9/2/69

Sixth Supplement to Memorandum 69-85

Subject: New Topic - Pleading and Practice

The attached letter from Thomas L. Lord, who practiced law in another state where the Federal Rules of Civil Procedure are used, expresses the view that a study should be made of the problems of practice and procedure in California in light of the federal rules.

In October 1968, the Commission considered a staff suggestion that pleadings in civil actions might be an appropriate topic for Commission study. At that time, the Commission determined that this would be too substantial a project to be undertaken at that time.

Attached to this Supplement are the letter from Mr. Lord and a statement that might be included in the Annual Report if the Commission wishes to undertake a study of the law relating to pleading.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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Re: Pleading and Practice

Gentlemen:

This letter is written to you as I am not sure to whom I should write. Thus, my apologies if it is directed to the wrong place.

Prior to coming to California eight years ago, I practiced law in Minnesota, where the Federal Rules of Civil Procedure are used. Also, in law school, we studied the Federal Rules. Thus, I was somewhat surprised to learn when I came to California that, although the discovery rules are in full blossom here, the archaic code pleading rules are still used. After eight years of trying to learn code pleading, and spending many, many hours studying Witkin and Chadbourn Grossman and Van Alstyn, I am still perplexed. Judging from much of the case law pertaining to pleading, many other lawyers and judges are in the same boat. I thus keep wondering: When is California going to adopt the Federal Rules? Incidentally, it seems to me that the discovery rules go very much hand in hand with the Federal Rules of Civil Procedure, and we thus seem to be part way on the trail to more sensible pleading.

Also, I cannot understand why only ten days is allowed to answer a pleading. Why not always use the thirty day period already provided when service is made outside the county? I would guess that 4 times out of 5 an extension of time to answer is requested by counsel for the defendant, necessitating phone calls back and forth, sometimes frantic

in nature as your client has come to see you when the time limit has almost expired. Also, a confirming letter must then be sent out. A thirty day period seems very adequate for most purposes and would relieve attorneys of a lot of unnecessary nonsense. A longer time period would also relieve attorneys of the nuisance and wasted time involved in having a default set aside under CCP 473, in those cases in which the attorney for the plaintiff refuses to grant an extension of time to answer. For example, I recently had to spend a great deal of time setting aside a default which was entered against my client immediately after the tenth day. The default was entered even though plaintiff's attorney knew the defendant was represented by counsel and my secretary had made several calls to plaintiff's attorney, but was never able to get past his secretary, who consistently said she could not grant extensions. The attorney for the plaintiff subsequently refused to stipulate to have the default set aside, although he didn't even bother to show up for the default hearing, knowing it would be a waste of his time. Nonetheless, although the judge aset aside the default without hesitation, plaintiff's attorney was able to cause me to waste much time on the motion.

Could you let me know whether there is any prospect for changes in the rules above mentioned, and if not, what suggestions do you have for pursuing the changes I suggest?

Very truly yours,

MUDGE AND REILLY

Thomas L. Lord

Thomas L. Lord

TLL:sf

A study to determine whether the California law relating to pleading should be revised and whether the Federal Rules of Civil Procedure furnish a basis for clarification or modification of the California law.

"The pleadings are formal allegations by the parties of their respective claims and defenses, for the judgment of the court." Code of Civil Procedure Section 420.

The code pleading system, introduced in California by the Practice Act, had its origin in the New York Code of 1848 (known as the "Field Code"). The system has remained essentially unchanged and is predicated largely on a basic policy that the pleadings should define the issues of the case. However, since its introduction, there have been tremendous changes in both deposition-discovery practice and pretrial procedure, which have greatly reduced the significance of the pleadings in framing the issues. Moreover, the existing rules can unfairly trap the unwary or inexperienced,[1] are easily circumvented by the skilled, and often require pleadings that are both cumbersome and meaningless.

A modernized form of code pleading for the federal courts exists in the Federal Rules of Civil Procedure. These rules eliminate a number of technical requirements of the traditional Field Code and have served, in whole or in part, as a framework for pleading reform in other states.

A study should be made whether the law relating to pleading should be revised and whether the Federal Rules of Civil Procedure furnish a basis for clarification or modification of the California law.

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1. See, e.g., Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191 (1926)(denial on the ground that "defendant has no knowledge or information sufficient to form a belief," does not directly deny for lack of belief, is therefore defective and raises to issue); Connecticut Mut. Life Ins. Co. v. Most, 39 Cal. App.2d 634, 640, 103 P.2d 1013 (1940)(negative pregnant--specific denial of one admits all lesser included sums).