#71 3/4/71

Memorandum 71-16

Study 71 - Pleading

SUMMARY

Attached as Exhibit I are the Minutes of the Southern Section of the State Bar Committee on Administration of Justice (CAJ), relating to the Commission's proposed legislation on counterclaims, cross-complaints, joinder of causes, joinder of parties, and related matters. Also included in Exhibit I are Minutes of the entire CAJ on one section of the proposed legislation.

This memorandum discusses only the sections of the bill that were disapproved. It should be noted that disapproval by the Southern Section does not necessarily mean that the entire CAJ will disapprove the particular section, nor does the action of CAJ bind the Board of Governors which has not yet considered this matter.

Also enclosed is an extra copy of the Commission's recommendation on this proposal.

ANALYSIS

§ 425.20. Separate Statement of Causes

California law (Code of Civil Procedure Section 427) presently requires that, when a plaintiff unites several "causes of action" in the same complaint, those causes "must be separately stated":

> provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.

The Commission, in proposed Code of Civil Procedure Section 425.20, would limit the separate statement requirement to cases where separate statement is necessary to avoid confusion. The reason for so limiting the separate statement requirement is that it encourages prolixity and uncertainty in the statement of facts constituting the causes of action. See the discussion in the report at 511-512, 544-545.

The Southern Section disapproved this change, stating four reasons for its disapproval:

(1) It is important to California practice that the "theory of the cause of action" be pleaded and, if there is a breakdown in the "basis of liability" type of pleading, confusion will result.

This objection is apparently based on a mistaken notion of what a "cause of action" entails. California follows the "primary right" theory of a cause of action; the primary right and duty and the delict or wrong combined constitute the cause of action. Thus, a cause of action is based upon the "right" of the plaintiff that has been injured and not the particular legal theory of liability. For example, a single transaction or occurrence may cause several primary rights of the plaintiff to be injured (e.g., personal injury and property damage) and give rise to several causes of action. (This is why, for example, the last proviso of Section 427--quoted above--permits "causes of action for injuries to person and injuries to property, growing out of the same tort," to be joined and exempts the two separate causes from the separate statement requirement.) Generally, however, if a plaintiff wishes to join several causes of action in a single complaint, he must separately state these causes under present law. However, if plaintiff's cause of action for personal injuries could be supported under any of several theories of recovery,

e.g., negligence or absolute liability, he is not required to specify in his pleading the theory or theories upon which he intends to rely. See generally 2 Witkin, California Procedure Pleading §§ 11-22.

Whether, as the Southern Section seems to feel, the bases of liability or theories of relief upon which the plaintiff intends to rely should be specified in the pleading is a matter which the Commsssion has previously discussed. The Commission determined that any new requirement that theories of relief be pleaded would not be desirable. This determination is in accord with the basic concept of code (fact) pleading, rather than the common law issue (based on old common law writs) pleading. In fact, a major reform of the 1872 code provisions was the substitution of "fact" pleading for "issue" (theory) pleading. Nevertheless, lawyers often plead several theories of recovery on one cause of action, and some persons confuse this with the separate statement requirement. Under present law, if a pleading designates particular theories of relief, it is not necessarily invalid. But despite a narrow designation of theories, a plaintiff may nonetheless recover upon any theory which the facts pleaded and alleged will support. See 2 Witkin, California Procedure Pleading §§ 189-193.

The proposed section does not change in any way the requirement that each cause of action must be pleaded; it merely restricts the separate statement requirement to cases where it serves a useful purpose.

(2) The present system of separate statement of causes is working well in California practice, sharply presenting the issues.

Whether the separate statement works well is, of course, largely dependent upon point of view. As Witkin points out, where several causes are joined, the pleader is simply required to repeat facts alleged elsewhere or else

incorporate them by reference in each of the separately stated causes. In addition, to be safe, the pleader may allege as many "causes" as he can envisage. This results in wordy and often confusing pleadings.

Further, the practitioners appear to be able to work well without separate statement in the two areas excepted from the separate statement requirement.

(3) The requirement that separate statement is necessary only to avoid confusion invites motions to separately state, resulting in a likely "tremendous" increase in court workload.

This argument appears tenuous. Since it is already a ground for demurrer to a complaint that the complaint is "uncertain" (including ambiguous and unintelligible complaints), it is hardly likely that the added ground of demurrer to avoid "confusion" will add substantially to the workload of the courts. In addition, it will be a rare case where a consolidated statement of causes of action arising out of the same set of facts will be confusing. If a practitioner chooses to demur on tenuous grounds, he may as well do this on the basis that the pleading is uncertain or fails to state a cause of action. The addition of "confusing" as a ground for demurrer will not increase bad faith motions; such motions can be made now.

