherwise provided in these rules, all provisions of law applicable to civil actions generally shall apply to proceedings under these rules. [1505(a), modified]

Rule ~~2~~ 3. Who May File A Request for Coordination

A request for coordination of an action pursuant to Section 404 or 404.4 may be filed by either of the following:

(a) The presiding or sole judge of the court in which the action is pending:

Provided by Legislative Research Incorporated (800) 530-7613

(i) On the Court's own motion; or

(ii) On the motion of any party to the action made pursuant to Rule 4.

(b) All parties plaintiff or defendant to an action sought to be coordinated.

Rule 3 4. Initiation Of Request In The Originating Court On Motion Of Less Than All Parties

(a) Any party to an action pending in any municipal or superior court may, subject to the provisions of this Rule 4, move the court for an order that a request for coordination be made pursuant to Section 404 or 404.4. Except as hereinafter otherwise provided, any such motion shall be noticed, briefed and heard in the same manner as motions generally in the court where the action is pending, except as may be otherwise provided by local rules for motions of this nature not inconsistent with these Rules. Such motion may be made at any time following commencement of the action.

(b) The party making the motion shall serve notice thereof, together with all supporting papers, on all parties who have appeared in the action. In addition:

(i) If the plaintiff is the moving party, he must serve the summons and complaint and the notice of the motion and all supporting papers upon any defendant who has not theretofore been served or appeared in the action, or he must file an affidavit stating why he has not done so and why the motion may be appropriately heard without notice to such defendant.

(ii) If a defendant is the moving party, and if any person named as a defendant in the action has not theretofore been served or appeared in the action, the notice of motion and supporting papers must be served on all parties who have appeared not less than 20 days before the hearing date as designated in the notice, and the plaintiff shall, within 10 days of the service of the notice of motion, file an affidavit stating that he has served the summons and complaint and the notice and all supporting papers on each defendant who has not been served or appeared, or stating why he has not done so and whether the motion may be appropriately heard without notice to such defendant. At the time of serving such papers on the plaintiff the moving defendant shall supply the plaintiff with sufficient copies of his notice and supporting papers to serve all defendants who have not then appeared.

(c) The party who makes the motion shall serve and file the following papers with the notice of motion:

(i) A list of each other action with which it is proposed to coordinate the action, identified by court, number and title, the name of each party to each such action, the name and address of counsel for each such party who has appeared by counsel, and the address given for service of process by each such party who has appeared in propria persona.

(ii) All papers upon which the motion will be based, including argumentative and evidentiary material, other than papers already on file in the action.

(d) Papers filed in support of and in opposition to coordination of the actions shall set forth separately material on each of the following:

(i) Each question of fact and each question of law claimed to be common to the actions proposed for coordination, and whether such question is predominating and significant to the litigation.

(ii) Each question of fact and each question of law that is involved in any of the actions proposed for coordination that is not common to all said actions.

(iii) The convenience of inconvenience of coordination to the parties to the actions proposed for coordination.

(iv) The convenience or inconvenience of coordination to witnesses in the litigation.

(v) The convenience or inconvenience of coordination to counsel in the litigation.

(vi) The status or development of each action proposed for coordination and the extent and nature of discovery therein.

(vii) Whether coordination will assist or impair the efficient utilization of judicial facilities and manpower.

(viii) The extent to which continuance of the action without coordination would threaten duplicative or inconsistent rulings, orders or judgments.

(ix) The likelihood of settlement of the actions without further litigation if coordination is denied.

(x) Whether any cause of action set forth in the pleadings in any of the actions should be separated and left in or returned to the court in which the action was filed, notwithstanding the coordination of the action otherwise.

(e) Evidence to be relied upon at the hearing shall be in the form of affidavits, answers to interrogatories and requests for admissions, ~~and~~ depositions~~.~~

Provided by Legislative Research Incorporated (800)530-7613

and matters of which judicial notice shall or may be taken. Oral testimony shall not be received at the hearing except by leave of the court.

