#52.80 1/7/76

Memorandum 76-16

Subject: Study 52.80 - Undertakings for Costs

A letter has been addressed to the Commission by Mr. Ernest L. Aubry, the attorney who represented the plaintiffs in the Beaudreau case, concerning the initial staff draft of a recommendation relating to undertakings for costs (attached to Memorandum 75-74 of September 23, 1975). A copy of Mr. Aubry's letter is attached as Exhibit I.

Mr. Aubry's various points are summarized as follows, followed by staff comment on each item.

1. The proposed legislation fails to provide a standard for the determination of when an undertaking should be required. (Letter, pp. 1-2.)

Staff comment: Under the recommendation as approved November 6, 1975, the standard is contained in each individual statute authorizing an undertaking for costs. The recommendation authorizes the undertaking as follows: nonresident plaintiff--in all cases except where there is no reasonable possibility that the defendant will prevail; vexatious litigant--no reasonable probability that plaintiff will prevail; all other cases--no reasonable possibility that plaintiff will prevail.

2. No procedure is specified for the hearing and determination of the motion. (Letter, p. 2.)

Staff comment. The recommendation requires the plaintiff to accompany his motion for an undertaking with an affidavit in support of the grounds for the motion and a memorandum of points and authorities. Proposed Code Civ. Proc. § 1040.15. In the Comment to proposed Section 1040.20, we note that, "[a]t the hearing, the usual showing is by affi-

davits or declarations although the court may receive oral and documentary evidence as well. 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 24-25, at 2693-2694 (2d ed. 1971)."

3. The requirement that the undertaking shall be one and one-half times the defendant's probable allowable costs raises due process questions. (Letter, p.2.)

Staff comment. The Commission changed this on November 6 to make the amount of the undertaking equal to the defendant's probable allowable costs. See proposed Code Civ. Proc. § 1040.25.

4. The burden of proof should not be on the plaintiff to show his claim is meritorious. (Letter, p.2.)

Staff comment. The Commission deleted this on October 11 and later decided to avoid "burden of proof" language. The recommendation now requires the moving defendant to accompany his motion with "an affidavit in support of the grounds for the motion and a memorandum of points and authorities." Proposed Code Civ. Proc. § 1040.15.

5. There may be equal protection problems in allowing public entities and public employees [and presumably the other "favored" classes of defendant] to require the plaintiff to furnish an undertaking when the privilege is not enjoyed by private litigants generally. (Letter, pp. 2-3.)

Staff comment. The Commission has acknowledged the potential equal protection problem. The problem is noted and sidestepped in Nork v. Superior Court, 33 Cal. App.3d 997, 999-1000, 1003, 109 Cal. Rptr. 428 (1973). However, the Beaudreau case indicates that, with respect to public entities and employees, the favored treatment is justified:

> We do not dispute that the state has a legitimate interest in protecting public entities and their employees against frivolous lawsuits. Nor do we necessarily find fault with the statutory classification distinguishing between plaintiffs on the basis of whether the parties they sue are public entities or public employees rather than private persons. The Legislature may have had reason to believe that there exists a greater danger of unfounded actions against public, rather than private parties. [Beaudreau v. Superior Court, 14 Cal.3d 448, 460-461, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).]

6. As a policy matter, public entities and public employees should not be so favored. (Letter, pp. 3-7.)

Staff comment. The Commission disclaimed any endorsement of the policy underlying each cost bond statute and limited its recommendation to remedying the procedural defects in the statutes.

7. There should be an exception to the undertaking requirement where the action against a public entity or employee is for declaratory or injunctive relief. (Letter, pp. 3-4.)

Staff comment. This is similar to the point raised by Mr. Brian Paddock of the Western Center on Law and Poverty. Mr. Paddock's concern was with the effect of the mandatory stay provisions on actions for injunctive relief. The Commission considered Mr. Paddock's point on November 6 and decided that no exception to the stay provision should be made in cases in which injunctive relief is sought.

8. An undertaking should not be required from an indigent plaintiff. (Letter, pp. 4-5, 7.)

Staff comment. As noted in our Comment to proposed Section 1040.20, "the court has the common law authority to dispense with the undertaking if the plaintiff is indigent. E.g., Conover v. Hall, 11 Cal.3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974)."

