9/5/82

Memorandum 82-87

Subject: New Topics

When the Commission considers its Annual Report, it is the practice to review suggestions for new topics that have been received since the last Annual Report was approved for printing. This enables the Commission to include a request for authority to study a new topic if necessary.

The suggestions for topics to study received since the last Annual Report was approved for printing are discussed below. Three topics are discussed below. The staff suggests that one technical matter be studied; this does not require any new authority. The staff recommends that the other two topics not be studied.

Notice of opportunity to present late claim for injury or death against public entity

Government Code Section 911.2 requires a claim against a public entity for death or injury to person or personal property to be presented to the public entity within 100 days after the accrual of the cause of action. If this time limit is not satisfied, a written application for leave to present a late claim may be made to the public entity within a reasonable time not exceeding one year after accrual of the cause of action. Gov't Code § 911.4.

If a person presents a late claim and the claim is rejected for that reason, the claimant may not be aware of the procedure for requesting leave to file a late claim and so may not exhaust available remedies before filing an action against the public entity. The staff has received a suggestion that these statutes be amended to require that the notice of rejection of the claim provided in Section 913 contain a notice of the procedure for filing late claims. This might be patterned after the warning in Section 911.8 given after denial of an application for leave to present a late claim.

The staff recommends that we study this technical problem, and prepare a bill for the 1983 legislative session. This matter would not require much staff time and is within the scope of a topic the Commission is authorized to study.

Appellate procedure

Ms. Faye L. Willard suggests that the Commission undertake a reform of the inner workings of the appellate courts, particularly with regard to the determination of facts upon which decisions are based. See Exhibit 1. (We have not reproduced the article by Chief Justice Bird referred to in the letter.)

The staff does not believe that the Commission is the appropriate body for the resolution of such complaints. The Executive Secretary has written Ms. Willard suggesting that she present her concerns to the Judicial Council.

Lis pendens

Mr. David Eric Friedman sent the Commission a copy of a comment relating to lis pendens and suggested the Commission study this subject. See Exhibit 2. (We have not reproduced the comment that was attached to the letter. See Comment, California Lis Pendens Practice: Jurisdiction of the Trial Court to Modify the Amount of the Undertaking and Lost Profits as Recoverable Damages, 9 U. San Fern. V. L. Rev. 85 (1981).)

The recently enacted legislation concerning statutory bonds and undertakings deals with one aspect of Mr. Friedman's comment. As to lost profits as recoverable damages, the staff suggests that the Commission take no action at this time since the State Bar Real Property Law Section is exploring the possibility of rewriting the lis pendens statutes. In view of the topics already on the calendar, the staff recommends against duplicating the efforts of the State Bar.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

FAYE L. WILLARD
3320 East Seventh Street
Long Beach, California 90804
December 18, 1981

Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, California 94306

Commission Members:

I would appreciate being sent the name of all of the members so that I may write them individually. For now, I shall address this letter to all of you.

Before me is a copy of a Staff Background Paper for 1979 of the California Citizens' Commission on Tort Reform and I note this Commission was composed of very prominent citizens. Therefore I would judge that the Law Revision Commission is much the same. As such, all of you probably have access to competent attorney firms when you require legal representation on a personal or private business level, and would not, from your individual experiences, know much of what is taking place at lower levels for those members of the public without legal representation or those who have inadequate legal representation.

In a federal case (Poe v. Ullman, 367 US 497, 6 L ed 2d 989, 81 S. Ct 1752) the United States Supreme Court stated it had no right to pronounce an abstract opinion on the constitutionality of a state law, that such law must be brought into actual, or threatened operation. . . to be reviewed, a case must retain the essentials of an adversary proceeding involving a real and not a hypothetical controversy.

While this letter has no relevancy to the above case, it serves as an introduction in this letter to references to my own, personal experiences in the courts of California, experiences that you, as prominent citizens, would have no way to know about except second hand.

As a lay person, and present litigant in pro per, my case is a good one to study. Just as a medical doctor may watch a liquid swallowed by a patient via a fluoroscope to see where the "stoppage" is, so can your review of my litigation see the places where the judicial "stoppage" is, and it is for this reason only that I relate to you some of the things that have happened in my litigation and ask of you, "Why?"

From my lay knowledge of law, learned through necessity and not choice, it appears that your Commission is concerned mainly with procedures and changes needed to make procedures work toward justice if possible. As Chief Justice Bleckly of the Georgia Supreme Court stated to the Georgia Bar Association, as printed in its annual report of 1886: "Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. . . It is unjust to do justice by doing injustice. Courts cannot do justice of substance except by and through justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a court to stray from justice of procedure in order to administer justice of substance."

Assuming that your Commission is dedicated to the same premise, there is a terrible problem in California courts which deprives litigants of the justice of procedure. Let's examine it.