(f) If the court grants the motion, it shall have discretion to stay all proceedings in the action pending determination of the request for coordination by the assigned judge in the case of a Section 404 request, or by the appointed judge in the case of a Section 404.4 request. The court shall also have discretion to sever any cause of action set forth in the pleadings and order that said cause of action shall remain in the originating court for disposition, where such severance will promote the ends of justice under the standards set forth in Rule 3(d). Within 20 days after the order granting the motion, the presiding judge or the sole judge of the originating court shall cause a request for coordination of the action to be filed.

Rule ~~4~~ 5. Initiation Of Request In The Originating Court On The Court's Own Motion

The presiding judge or sole judge of any municipal or superior court in which an action is pending may, on his own motion, file a request for coordination pursuant to Section 404 or 404.4; provided, however, that notice of ~~its~~ his intention to file such request and an opportunity to be heard shall be given to all parties to the action. Such notice shall be served on all parties who have appeared in the action not less than 10 days prior to the hearing. If any person named as a defendant in the action has not been served or appeared, such notice shall be served not less than 20 days prior to the hearing, and the plaintiff shall take the steps required of him by Rule 4(b)(ii). The notice shall be accompanied by the list specified in Rule 4(c)(i) and such other supporting papers as the court may deem appropriate. Any party may, not later than two days in advance of the hearing, file papers, either evidentiary or argumentative in nature, in support of or in opposition to the motion. The hearing and the court's order shall be governed by Rules 4(d), 4(e) and 4(f).

Rule ~~5~~ 6. Content Of Request For Coordination

Every request for coordination shall contain or be accompanied by the list described in Rule 4(c)(i) and all papers upon which the request is based, including material on each of the matters set forth in Rule 4(d).

Rule ~~6~~ 7. Where Request For Coordination Shall Be Filed And Number Of Copies To Be Provided

Provided by Legislative Research Incorporated (800) 530-7613

(a) Any request for coordination pursuant to Section 404, and all other papers thereafter filed in connection therewith, shall be filed with the secretary of the Judicial Council or such person as he may designate. Provided, however, that after appointment of the assigned judge, all papers shall be filed in such place as he may designate. [cf. 1511]

(b) Any request for coordination pursuant Section 404.4, and all other papers thereafter filed in connection therewith, shall be filed with the designated clerk.

(c) Unless an application for appointment of a document depositary is filed with the request for coordination pursuant to Rule 11, there shall be lodged with the secretary of the Judicial Council or the designated clerk, as the case may be, a sufficient number of copies of the request for coordination and all supporting papers to provide a copy for all parties or their counsel in all the actions proposed to be coordinated. If an application pursuant to Rule 11 is made and denied, such number of copies shall be so lodged within 5 days of the order denying the application.

(d) The person(s) filing the request for coordination shall at the same time cause to be filed in each action proposed to be coordinated a notice of the filing of the request. Such notice shall list each other action proposed to be coordinated, identified by court, number and title, the name of each party to each such action, the name and address of counsel for each such party who has appeared by counsel, and the address given for service of process by each such party who has appeared in propria persona. In lieu of physically incorporating such information in the notice, the person filing the same may attach a copy of the list required by Rule 4(c)(i). [Concept of 1522, modified]

Rule 7 8. Appointment Of The Assigned Judge

(a) Within 20 days after the filing of any request pursuant to Rule 7(a), the Chairman of the Judicial Council shall appoint the assigned judge.

(b) If after designation of the assigned judge he shall for any reason cease to act in that capacity, the Chairman of the Judicial Council shall assign his successor within 20 days thereafter.

Rule 8 9. Stay

The assigned or appointed judge may, upon written application and hearing after notice duly served and filed not less than 10 days before such hearing,

stay proceedings in any action proposed for coordination to a date 10 days after the effective date of the order determining whether the action is or is not to be coordinated. Such stay application may be made by any party to any of the actions proposed for coordination. If coordination of the actions or any of them is thereafter ordered, such stay shall continue in effect with respect to the actions to be coordinated until the further order of the appointed judge.

