Memorandum 90-101

Subject: Study J-102 - Motions

Attached is a letter from Senator Robert Presley requesting that the Commission study a suggestion by Judge William Rylaarsdam that proposes to eliminate a number of motions he feels are antiquated and replace them with a new comprehensive motion to dismiss.

The subject matter of this topic clearly is appropriate for Commission study. However, the article attached to Senator Presley's letter indicates that the civil procedure committee of the California Judges Association is presently studying the proposal. Nevertheless, Senator Presley wants the Commission to study the proposal.

The Commission may study only matters it has been authorized to study by a concurrent resolution. We are already authorized to study "pleadings" and that authorization might be broad enough to cover the various motions that would be replaced by a new motion to dismiss. As you know, each session a concurrent resolution is adopted listing the topics the Commission is authorized to study, and it could be made clear in the resolution adopted next session that the Commission is authorized to study "motions in civil actions." We could revise the description of the pleading topic to read:

> Whether the law relating to pleadings and motions in civil actions and proceedings should be revised.

There are two problems in making the suggested study. The first is the question of priority. The Commission now has a heavy agenda that will occupy substantially all of its time for a number of years. The Legislature has directed that we give equal priority to two major studies: administrative law and preparation of a family code. The time the Commission devotes to the suggested study might delay completion of work on these two major studies. It might, however, be possible to find time to work on the suggested study if we have a satisfactory background study prepared by an expert in the field. Having such a study would minimize the amount of time the Commission and its staff would need to devote to the suggested study.

The background study would identify the law and would weigh the benefits and detriments of creating the new comprehensive motion to dismiss. In preparing the background study, the consultant would gather and consider the views of interested persons and organizations. When the background study is available, the Commission can then prepare a tentative recommendation, which will be distributed for review and comment to interested persons and organizations. The comments received will be considered when the Commission determines the recommendation, if any, it will submit to the Legislature.

The Commission ordinarily pays its consultants a modest amount that does not purport to fairly compensate them for their work. To a considerable extent, the consultants provide their services as a public service. In some cases, the amount we pay an academic covers only all or part of the cost of the law students the consultant hires to assist in research needed in connection with the study. I would estimate that we would need about $5,000 (plus perhaps $1,500 for travel expenses in attending Commission meetings) to obtain a consultant to prepare the background study.

Unfortunately, we do not have funds to permit us to obtain a background study prepared by an expert. In order to permit the Commission to work on both of the two major priority studies at the same time, the Governor proposed an increase in the Commission's budget for 1990-91. The budget proposed by the Governor was approved by the Assembly budget subcommittee, but the Senate budget subcommittee did not approve the increase, and the matter will be considered by the conference committee on the budget.

I do not know where we could find money for a consultant on the suggested study in our budget for 1990-91, especially if the additional amount to cover the two major studies is not approved by the Conference Committee.

Perhaps we could make clear in the concurrent resolution adopted next session that we have authority to make a study of "motions in civil actions" and delay work on the background study until we have funds available to retain an expert consultant. This would mean we might have to wait several years before we can actively consider the suggested study. Perhaps by then the civil procedure committee of the California Judges Association, which is presently studying Judge

Rylaarsdam's proposal, will have secured the enactment of legislation along the lines he suggests, and the Commission can then drop the topic from its agenda of topics.

What action does the Commission wish to take in response to Senator Presley's request that we study this proposed reform?

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 90-101

Study J-102

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May 21, 1990

Law Revision Commission
4000 Middlefield Road, Room D
Palo Alto, California 94303

Attn: John DeMoully

Dear Mr. DeMoully:

Please find enclosed an article by the distinguished Jurist William Rylaarsdam, Judge of the Orange County Superior Court in Santa Ana. In this article he proposes to eliminate a number of motions he feels are antiquated and create a new motion to dismiss.

In addition a well respected law firm, Aklufi and Wysocki, in Riverside have recommended we create statutory language to provide for these reforms.

After speaking to a number of judges with experience in these matters, including legislative colleagues, I am learning there are as many procedural experts who support this proposal as there are who oppose it.

I would respectfully request that the Commission study this proposed reform and contact both Justice Rylaarsdam and Counselor David Wysocki of Aklufi and Wysocki to get their input in reviewing this matter.