(4) Restriction of the separate statement requirement is "an undesirable step" towards the informal notice pleading of the federal rules.

Although the federal rules contain a comparable provision in Rule 10(b), requiring claims founded upon separate transactions or occurrences to be stated in separate counts whenever a separation facilitates the clear presentation of the matters pleaded, restriction of California's separate statement rule in no way adopts any form of "notice pleading." The Commission's

recommendation leaves intact, and even reaffirms, the concept that the facts which constitute the causes of action must be pleaded--not legal theories or mere notice of the type of action involved. The restriction of the separate statement requirement will serve only to consolidate all relevant facts into one unified pleading upon which all causes of action and legal theories will be based unless to do so in a particular case is confusing. Thus, if a plaintiff has two causes of action arising out of a single transaction, he need only plead the facts of the transaction which give rise to his causes once, rather than twice.

You will recall that Witkin suggests that the separate statement requirement be eliminated entirely; he is of the view that a demurrer on the ground of uncertainty is sufficient to shape up pleadings in any case where a separate statement is needed so the other pleader can make a responsive pleading.

Assuming that Section 425.20 is retained in its present form, the Commission may wish to consider adding the following paragraph to the Comment to that section.

> Section 425.20 does not affect the common, although not required, practice of pleading in separate counts the facts supporting the various legal theories of liability upon which a cause of action is based. See 2 B. Witkin, California Procedure Pleading § 12 at 986 (1954). This section merely makes clear that the additional separate statement of causes of action is necessary only to avoid confusion.

This brief statement and reference to Witkin might help to clarify the effect of the section. Witkin's Section 12, referred to in the statement, discusses the distinction between a cause of action and a legal theory of wrong.

§ 426.20. Compulsory Joinder of Related Causes of Action

California does not now have a statutory requirement that a plaintiff must join all his related causes of action arising out of a single transaction.

However, as a practical matter, the plaintiff seldom fails to plead all causes, both for the sake of convenience and for fear that the rules of res judicata or collateral estoppel may bar any unpleaded causes. For this reason, and because adoption of a uniform rule would clarify the law by ending the need to rely on the uncertain rules of res judicata and collateral estoppel, the Commission has recommended that a plaintiff be required to join all causes he has against a party if related to the cause alleged in his complaint. One very important consequence of this rule will be that parties to a lawsuit will not fail to dispose of all claims arising out of the same transaction or occurrence in a single action, thus making adjudicative procedures more efficient by combining several suits in one. The proposed statute contains liberal provisions to avoid injustice. See Sections 426.40-426.60.

The Committee on Administration of Justice as a whole has opposed Section 426.20. The reasons given for opposition are twofold: compulsory joinder would burden the judicial system by added causes and attendant motions, and a plaintiff should have the right to defer some actions or bring later actions for a newly discovered cause or right.

That compulsory joinder would burden the judicial system is dubious in view of the fact that plaintiffs already join all causes in the normal course of events and very rarely hold back a cause for strategic reasons. The experience under the existing compulsory cross-complaint requirement does not indicate that that requirement has burdened the judicial system. Further, any added court burden due to increase of motions will be more than compensated by the decrease in time and expense of several trials of causes arising out of a single transaction.

The committee's second basis of opposition--that a plaintiff should have the right to defer a cause of action--is, of course, a basic policy

decision. It has been the Commission's view that to allow the plaintiff to decide when he will join causes and when he will not is to provide a tactical weapon to one party, with no good reasons apparent therefor. The defendant is faced with two separate actions arising out of the same transaction with perhaps two discovery proceedings, two separate trials, and the like. Further, under the Commission's recommendation, there is little danger of injustice to a plaintiff who fails to discover a cause of action at the time of his original pleading, for Section 426.20 acts to bar only unpleaded causes which exist at the time the plaintiff files. Thus, for example, it does not bar a later action for recovery of damages accruing after the filing of a complaint if the plaintiff did not have a cause of action existing at the time. In addition, a party who in good faith fails to plead a cause of action will, upon application to the court prior to trial, be granted leave to assert the cause unless it will result in substantial injustice to the plaintiff. Proposed Section 426.50. Moreover, in many cases, the statute of limitations will run on the unpleaded cause before the time of trial on the pleaded cause, and the plaintiff's unpleaded cause will be barred by the statute of limitations.