Rule ~~9~~ 10. Notice Of Hearing

Within 10 days after the appointment of the assigned judge, in the case of a Section 404 request, or after the filing of a Section 404.4 request, the assigned judge or the appointed judge, as the case may be, shall cause to be served on all parties who have appeared in any of the actions proposed to be coordinated the following:

(a) A notice specifying the time and place at which the request for coordination shall be heard, which time shall not be less than 60 days after the service of such notice;

(b) A copy of the request for coordination and all supporting papers, except to the extent such requirement may be modified by order pursuant to Rule 11;

(c) An order requiring the plaintiff in each action proposed to be coordinated to serve upon each named defendant who has not appeared in such action a copy of the complaint in such action, together with a copy of the notice of the coordination hearing and of the request for coordination and supporting papers, and to file within 20 days an affidavit stating that said service has been accomplished or an affidavit stating the reasons for failing to do so, and whether the request for coordination may be properly heard without notice to such defendant.

(d) If coordination has been proposed by a party, the court may make an order directing that party to supply the plaintiff in each action proposed to be coordinated with sufficient copies of the request and supporting papers to serve all defendants who have not appeared, within 5 days after the date of the order.

Rule ~~10~~ 11. Service Of Papers

All papers that are filed in connection with a request for coordination (with the exception of those required to be lodged pursuant to Rule 7(c) of these Rules) shall be served by the party filing them on all parties or their counsel who have appeared in any of the actions to be coordinated, according to the list contained in the request for coordination, or who thereafter appear in support of or in

Provided by Legislative Research Incorporated (800) 530-7613

opposition to the request by the service and filing of papers in connection therewith; provided, however, that the assigned judge or the appointed judge, as the case may be, may, by ex parte order for good cause shown, relieve any party of the obligation of serving all papers on all parties where, by reason of the number of parties and the volume of papers, such obligation would be unduly burdensome and where no party would suffer prejudice by means of the employment of a depositary, as herein provided for. In such case the assigned or appointed judge shall designate a depositary or depositaries for all papers that are not served upon all parties, who shall provide access to said papers to any party during business hours, and all parties shall be notified of the identity and address of such depositary or depositaries and the general nature of the papers lodged with him. An application for appointment of a depositary or depositaries pursuant to this rule may be filed with the request for coordination and, if so, must be acted upon by the assigned judge within 5 days of his appointment or by the appointed judge within 5 days of the filing of the request for coordination, accompanied by such application.

Rule ~~11~~ 12. Additional Filings In Support Of And In Opposition To The Request

Each party to any of the actions proposed to be coordinated may serve and file argumentative or evidentiary papers in support of the request at any time within 30 days after service of the notice of hearing pursuant to Rule 10 or in opposition thereto at any time within 45 days after the service of said notice of hearing. Such papers may contain material directed to the determination of the site or sites at which the coordinated actions should be heard and to the determination of the reviewing court that should have appellate jurisdiction if the actions to be coordinated are within the jurisdiction of more than one reviewing court. No party may rely at the hearing on any evidentiary matter that is not contained in the request for coordination or served and filed in accordance with this rule, except for oral testimony when permitted under Rule 14. Rebuttal papers must be filed not less than 5 days before the hearing.

Rule ~~12~~ 13. Burden Of Proof

The burden of proof that actions should be coordinated is on the party or parties who propose or support coordination of the actions.

Provided by Legislative Research Incorporated (800) 530-7613

Rule ~~13~~ 14. Form Of Evidence

The provisions of Rule 4(e) shall apply to the hearing on the request for coordination.

Rule ~~14~~ 15. Hearing~~, Record And Findings~~

(a) The hearing shall be held on the day and hour specified in the notice, or at such other time as the assigned or appointed judge may fix by order served and filed, and shall proceed as expeditiously as may be practical to a conclusion, but the assigned or appointed judge may continue the hearing from time to time if justice requires it. Except as otherwise permitted by the assigned or appointed judge for good cause shown, only the parties who have filed a request for coordination pursuant to Rule 7, or who have filed papers in support of or in opposition to such request pursuant to Rule 12, shall be heard. [last sent. 1513, modified]

(b) When it appears that a request for coordination may be disposed of upon the determination of a specified issue or issues, without the necessity of conducting a hearing upon all issues raised by such request and by any opposition thereto, the assigned or appointed judge may order that the specified issue or issues be heard and determined prior to any hearing on the remaining issues. [1530]