9. There may be other and better ways to deter frivolous litigation. (Letter, p. 6.)

Staff comment. The Commission in its recommendation noted that it had not "considered whether there may be other and better ways to deter frivolous litigation."

10. The Commission's recommendation should be circulated for comment before the legislation is introduced in the Legislature. (Letter, pp. 1,7.)

Staff comment. The Commission determined to submit legislation prior to circulation of the recommendation for comment because of legislative interest in prompt action in the wake of the Beaudreau case.

Respectfully submitted,

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Memorandum 76-16

EXHIBIT I

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December 23, 1975

Mr. Marc Sandstrom
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Re: Law Review Commission Study
52.80 - Undertakings for Costs

Dear Mr. Sandstrom:

I am the attorney who represented the petitioners in Beaudreau v. Superior Court (1975) 14 Cal.3d 448. I have been informed that the Commission has undertaken a study (demoninated #52.80) concerning the issue of cost bonds in conjunction with prosecution of civil litigation. Because of my continuing interest in that topic, I request that you place me on your mailing list for receipt of materials (additional staff studies prepared after September 23, 1975; revisions to language of the proposed statute; etc.) on this subject and notices of meetings at which it is to be discussed.

Your Study 52.80 and staff draft recommend proposal of legislation in response to the Beaudreau decision and like cases but without the Commission's having studied the advisability of cost bonds. Such action by the Commission would be unjustifiably hasty and ill-conceived. The issue involves fundamental policy questions. Recommended replacement legislation should not be predicated on anything less than a full, deliberate and well-considered inquiry into the full range of implications, and only after ample opportunity for public comment - before a measure is introduced into the Legislature.

I offer herein comments and questions based on my initial reactions to a reading of some of the staff papers.

Deficiencies of Proposed Statute in View of Decisional Law Interpreting Due Process Provisions

The proposed legislation nowhere specifies standards for the direction of the exercise of discretion by the trial court (a) in ascertaining in a particular case the necessity for requiring a

bond (Would the procedures and standards be the same as in applications for preliminary injunction? Would the matter be submitted on affidavits? How far into the merits of a plaintiff's claims would the hearing inquire?); or (b) in fixing the amount of the undertaking. See Beaudreau, 14 Cal.3d at 454, 460; Nork v. Superior Court (1973) 33 Cal.App.3d 997; Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600; compare Corps. Code §834 and C.C.P. §1029.6(a).

What is the rationale for requiring an undertaking in an amount one-and-a-half times defendant's probable allowable costs and expenses? Does this not raise additional due process questions?

To place the burden of proof on plaintiff to show the merit of his claim substantially impairs his right to invoke judicial machinery for resolution of disputes. The plaintiff, by such requirement, is compelled to prove his case prematurely and to do so without benefit of the right granted all litigants to invoke discovery. Particularly (though not solely) in actions against public entities, it is most often true that the specific information for proof of plaintiff's case is in possession of the defendant. The assertion that "plaintiff will more often have superior knowledge of facts relevant to the question of merit" is of highly dubious validity.

On the other hand, when the plaintiff does have the superior knowledge, the defendant may use discovery preparatory to motion and hearing for determination of the cost bond issue.

Establishing probability of merit to avoid imposition of a cost bond is radically different than likelihood of success to obtain a preliminary injunction. In the latter instance, plaintiff is seeking affirmative relief from the opposition, and that is precisely what the defendant desires when moving for an order compelling filing of an undertaking (Beaudreau, 14 Cal.3d at 457). The allocation of burden seems patently misplaced.

Of course, plaintiffs should, at their option, be allowed to present their own evidence regarding meritoriousness of their claims; but, when the defendant seeks to exact from plaintiffs property to which the former has no pre-existfng claim of right (either acquiring the undertaking or compelling plaintiff to incur dismissal of the action), it would seem to be a constitutional requirement that the moving party be the one on whom to place the burden of going forward and the burden of persuasion.

Aside from the basic societal policy issues specified below, are there equal protection problems in according to public entities

and public employees the benefit of requiring cost bonds (even after hearing) without extending the same privilege to private litigants (defendants) in other civil lawsuits generally?

Also - if a plaintiff suing a public entity demonstrates probability of merit, should the privilege not likewise be extended to him? Recalcitrant public entity defendants, like vexatious litigant plaintiffs, do exist.