§ 426.60. Special Proceedings and Small Claims Actions Excepted

The Commission has determined that its proposed broad compulsory joinder rules should not be applied to special proceedings or to small claims proceedings, but to ordinary civil actions only. The Southern Section feels that special proceedings generally should not be excepted, but only specific types of proceedings. Although there is no rationale for this feeling provided in the Minutes, the apparent fear is that some special proceedings will be left without any applicable joinder rules. If this is indeed the fear, it

is unwarranted. To begin with, it is not at all clear that present joinder rules apply to special proceedings. (See Comment to Section 426.60.) Second, many special proceedings provide their own specialized joinder rules (e.g., Judicial Council rule governing proceedings under Family Law Act). Third, absent any applicable statutory rules governing a special proceeding, res judicata and collateral estoppel will apply. Finally, it should be noted that a listing such as the committee seeks would involve substantial investigation into many specialized procedures, a task which is impracticable and possibly beyond the Commission's authority at this time.

We assume that CAJ does not object to the small claims court exclusion.

§ 428.30. Joinder of Causes of Action Against Cross-Defendant

Under the proposed legislation, a cross-complaint is treated like a complaint and the cross-complainant can assert against any cross-defendant all causes he has against the cross-defendant, whether or not they are related causes. The Southern Section would not allow the cross-complainant to join unrelated causes if the cross-defendant (1) is brought into the action by the cross-complaint and was not previously a party or (2) is already a party but has not asserted a claim against the cross-defendant. The reason given for this divergence from the Commission scheme is that it will avoid "indefinite expansion" of issues and parties whereas the Commission scheme permits an unduly broad joinder of causes of action and parties, leading to the "overburdened" single action, with motions to sever and the like.

The Commission has, of course, considered the possibility of an infinitely large law suit, with complex interrelations of parties and claims, and has determined that, despite this theoretical possibility, most cases involving multiple parties and claims can be easily handled. Further, if

the litigation is to become overburdened, problems can be easily handled by severance of causes or issues for trial under Section 1048. The Commission has felt that "motions to sever and the like" are not necessarily anathema and can be a quite valuable tool. It should be noted that the Commission's scheme is basically similar to the Federal Rules (Rule 13) which have apparently functioned smoothly and efficiently in practice. Finally, if the goal of the Southern Section is to limit issues at trial, it should attack the basic notion that a plaintiff or defendant may assert unrelated causes against each other, rather than making their exception to the permissive joinder rule apply to cross-complainants only. The CAJ rule makes the race to the courthouse the determining factor, for it provides a rule that depends on which party commences the action.

New Matter: Service of Pleadings Upon All Parties

The Southern Section wishes to add a provision requiring that copies of all pleadings be served upon all parties who have appeared for informational purposes. While such a provision appears to the staff to be attractive at first glance, it may place a significant burden upon parties to the litigation. This appears to be a matter which requires separate consideration for which the Commission has no time available at present.

§§ 430.10-430.80. Objections to Pleadings

The Southern Section objects to the renumbering of Sections 430-434 as 430.10-430.80. The reasons given are that the old numbering and language used are well understood and familiar. The staff feels that, while it may at times be a virtue to prefer the tried and trusted to the new, nostalgia should not be allowed to interfere with progress. The renumbering and reorganization of

the sections is a practical necessity for clarity and organization of the code generally. And substitution of the word "objection" for "demurrer" in portions of the code loses nothing in substance while it gains much in meaning. After all, a demurrer is nothing but the pleading by which an objection is made. Thus, proper language substitution can add to precision of usage.

§ 431.70. Set-off

Section 431.70 allows certain previously unpleaded cross-demands to operate as set-off against a claim even though barred by the statute of limitations. Such set-off is not permitted, however, if the claim is one which should previously have been asserted under the compulsory joinder rules of Sections 426.20 and 426.30. The Southern Section would change this rule to permit such claims to be set off. This is simply a difference in policy. The Commission's position (and Section 431.70) is consistent with prior law as to claims not properly asserted by a defendant. (See the Comment to Section 431.70.) As to claims not properly asserted by a plaintiff, there is no prior law. Our scheme of compulsory joinder of plaintiff's claims is an innovation. However, the policy reflected in Section 431.70 is consistent with the basic underlying theme that plaintiffs and defendants should be treated similarly where possible.