Rule ~~15~~ 16. Order Regarding Coordination

(a) In the event that the assigned or appointed judge determines that the actions or any of them should or should not be coordinated, the order shall be signed and dated and shall identify by court and title each action that is to be coordinated and each action that is not to be coordinated. In said order, the assigned or appointed judge may, for good cause shown, sever any cause of action set forth in the pleadings in any of the actions and order that such cause of action shall not be coordinated, notwithstanding the coordination of the action otherwise, but shall be left in or returned to the originating court for disposition. The order shall be entered in each court where an action proposed to be coordinated was initiated provided, however, that the date of the order shall be deemed to be the date of entry for all purposes.

(b) In addition to the foregoing, in the case of a Section 404 request, the assigned judge shall designate the site or sites at which the coordinated actions should be heard and determined and, where the actions to be coordinated are within the jurisdiction of more than one reviewing court, he shall designate

Provided by Legislative Research Incorporated (800) 530-7613

the reviewing court that shall have appellate jurisdiction of the coordinated actions.

(c) An action ordered coordinated pursuant to Section 404.4 shall be heard by the judge theretofore appointed to hear the other actions with which it is to be coordinated, and appellate jurisdiction shall be in the reviewing court theretofore designated for such other actions.

(d) An order granting or denying coordination may be reviewed by writ of mandate in any reviewing court having jurisdiction under the rules applicable to civil actions generally, subject, however, to the provisions of Rule 20, California Rules of Court. [part of 1506, modified]

(e) The entry of an order pursuant to Rule 16(a) granting coordination shall automatically stay all proceedings in all actions so coordinated until further order of the appointed judge, except proceedings as to causes of action severed pursuant to Rules 4(f) or 16(a) for disposition by the court in which the action was pending prior to the order for coordination. [part of 1531, modified]

Rule ~~16~~ 17. Appointment Of The Appointed Judge And The Designated Clerk; Inability To Act

(a) Within 20 days following the granting by the assigned judge of an order for coordination of the actions or any of them under Section 404, the Chairman of the Judicial Council shall assign a judge (the "appointed judge") to hear and determine the coordinated actions at the site or sites designated in the order of the assigned judge. The appointed judge shall promptly notify the "designated clerk" of his designation.

(b) If after designation of the appointed judge he shall for any reason cease to act in that capacity, the Chairman of the Judicial Council shall assign his successor within 20 days thereafter.

Rule ~~17~~ 18. Transfer Of Papers On File And Filing Of Additional Papers

(a) Promptly upon the determination of the designated clerk, the appointed judge shall cause notice of the assignment of the appointed judge, of the designation of the designated clerk and of entry of the order regarding coordination of the actions to be given to the presiding judge or sole judge and the clerk of each court in which each of the actions which was proposed to be coordinated is pending, and to each party to such actions.

(b) Except as provided in Rule 18(c), the clerk of each such court shall

thereupon transmit to the designated clerk all the papers on file in the action or actions to be coordinated.

(c) Where a cause of action has been severed, pursuant to Rule 4(f) or 16(a), for disposition by the court in which the action was pending prior to the order for coordination, any party to such action may specify papers on file in such action that he desires retained by the clerk of such court for use in the disposition of such cause of action, and the clerk of such court shall retain such papers. A party desiring retention of papers as aforesaid shall, within 10 days after the notice referred to in the first sentence of this Rule 18(a) file with the clerk of the court in which the action was pending prior to the order for coordination and with the designated clerk and shall serve on all parties who have appeared in any of the actions to be coordinated, a notice designating the papers to be retained as aforesaid. Any party to the coordinated actions who thereafter desires to rely in said coordinated action on any papers so retained shall file a copy thereof with the designated clerk.

(d) The designated clerk shall assign a new number which shall apply to all of the coordinated actions, and the appointed judge shall designate a title for the coordinated actions, such as "In re the Titanic Catastrophe." All papers thereafter filed in the coordinated actions may be so titled and numbered, and the title and number of the original action may be omitted unless the paper applies peculiarly to such action.

