

Date of Meeting: October 8-9-10, 1958
Date of Memo: October 1, 1958

Memorandum No. 2

Subject: Study #22 - Cut-off Date, Motion for New Trial

At its meeting on September 29, 1958, which I attended, the Northern Section of the Committee on Administration of Justice had before it the Recommendation of the Law Revision Commission relating to the time within which motions for new trial and to vacate judgment may be made. A copy of the Recommendation is attached.

The Northern Section approved the Recommendations with the following suggestions:

(1) That "the adverse party" in both Section 659 and Section 663a of the Code of Civil Procedure be changed to "any party." [If this suggestion is accepted in principle by the Commission should the substituted language be "any party to the action"?]

(2) That Section 953d of the Code of Civil Procedure be amended to refer to Section 663a as well as to Section 659. [As thus amended Section 953d would read as follows:

953d. Any notice of entry of judgment required by the provisions of Sections 659 or 663a of this code, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes.]

The portion of the Committee on Administration of Justice Staff memorandum

on which the action referred to above was based reads as follows:

MEMORANDUM

Re: New Agenda Item No. 3 - C. C. P. 659 and
663a - Time for giving notice of intention
to Move for New Trial or to Vacate Judgment.

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This proposal, of the Law Revision Commission, in principle, appears to be a salutary one.

The problems that are suggested, for the consideration of the Committee concern (1) Drafting detail; and (2) Possible expansion of the remedial legislation. Whether the latter would be agreeable to the Commission or within the scope of its authorized study is not now known. It may be that the Commission would prefer not to complicate the situation at this point.

Drafting detail (See pages 3-4 of "Recommendation" for Commission's text).

Suggestion No. 1.

Substitute "prevailing or any other party" for "adverse party" in both Section 659 and 663a.

Comment: Recent decisions of the California Supreme Court hold a clerk's notice insufficient as "written notice of the court's action" under C. C. P. 259a (Goetz v. Superior Court, 49 C. 2d 784) or as a notice of entry of judgment sufficient to start the time running for a motion for new trial (Cowee v. Marsh, 50 A. C. 168). The Commission has not sought to change this rule. As to the "party" who is to give the notice, it is said in the Cowee decision (adopting the opinion of the District Court of Appeal) that "The statute has not said expressly who may give the notice Any party desiring to achieve finality of the judgment may do so by giving the statutory notice." (P. 170). At another point, however, the quoted opinion refers to earlier decisions noting, "It has long been the custom and practice of California attorneys representing prevailing clients to serve the statutory notice of entry of judgment on the opposing counsel." (P. 171).

The term "adverse party" in the Commission text may give rise to litigation. Suppose a co-defendant gives the notice in an accident case where it is alleged both defendants are negligent. Or a co-plaintiff.

It is difficult to conceive why a formal notice of entry of judgment, even though given by a co-party, should not start the time running.

For an alternate approach, see Suggestion No. 3.

Suggestion No. 2.

Amend C. C. P. 953d (re notice of entry of judgment) to add a reference to Section 663a.

Comment. C. C. P. 953d refers only to a notice required by Section 659. The proposal brings Section 663a in conformity with Section 659 in this respect.

Suggestion No. 3 (alternate).

Delete from both Sections 659 and 663a as proposed, all reference to the person by whom the notice is to be given; instead amend Section 953d to read:

953d. Any Notice of entry of judgment required by ~~the provisions of~~ Section 659 or Section 663a ~~of this code, must~~ shall be given in writing a written notice by an attorney of record for a party, or by the party if he has no such attorney, served and filed in the action, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes.

Comment: This approach would appear to codify the practice as to who gives the notice, attorney or party. It adds the requirement of service and filing, to avoid letters and make a record, upon which time limits can be computed. Contra, it is wordy and may induce litigation where the document is not promptly filed with proof of service. Section 953d, moreover, is obscure, and is not the normal place to look.

Respectfully submitted

John R. McDonough, Jr.
Executive Secretary

July 22, 1958

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Time Within Which Motions for New Trial
and to Vacate Judgment May be Made

Section 659 of the Code of Civil Procedure authorizes a notice of intention to move for a new trial to be filed, inter alia, "within ten (10) days after receiving written notice of the entry of the judgment." Section 663a of the code authorizes a notice of intention to move to set aside and vacate a judgment or decree based upon findings of fact made by the court or the special verdict of a jury to be filed "within ten days after notice of the entry of judgment." Under both of these sections a motion is timely even though made many months or years after judgment has been entered and the time within which an appeal may be taken has passed, if the moving party can show that he was not given written notice of entry of the judgment by the prevailing party. Notice received from the clerk of the court is not sufficient to start the moving party's time running under Section 659; the same is presumably true under Section 663a.

The Commission believes that this situation is undesirable. The orderly administration of justice requires that motions for new trial and to set aside and vacate judgments be made and disposed of within a reasonably short time after a case is decided.

While the party against whom the motion is made can be said to have brought the difficulty on himself by failing to give notice of entry of judgment, the State has a larger interest in the matter than that of assessing the blame for long-delayed motions between the parties or their counsel.

The Commission recommends, therefore, that Sections 659 and 663a of the Code of Civil Procedure be revised to require the motions to which they relate to be made within 30 days after entry of judgment or within 10 days after receipt of written notice of entry of judgment, whichever is earlier. Under this rule the prevailing party will be able, as at the present time, to shorten the time to move for a new trial or to vacate a judgment by giving prompt notice of the entry of judgment. Should he fail to give such notice the time to move will expire 30 days after the entry of judgment.

The Commission does not believe that these proposed amendments will impose undue hardship on the moving party. As the report of its research consultant shows, at least 12 jurisdictions have a similar rule in respect of motions for new trial and most of them give the moving party only 10 days or less after entry of judgment (or other event of record) to make the motion. Moreover, the losing party must keep track of the date of entry of judgment in any event inasmuch as his time to appeal runs from that date.

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

An act to amend Sections 659 and 663a of the Code of Civil Procedure relating, respectively, to the time within which notice of intention to move for a new trial and notice of intention to move to set aside and vacate certain judgments and decrees may be filed.

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

SECTION 1. Section 659 of the Code of Civil Procedure is amended to read:

659. ~~Notice-of-Motion--Filing-and-Service,-Time--Contents+ Extension-of-time.~~ The party intending to move for a new trial must, ~~either-(1)-before-the-entry-of-judgment-and,-where-a-motion for-judgment-notwithstanding-the-verdict-is-pending,-then-within five-(5)-days-after-the-making-of-said-motion,-or-(2)-within-ten (10)-days-after-receiving-written-notice-of-the-entry-of-the~~ judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both, either

1. Before the entry of judgment and, where a motion for judgment notwithstanding the verdict is pending,

then within five days after the making of said motion; or

2. Within thirty days after the entry of the judgment or ten days after receiving from the adverse party written notice of the entry of judgment, whichever is earlier.

Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation.

SECTION 2. Section 663a of the Code of Civil Procedure is amended to read:

663a. The party intending to make the motion mentioned in the last section must, within thirty days after the entry of judgment or within ten days after receiving from the adverse party written notice of the entry of judgment, whichever is earlier, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which, and the time at which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. The time designated for the making of the motion must not be more than sixty days from the time of the service of the notice. An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment and a bill of exceptions to be used on such appeal may be made prepared as provided in section-six-hundred-and-forty-nine. Section 649.