§ 1048. Severance or Consolidation for Trial

Section 1048 is amended in the proposed legislation to substitute more precise language taken from the Federal Rules.

The Southern Section recommends that a subdivision be added including appropriate provisions relating to entry of a separate final judgment. This

is not adequately covered by California statute. The Commission has previously discussed this idea and determined that it is beyond the scope of its present studies and involves many problems that would require substantial time and resources to solve.

It should be noted that, although the Comment to Section 379.5 (separate trials for convenience of parties) refers to Section 1048, there is no similar cross-reference from Section 1048 to Section 379.5. The staff recommends that the Comment to Section 1048 be amended to add the following paragraph:

> The authority of a court to make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, including separate trial, is contained in Section 379.5.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

Memorandum 71-16 EXHIBIT I

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

February 25, 1971

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: S.B. 201 - Joinder, Counterclaims, etc.

Dear Mr. DeMoully:

Enclosed you will please find two photocopies of Minutes of the Southern Section of the Committee on Administration of Justice in draft form. These are being sent to you at the earliest moment following completion of action of the Southern Section on February 22.

There are in the opinion of the Southern Section a number of problems raised with the Commission's measure as reflected by these Minutes. The Northern Section of course will have its views. However, I feel that there should be some opportunity for discussion between us before you press S.B. 201 for hearing.

I might also add that the Board Committee on Legislation probably has the final authority but it will not meet until more than two weeks.

Yours very truly,

Garrett H. Elmore

Garrett H. Elmore

GHE:jc
cc: Mr. Horton, Mr. Hopkins
Mr. Bradford, Mr. Malone

(1)

AGENDA 70-29.5, 70-49.40, 70-49.41 - JOINDER OF CAUSES OF ACTION AND PARTIES; COUNTERCLAIMS AND CROSS COMPLAINTS - S.B. 201 (1971) (2/8/71)

(SUBJECT MATTER: Law Revision Commission revision of Title 3 (Parties) and Title 6 (Pleadings), CCP.)

ACTION TAKEN: Section by section review of LRC proposal (now S.B. 201); see below for recommended action.

DISCUSSION: Messrs. Fernandez and DeLuce, as a subcommittee of the Southern Section, having filed a written report dated 2/4/71, presented their views as to each section or group of sections, following which action was taken as indicated below.

Sec. 378, 379, 379.5, 389 - Parties. Approve these new sections and the repeal of existing CCP sections subject to a staff check on whether existing Sec. 384 creates substantive rights as between co-owners.

The LRC revision here is based upon the premise that deletion of specific joinder provisions, many of which ante date the revision of the 1920's, will eliminate unnecessary provisions. The general provisions cover the specific.

As to new CCP 389, based upon the federal rule, it is believed that the change is desirable to give guidelines to trial courts, and avoid dismissals on jurisdictional grounds.

Sec. 425.20 - Separate Statement of Cause of Action. A motion was adopted without dissent to disapprove this change from present CCP 427. The latter now generally requires separate statement, except that no separate statement is required in certain husband-wife actions or in recovery for injuries to person and to property growing out of the same tort. Sec. 415.20 requires separate statement only "when necessary to avoid confusion". Reasons: (1) It is important in California practice that the "theory of the course of action" be pleaded. There are, for example, different statutes of limitation, depending upon the basis or theory of liability pleaded. Also, each has elements for statement of a cause of action that is not demurrable. Sec. 415.20 tends to break down the requirement for "theory" or "basis of liability" pleading and we believe will lead to confusion. (2) In our view the present system of separate statement is working well in California practice. It sharply presents the issues, both for demurrer and later for an order on partial summary judgment motion. (3) Sec. 425.20

wording is so general it is likely to cause a tremendous increase in court workload by motions to require separate statement, a situation that does not now exist. (4) Sec. 425.20 is an undesirable step towards the informal "notice pleading" of the federal rules versus the "cause of action" pleading of state practice. In summary, despite the criticism of "prolixity", the cause of action separate statement pleading, in our view, serves useful purposes in the expeditious handling of the heavy state court litigation and should be retained.

Sec. 426.20 - Compulsory Joinder of Related Causes of Action by Plaintiff. Note: This has been previously disapproved (by divided vote) at the December, 1970, General Meeting. No further action was taken.