It was gratifying for me to receive through a friend a communication from Chief Justice Rose Bird's Office enclosing a copy of an article Justice Bird wrote in 1978, just a year after she was sworn in, but it was also sad to realize that the experiences I have had with the courts on a personal level were not isolated ones but things that happen to other litigants as well. And it was even sadder to realize that more than three years after Justice Bird recognized some of the problem that things have gotten worse and not better.

I am enclosing a copy of the article. The first portion is relevant to this letter, and the latter portion about publishing of Opinions of the appellate courts not relevant. We need to close the many loopholes used by unscruptulous counsel to gain not only an unfair but illegal advantage over their adversaries. I fully concede that such tactics are more often used on adversaries of unequal wealth and power, but we must make our procedures as fair as possible for everyone.

In my own litigation in which I sued four dentists for malpractice and fraud, several attorneys who represented me at various times were intimidated or other off the case so I found myself reluctantly in pro per at the crucial time when the dentists brought motions for summary judgments and won. I had to carry through the appeal representing myself and I was subjected to the following:

1. Five consecutive court reporters' transcripts of hearings of motions ordered by me were delivered with gross fraudulent changes and deletions, all of which benefited my opposition. In general, the changes and deletions concerned my objections that discovery was incomplete and summary judgment premature, that I was not prepared to represent myself as shown by my ignorance of the 1973 revision of the Summary Judgment statute not allowing conclusionary material to be presented by the non-moving party, and prejudicial remarks of the judge, who announced at the beginning of a hearing my attorney made to withdraw as attorney of record three weeks before the same judge was to hear the summary judgment that "Although I know none of the facts of this case, in my opinion it should never have been filed." This statement was made several weeks before I filed opposition papers to the summary judgment so indeed he had no knowledge of my facts yet his prejudice against my litigation showed prejudgment.

2. When I was preparing my appellate briefs, the entire file disappeared from the Long Beach Superior Court. It has now been some 15 months and the entire file is still missing. At the time of preparing my first appellate brief, the Register of Actions contained more than 70 separate entries to give you an idea of the massiveness of the lost material. I needed the file to help me prepare my briefs, and I referred to material in the file, not designated to become part of the record on appeal, in my briefs knowing current California law permits the appellate court to send down for any material in the file whether designated or not.

3. The facts in the Opinion of the Court of Appeal, Second District, Division Five concerning the malpractice issue were wrong. One dentist and his procedures were substituted for another dentist defendant and his procedures so that what applied to one did not apply to another. True party defendants and their procedures comprising most of the record on appeal and briefs were totally omitted while a lesser defendant and his procedures were the only ones mentioned at all. Only one place in the record supported mention of this lesser defendant and then, only by taking a partial sentence out of context. In essence I had charged two dentists with stopping care in the middle of their procedures (which they admitted in their own papers filed on appeal in a separate part of the Opinion in the fraud discussion) who, in a bait and switch scheme which failed had sent me to a colleague in the same dental group who had presented a new plan of dental work for other unrelated teeth, and when I rejected this plan, then threatened that if I did not have it instituted, the dental group would deny me access back for consultation about, or completion

or substitution of the work in progress begun, but never finished, by the other two dentist defendants. Over and over again in the record, the unfinished work on two specific teeth was mentioned and the specific dentist defendants involved.

Yet in the facts in the Opinion, these dentists and their procedures were never mentioned. Only the dentist I was switched to, who had presented a new, unrelated $9000 plan of work for other teeth was mentioned in regard to premature cessation of dental services, and the Opinion stated there was no case of patient abandonment inasmuch as my rejecting the $9000 plan meant I had abandoned the dentist and not vice versa.

Since it is a theoretical impossibility to allege premature cessation of work the patient refused, the appellate court justices must have wondered how on earth any litigation could have made such a claim, which, of course, I had never made.

The answer is simple. Some court employee who condensed the facts the justices would use to render their decision from, had deliberately omitted the relevant matter and substituted the irrelevant. More astounding, elsewhere in the same Opinion where discussion of fraud took place, the facts included mention of work on two teeth left unfinished by the other defendant dentists.

As to the court reporters' transcripts being sent to me fraudulently changed and deleted, through my research I found many loopholes that could account for this. I submitted a eleven page Appendix with one of my appellate briefs, and later mailed the Appendix outlining the problem, the loopholes, and possible ways to close these loopholes to the Shorthand Reporters' Board. Subsequently two state investigators were assigned to the case and have visited me, and I believe they are still working on it at the present time.

I am most anxious that when my case continues (I won a reversal on the fraud as to three of the four defendants and right to amend my complaint to plead lack of informed consent) that I will not be subjected to more reporters' transcripts fraudulently changed. As for past damage to my litigation, when I found the lower court corruption extended as high as the Court of Appeals, it appeared not to matter. If law clerks or court employees can "fix" the facts which the justices see and render their decisions on, then what happens in lower court doesn't matter. The party who wins can have his case reversed on appeal (through falsification of facts the law clerks (research assistants) allow the justices to see, or if the party who loses takes an appeal, through the same fraudulent methods used by these unseen, faceless people in the background, only those facts guaranteed to produce an opinion or decision affirming the lower court will be presented.