Rule ~~18~~ 19. Pretrial Conferences And Orders In Coordinated Actions

As soon as is reasonably practical after his appointment, the appointed judge shall hold a conference with all parties or their counsel, at which the status of the coordinated actions shall be reviewed, including the status of all pleadings, motions and discovery. All counsel or parties who have appeared in propria persona shall come to said conference prepared to discuss such matters or any other matters that may be covered by the judge's procedural order hereinafter referred to. Counsel may submit to the judge in advance of the conference a proposed agenda therefor and a proposed procedural order. Following such conference, the judge shall issue an order covering such matters of procedure and discovery as may be pertinent to the case and suitable for scheduling at the time. The judge may thereafter, from time to time, hold additional conferences of this nature and issue additional procedural and discovery orders. Such orders may, as appropriate, provide for the following:

(a) Schedule the filing of any pleadings or motions to be directed to the pleadings;

(b) Schedule the hearing of any motions directed to the pleadings;

(c) Schedule the filing and hearing of any other motions;

(d) If any of the coordinated actions have been filed as class actions, schedule the briefing and hearing on the propriety of the action as a class action, the giving of notice to the class, and other matters pertinent to the class action issue;

(e) Schedule discovery by the respective parties, touching upon:

(i) Class action issues;

(ii) Other nonsubstantive issues;

(iii) Substantive issues;

(f) Determine means of resolving preliminary legal questions when such is desirable to expedite the disposition of the case;

~~(g) Recognize the appointment of liaison counsel by all parties on either side of the coordinated actions or for subgroups of such parties;~~

(g) ~~(h)~~ Establish a central depository or depositories for documents or evidentiary material.

(h) ~~(i)~~ Provide means for obtaining stipulation of fact;

(i) ~~(j)~~ Provide for any other procedural devices that may expedite the preparation for trial and the trial of the action;

(j) ~~(k)~~ Establish procedures to identify and narrow the issues of fact and law to be tried;

(k) ~~(l)~~ Establish procedures to identify documents and witnesses to be relied upon at trial.

Rule 20. Liaison Counsel

The appointed judge may, with the consent of the parties affected, appoint liaison counsel for all parties on either side of the coordinated actions, or for subgroups of such parties. [concept of 1507(a), modified] The order appointing liaison counsel shall designate the powers and duties of such counsel, which may include but need not be limited to the following: (a) To receive on behalf of and promptly distribute to the parties for whom he acts notices and other documents from the court or from other parties; (b) to act as spokesman for the side or subgroup which he represents at pretrial conferences subject to the right of each party to present individual or divergent positions where necessary; (c) to

call meetings of counsel for the purpose of proposing joint action.

Rule ~~19~~ 21. The Conduct Of Pretrial Hearings And Of The Trial

(a) All pretrial hearings and the trial shall be held at the site or sites set forth in the order for coordination. The appointed judge may, in his discretion, order separate trial of different issues of fact or law where the convenience of the parties and witnesses and the needs of justice will be advanced. In particular any issue or issues that may not affect all parties to all of the coordinated actions may be tried separately. Where any issues designated for separate trial are to be determined by a jury, the appointed judge may determine in his discretion whether the same jury should determine all such issues.

(b) All parties plaintiff in the several coordinated actions shall constitute a 'side' and all parties defendant to the several coordinated actions shall constitute a 'side' for purposes of applying Section 601 of the Code of Civil Procedure, unless the appointed judge shall determine that there is a substantial diversity of interest with respect to one or more issues in the case among two or more groups of such plaintiffs or defendants, in which case he may order that each such group shall be treated as a 'side' for purposes of said section.

Rule ~~20~~ 22. Judgment

A single set of findings of fact and conclusions of law may be signed and filed applicable to all of the coordinated actions. A separate judgment shall be signed and filed, applicable to and titled in each of the coordinated actions. Until such time as a judgment in a coordinated action becomes final, all post-trial proceedings in such action to be determined by the trial court shall be determined by the appointed judge and all papers to be filed in the trial court shall be filed with the designated clerk; thereafter, all proceedings shall be conducted in the court where the action was initiated; provided, however, that the appointed judge may retain jurisdiction of the coordinated actions or some of them when, in his discretion, he determines that supervision of subsequent proceedings on a coordinated basis will be in the interest of justice, in which case he shall so provide in the judgment. For the purpose of this rule, the judgment ~~shall be~~ is final when ~~the time for appeal from such judgment has elapsed, unless an appeal is then pending.~~ by reason of lapse of time or otherwise it is no longer subject to appeal. When a judgment in a coordinated action becomes final, a certified copy of the judgment shall be filed and entered in the court

Provided by Legislative Research Incorporated (800) 530-7613

where the action was initiated, with the same force and effect as though said action had been tried and determined in that court.