Sec. 426.30 - Compulsory Pleading of Related Cause of Action by a Defendant or Cross Defendant. After extended discussion, the Section voted, 4 to 3, to approve Sec. 426.30. It appears that Sec. 426.30 is a broadening of the present compulsory counterclaim procedure, in that Sec. 426.30 provides a broader scope than present CCP 438 (counterclaim must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had). The majority is willing to accept the broader test. It does not feel that there should be a parity between plaintiff and a defendant as to causes of action which must be asserted. Substitution of the "Related Cause of Action" text is not an unreasonable extension of the compulsory counterclaim provisions. Note: The detail of whether the "related cause of action" must involve only the plaintiff was not considered. End of Note. The minority favors adding wording that would narrow the "Related Cause of Action", e.g., "would tend to diminish or defeat the plaintiff's recovery", thereby ruling out certain equitable causes of action.

Sec. 426.30, 426.40 - Exceptions to Compulsory Pleading. It was noted that if the committee's objection to plaintiff-joinder is sustained, re-wording may be needed. The Section has no particular comment on the "exception" provisions in these two sections, except to suggest the two sections could be combined.

Sec. 426.50 - Relief from Default in Pleading Cause of Action. Approve.

Sec. 426.60 - Application to Civil Actions. Disapprove, unless made more explicit. While we recognize the beneficial purpose of the exclusion, we do not feel that this broad distinction is the best treatment, i.e., more specificity is desirable.

Sec. 428.10 - Permissive Joinder of Causes by Plaintiff. Approve, 6 yes, 1 no, 1 abstention. The majority feel that this extension is not objectionable, even though with the repeal of present CCP 427 there will be no restriction upon the types of causes of action that may be joined. There is a power to sever. Also, this is permissive only. The member in the minority opposes a relaxation, on the ground it will result in an "overburdened" single action, with numerous parties and motions to sever. He would retain present CCP 427. Staff raised the question of whether this section requires a "nexus", i.e., one cause of action affecting all defendants. It was the view this was covered by the "party joinder" rules of new Sec. 378.

Sec. 428.10, 428.20 - Cross Complaints. On initial review these sections were preliminarily approved. Note: See Minutes of Southern Section, 2/22/71 for further discussion.

AGENDA 70-29.5, 70-49.40, 70-49.41 - JOINDER OF CAUSES OF ACTION AND PARTIES; COUNTERCLAIMS AND CROSS COMPLAINTS - S.B. 201 (1971) (2/22/71)

ACTION TAKEN: Section by section review of LRC proposal (new S.B. 201) on basis of subcommittee report. Continued; see below for recommended action.

DISCUSSION: Messrs. Fernandez and DeLuce as a subcommittee continued the review (see Minutes of 2/8/71).

Sec. 428.10, 428.20, 428.30 - Cross Complaints. These sections were considered together. After extended discussion, a motion was adopted, 5 yes, 1 no, to disapprove Sec. 428.10, 428.20 and 428.30 on the ground that, taken together, they permit an unduly broad joinder of causes of action and parties, leading to the "overburdened" single action, with motions to sever and the like. The majority favors (1) permitting a defendant (or cross defendant) to cross complain against the plaintiff (or the person filing the cross complaint) on any cause of action (see Sec. 428.10(a)); (2) restricting all other causes of action by cross complaints to whose which arise out of the same transaction or series of transactions alleged in the plaintiff's original complaint. This will avoid indefinite expansion of issues and parties, as is possible under Sec. 428.10 through 428.30, as we understand. We believe consolidation of actions takes care of most problems. Sec. 428.10 through 428.30 would therefore have to be re-drafted to meet these objections. The member in minority favors the LRC approach, and feels the multiple issues and parties can be handled, despite the theoretical possibilities mentioned.

Sec. 428.40 - Separate Document. Approve.

Sec. 428.50 - Leave to File. Approve. There is no objection to the "before" wording.

Sec. 428.60 - Service. Approve. The Section was inclined to question "party affected" but makes no comment since it is in Section 442.

New Matter: As a separate matter, it was moved, seconded and carried (1 dissent), that provisions be added to the Act which will require that copies of all pleadings be served upon all parties who have appeared, even though they may not be "affected thereby". See CCP 2030(a), last sentence, re serving informational copies of interrogatories and answers on all other parties who have appeared.

Sec. 428.70 - Third Party Defendant - Special Answer. Approve (1 dissent).

Sec. 428.80 - Abolish Counterclaim. Approve.

Sec. 429.10, 429.20 - Petition re Marriage. No comment.

Sec. 429.30 - Infringement. No comment.