Before I worked on my appellate court briefs, I read many of the official state reports, and some of the Opinions were written by the same justices who wrote the Opinion in my own litigation (Los Angeles Court File SOC 46456, in appeal 59108 and 60104 (later consolidated). While reading the state reports, invariably I agreed with 85% or more of the decisions, but now I realize the decisions were based on the facts presented and the facts presented may have been tampered with as in my own case. But I do not blame the justices for their decisions. The blame must go to those unseen people in the background who supplied the fraudulent or deleted facts.

I submitted a petition for rehearing to point out the error in facts. The petition was denied by return mail. I submitted a petition for Hearing and within a week it, too was denied. I then submitted a petition to recall the Remittitur on basis of fraud imposed on the court and it was denied -- by return mail. Since the law gives a party only one right of appeal, and the petitions for rehearing, hearing and to recall Remittitur are privileges, such petitions are not even being read nor considered as in my case. And fraud at the appellate level in which an unseen, not accountable to the public research asssistant performed an illegal act, certainly was repeated at additional stages such as turning back any petitions to correct the wrong facts.

Justice cannot enter when corrupt guards stand at the door. Current requirements that when a petition is sent for a Hearing to the California Supreme Court, that the appellate court sends its material up only results in the fraudulent facts condensed by a research assistant taking another short trip.

It would be more democratic to eliminate altogether the "privilege" of petitioning for rehearings and hearings and recall of the remittiturs in civil suits if it is to remain something of choice of individual justices who may have a "pet" cause.

Contempt for the public is shown by those who work in the court system not only by the speed with which such petitions are denied, indicating they don't have to read them at all, but the atrocious notification to litigants of such denial via post card. Here where a state sends out many mailings of bureaucratic trivia on many subjects, a litigant whose future and health may depend upon the outcome of a court case is further degraded by the indignity of being informed of a most important matter in his life by a post card.

We must close the many loopholes. Let the public litigant have access to the synopses used by the justices in making a decision, or require after all the appellate briefs have been submitted that the litigant present a one page synopses of his case. If nothing else, the litigant would present his side as would his adversary. If the justices are to ignore the massive amounts of material submitted and reach their decisions from a small abbreviated version of facts, than at least have the opposing parties supply the abbreviations.

This is sheer speculation as I have no way to know the secrets of internal court workings, but I would imagine that these law clerks or research assistants often go one step further and even submit tentative rulings adopted by the judges. And the party, who is disadvantaged because fraud has occurred with such a research assistant to blame because he submitted false facts or omitted pertinent facts, has no avenue open to him to call attention to this except the privilege of petitioning for a rehearing granted in 2% or so of the cases.

Why can't there be a special proceeding in which the abbreviated material actually used by the justices can be examined and if the fraud is seen on the face, another speical proceeding given litigants as a right and not a privilege. In this way, the culprits responsible for substitution of facts would be revealed and dismissed from the court system, and counsel who bribes such personnel would face discipline and it is to be hoped, disbarrment as well.

As a lay person I do not know whether a federal court proceeding would be in order after state court corruption resulted in a miscarriage of justice. Perhaps this is so, but someone in pro per has difficult enough time keeping a case alive much less being expected to go through federal court and all its mysteries.

As a member of the League of Women Voters, a year ago I asked the State level of the League to consider court reporting corruption. They didn't elect to make it a statewide league issue, probably because interest was insufficient. But they should be interested in the power behind the throne -- the research assistants who decide what facts the judges they work for should be given. This matter concerns everyone or should if they knew about it. I have also asked our local newspaper to do an investigation series on inner court corruption and secrecy.

If you would like additional material, I will be glad to mail you the Appendix to one of my briefs in regard to loopholes in court reporting system and possible remedies, as well as the Opinion of the appellate court in my case showing how the facts were omitted with irrelevant material only substituted. Please send me the individual names of the members so I can write them individually as well. I feel corruption in the courts is the biggest problem in society.

Faye L. Willard

EXHIBIT 2

San Fernando Valley Law Review

8353 Sepulveda Boulevard
Sepulveda, California 91343
(213) 893-2150

December 8, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Sir:

I am the author of Comment, "California Lis Pendens Practice: Jurisdiction of the Trial Court to Modify the Amount of the Undertaking and Lost Profits as Recoverable Damages", 9 U. San Fernando V. L. Rev. 85 (1981).

The article argues on various grounds that the California Legislature should amend Code of Civil Procedure sections 409.1 and 409.2 to expressly provide that the amount of the lis pendens undertaking be subject to a motion to increase or decrease upon a showing that it has or may become inadequate or excessive. The article also argues for judicial recognition of the recovery of lost profits under a lis pendens undertaking.

Thank you for consideration of this matter.

Very truly yours,

David Eric Friedman

DAVID ERIC FRIEDMAN
RESEARCH EDITOR
VOLUME 10

Enclosures (2)