Rule 23. Motions Pursuant to C.C.P. Section 170.6

Any party claiming prejudice on the part of the assigned or appointed judge, pursuant to Section 170.6 of the Code of Civil Procedure, shall file the affidavit therein provided for and, if the motion be in writing, the written motion, within 20 days after service of the notice provided for in Rule 10, with respect to the assigned judge, and Rule 18(a), with respect to the appointed judge. In applying the last sentence of subdivision (3) of said Section 170.6, all parties plaintiff in the actions that are proposed for coordination or that have been coordinated shall constitute a "side," and all parties defendant in the actions that are proposed for coordination or that have been ordered coordinated shall constitute a "side," unless the judge shall determine that there is a substantial diversity of interest with respect to one or more issues in the case among two or more groups of such plaintiffs or defendants, in which case he may order that each such group shall be treated as a "side" for purposes of said section.

(Caution - There still appears to be a problem under C.C.P. §170.6 arising out of possible later coordination or "tag-along" cases under C.C.P. §404.4. A Challenge by a party to such a case obviously would upset coordinated proceedings. Also, there is a question whether Rule 23, above, effectively regulates the 170.6 problem as to "original parties" in connection with subsequent trial on the merits in view of the provisions of the last sentence of subdivision (2) of 170.6 (providing, in part, that the circumstance that a judge has acted at a pretrial or other hearing not involving determination of disputed issues of fact on the merits ". . . shall not preclude the later making of the motion. . . ." No ready answer to either problem is discerned; and amendment of 170.6 may be necessary.)

Provided by Legislative Research Incorporated (800) 530-7613

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

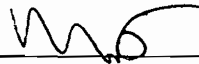
I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2030 Main Street, Suite 1040, Irvine, California 92614.

On November 30, 2009, I served the foregoing document described as Appellant's Motion For Judicial Notice; Memorandum And Declaration In Support Thereof on the interested parties by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Irvine, California, addressed as follows:

SEE ATTACHED SERVICE LIST.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED: November 30, 2009



Kevin M. Tripi

SERVICE LIST

Attorney	Party(ies)
Max H. Stern, Esq. DUANE MORRIS 1 Market, Spear Tower, Suite 2000 San Francisco, CA 94105	Attorneys for Defendants and Respondents **CSB Partnership**, **Chris & Tad Enterprises**, **CSB & Ellison, LLC**, **CSB & Hinckley, LLC**, **CSB & Humbach, LLC**, **CSB & McCray, LLC**, and **CSB & Perez, LLC**
Bradley S. Pauley, Esq. Robert H. Wright, Esq. HORVITZ & LEVY 15760 Ventura Blvd., 18th Floor Encino, CA 91436 **-and-** Michael A. Sandstrum, Esq. BREMER, WHYTE, ET AL. 20320 S.W. Birch St., 2nd Floor Newport Beach, CA 92660	Attorneys for Defendants and Respondents **E-Commerce Exchange, Inc.**
James Casello, Esq. CASELLO & LINCOLN 1551 North Tustin Ave., Suite 480 Santa Ana, CA 92705	Attorneys for Defendants and Respondents **Fax.com**; **Daniel Quon**, **Daniel E. Quon, O.D., Inc, dba Optometrist at South Coast Plaza**, **Clayton Shurley**, **Clayton Shurley's Texas BBQ**, **Clayton Shurley's Real BBQ**, **Elliott McCrosky dba California Homefinders and E&N Financial**
Shon Morgan, Esq. Christopher Price, Esq. QUINN EMANUEL ET AL. 865 South Figueroa St., 10th Floor Los Angeles, CA 90017	Attorneys for Defendants and Respondents **Flagstar Bank**