Sec. 430.10-430.80 - Objections to Pleadings. After discussion, two substantive changes are unanimously recommended to conform to views here expressed. (1) Sec. 430.10, subd. (e), should be amended to strike the last clause ("and separate statement is necessary to avoid confusion"); (2) Sec. 430.10 should be amended to provide for misjoinder of causes of action as a ground of demurrer. As to (2), there will be occasions under the views taken herein, where improper causes of action are joined in a cross complaint. In addition, it is recommended (by a vote of 5 to 2) that the form of Article 1 (Sec. 430.10 through 430.80) be opposed, and that the present code sections, including CCP 433, 434 be retained, subject only to such amendments as are necessary to make them applicable to cross complaints. There does not appear any need to re-arrange these sections which are well understood and refer clearly to the use of a demurrer in contrast with the new wording "object to". The two in dissent would accept the LRC form with, however, the two substantive changes first above-mentioned.

Sec. 431.70 - Cross Demands. Recommend disapproval, unless the next to last sentence is amended to read: "Where the cross demand is barred for previous failure to assert it under Section 426.20 or 426.30, the relief accorded under this section shall not exceed in value the relief granted to the other party." A less harsh penalty for failure to plead by cross complaint should be imposed; otherwise, by pleading technicality there can be a complete loss of rights.

Sec. 1048 - Severance, Consolidation. Approve Sec. 1048(a) and 1048(b) which are taken from FRCP 42 and are more explicit than present CCP 1048. However, new Sec. 1048 should also include appropriate provisions relating to entry of a separate final judgment. Subd. (b) of FRCP 54 provides a suitable pattern, provided it is coordinated with (1) the situation where demurrer is overruled and plaintiff or cross complainant fails to answer or where the demurrer is sustained without leave to amend; (2) the summary judgment provisions of CCP 437c, both in case of a full summary judgment and in case of an order for partial summary

judgment. Subject to these comments the Section approves the principle of FRCP 54(b) for insertion in new Sec. 1048 as subd. (c). Note: Present CCP 578, 579 (unchanged since 1872 and expressed generally in terms of "plaintiff" and "defendant") now authorize a several judgment. They should be considered for repeal if subd. (c) is added. It is also suggested consideration be given to a new subd. (d) in new Sec. 1048, incorporating the substance of FRCP 20(b) re orders preventing undue expense to a party when another party is included against whom he asserts no cause of action and who asserts no cause of action against him. It is recognized such provisions would duplicate proposed CCP 379.5, but it is felt that the subject is so important that this second "placement" is warranted. Staff Note: Another solution would be to have CCP 379.5 refer to subd. (d) of Sec. 1048, by way of "flag", thereby avoiding duplication. End of Note. Subd. (d) in the subcommittee report was not adopted.

General Recommendation: A motion was then adopted (1 dissent) expressing the view of the Southern Section that the Act, in the form proposed by the Law Revision Commission, presents substantial questions as to desirability and workability and should be opposed unless amended.

- - - - - - - -

The Chair thanked Messrs. Fernandez and DeLuce for their work as a subcommittee.

- - - - - - - -

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

March 1, 1971

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

Herewith two copies of Minutes of the CAJ General Meeting which sets out the (divided) views on plaintiff's mandatory joinder.

This fills out the Southern Section Minutes we sent to you.

Yours very truly,

Garrett H. Elmore

GHE:jc
Enc.
cc: Mr. Horton
Mr. Hopkins
Mr. Bradford

(8)

(Gen. Mtg. 12/11-12/70)

AGENDA 70-29.5, 70-49.40, 70-49.41 - JOINDER

ACTION TAKEN: 1) Concur with South and oppose any enlargement of provisions for mandatory joinder of related causes of action (10 yes, 4 no); 2) continue balance for section action.

It was noted that the LRC proposal proceeds on the theory that all related causes of action should be joined in the action and recommends compulsory joinder of such causes with provision for severance where appropriate; the Conference proposal on the other hand is for permissive joinder of such causes. The majority feel that compulsory joinder would promote the commencement and possibly trial of actions which would not otherwise be brought and complicate the administration of justice by burdening the courts with added causes of action, demurrers and motions, including motions to sever and that a plaintiff should have the right to defer some actions or later bring an action for a newly discovered cause or right. Also see South's action of 11/2/70. The minority point to the present requirement that a defendant join all related causes he may have in a cross-complaint and feel that fairness demands that the plaintiff be required to join all such causes he may have. They do feel the system is workable and minimizes multiplicity of actions and the difficulties of collateral estoppel.