Please let me know if I can be of any assistance in furthering this review. I look forward to hearing from you at your convenience and I thank you in advance for your assistance.

Sincerely,

ROBERT PRESLEY
State Senator

RP:scw:cl

Enclosure

cc: David Wysocki

Kill the Procedural Dinosaur

A judge's modest proposal to eliminate the demurrer and other monstrosities

BY JUDGE WILLIAM F. RYLAARSDAM

IN AN ARTICLE in the December issue of CALIFORNIA LAWYER, Curtis Karnow of San Francisco urged that procedures be devised to make resolution of cases on summary judgment easier. (See "Follow the Federal Lead on Summary Judgment.") I second his suggestion and propose that at the same time we kill that procedural dinosaur, the demurrer.

A significant portion of law and motion practice consists of demurrers. I estimate we spend at least 20 percent of our time in the Orange County law and motion departments on demurrers and that the cost to clients for the use of this procedure runs into millions of dollars a year. Yet few cases are resolved on demurrer, and most of those few are reversed on appeal. Because of the associated practice of liberal amendments, the demurrer process assures that the same issue in a case is argued again and again. The amendments frequently delay cases six months to a year or even longer.

One would think that all the expense, delay, repetition and lack of resolution would long ago have caused a ground swell of support for the abolition of this vestige of primeval civil procedure. But in my quarter century of practice I have never encountered even a suggestion that this be done. The time has come to make the suggestion and solicit the support.

Few cases are ever resolved on demurrer, and most of those few are reversed on appeal.

I propose that we do away with our present demurrer, motion for judgment on the pleadings, motion to strike, motions for summary judgment and summary adjudication of issues and instead create a single motion to dismiss. The new motion would permit the court to dispose summarily of those cases, causes of action and affirmative defenses that are truly without merit. The motion I propose would be modeled on Code of Civil Procedure section 437c, the present summary judgment statute, with some significant changes.

The grounds for the motion, which could be based on either evidentiary documents or on the face of the pleadings, would include the present grounds for summary judgment, motion to strike and demurrer, with the following exceptions: "Uncertainty" and "written or oral contracts" would be eliminated, since modern discovery procedures adequately address those defects. "Failure to state facts sufficient to constitute a cause of action" would constitute grounds for the motion only if the court also found that "there are no facts which could be alleged to constitute such a cause of action."

At a single hearing the court would consider not only the complaint but also any amendments proposed by the opposing party. If the court was persuaded that an amended complaint would cure the defect cited by the moving party, it would order that the complaint be amended and the motion would be denied without permitting further attack on the amended pleading. If the court concluded that no amendment would cure the defect, the motion would be granted. The burden would be on the opposing party to supply the specific amendment that would cure the defect. The motion could be made only once unless the moving party could show either new facts that could not have been presented earlier or a change in the law.

This proposed new motion to dismiss would have to be made no sooner than 60 days after the case is at issue and heard no later than 60 days before the first trial date. Further, the motion would require at least 60 days' notice to permit the opposing party to conduct discovery, if necessary, in order to oppose the motion. Continuances to obtain further evidence would be granted only if the opposing party demonstrated that the evidence could not have been obtained during the 60 days the motion was pending.

The new motion could be used to dispose summarily of entire causes of action and affirmative defenses, if the undisputed facts demonstrated they had no merit. It would eliminate the present summary adjudication of issues motion. Because of the failure of both the courts and the Legislature to define what is a proper issue for summary adjudication, this procedure has grown into an unwieldy, time-consuming monster that does little to save trial time and indeed frequently complicates trial following the granting of such motions.

Finally, I endorse Mr. Karnow's suggestions for reallocating the burden of proof. Once the moving party has made a prima facie showing that the opposing party lacks evidence to support an essential element of a cause of action or affirmative defense, the burden should shift to the opposing party to demonstrate the existence of such evidence.

I have drafted a proposed statute in accordance with these suggestions. The civil procedure committee of the California Judges Association is presently studying the proposal. I would welcome comments from bench and bar.

William F. Rylaarsdam is a judge of the Orange County Superior Court in Santa Ana.

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