Policy Issues

Suing the government. Is it socially desirable to insulate government from citizens?

Is it advisable to institutionalize cost bonds at all as a benefit to governmental defendants?

The plaintiffs in Beaudreau were faced with a $20,900 obstacle to prosecution of their suit. Defendants in the future could easily obtain judicial approval of like sums because of plaintiffs' inability, without benefit of discovery, to show probability of success in a meritorious lawsuit.

There are cogent arguments to be advanced against the social utility of enabling government to be insulated by such devices as cost undertakings. E.g., see Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights," 1973 Duke L.J. 1153 (Part I), 1974 Duke L.J. 527 (Part II).

Beyond the purpose of deterring frivolous litigation, where is the rationale for requiring cost bonds explicated? What would the increased incidance of frivolous litigation be in the absence of the security-for-costs imposition?

Why should the public employee, as opposed to the public entity, be allowed such a privilege? Even if the state can establish for itself a justification of sufficient magnitude to permit imposition of cost bonds, government employees cannot be impressed with the same justification, for such employees are not co-extensive legally with their employers and there is no reason for immunizing them from wrongs which they commit.

If the state should be permitted as a general proposition to require cost bonds, should the area be narrowed to specified kinds of cases, or exceptions made in certain matters such as suits for

declaratory or injunctive relief to vindicate constitutional rights?

Insulation of public officials from liability and accountability for their conduct in office. Prior to the Beaudreau decision, the Government Code served as an effective deterrent -and in many instances, an absolute bar- to indigent persons, and others, seeking redress in courts against public officials. Public entities and their employees enjoyed benefits not accruing to private citizens. As an example, a state or local government agency participating in a federal grant-in-aid program (such as cooperative federal-state programs funded pursuant to the Elementary and Secondary Education Act and the Social Security Act) could refuse to adhere to requirements established by federal law and regulations and have their illegal actions shielded from judicial scrutiny because would-be plaintiffs (those individuals with standing to sue, nonetheless) do not possess monetary resources necessary to meet the outlay occasioned by a demand for security. (The Beaudreau plaintiffs, had the statutes withstood constitutional challenge, would have been obliged to post $20,900 in cash.) Thus, public entities and employees would enjoy immunity from wrongdoing; citizens would not be able to have the merits of their claims adjudicated in court.

Moreover, public employees, when accused in litigation of wrongful conduct, have their defense provided by publicly employed attorneys and are relieved of the cost of defending the lawsuit, regardless of their economic circumstances and without inquiry into the propriety of their challenged acts -an advantage not granted to private individuals named as defendants in a lawsuit. (The public entity is compelled by law to undertake the defense of its employees, and the citizen plaintiff must therefore assume the cost of processing his own claim in the courts as well as finance his adversary's case at the same time.) Indigent persons, on the other hand, have insufficient access to legal services and do not have the monetary resources to hire attorneys and pay other costs of litigation. The number of "poverty lawyers" funded by the Office of Economic Opportunity and other attorneys employed in public interest law firms is far from adequate to meet the need for legal services for individuals who have historically been unrepresented or underrepresented in our system's method of allocating resources of the bar. Imposition of costs as a condition for filing suit is but another obstacle to fair legal representation, further delaying attainment in fact of the precept of equal justice.

The remedy of a security deposit previously available through the Government Code to the public entity or employee was not extended

to private citizens. There was no reciprocity or mutuality. That is, the plaintiff could not demand that a defendant attempting to defend his wrongful conduct put up money to help finance the plaintiff's case.

Impairment of Right of Access to the Courts

> "'[W]henever one is assailed in his person or his property, these may be defended.' Windsor v. McVeigh, 93 U.S. 274, 277 (1876) ...." Boddie v. Connecticut (1971) 401 U.S. 371, 377, 28 L.ed.2d 113, 118, 91 S.Ct. 780.

This statement of the Supreme Court is recognition of a basic right in our system of law-namely, the right accorded the individual to have resort to the courts for vindication of legally protected rights; but §§ 947 and 951 operate, irrationally, to obstruct aggrieved persons' effective utilization of the judicial process.

There is an overwhelming public interest in having the courts available for dispute-resolution and in avoiding the condition of arbitrary foreclosure of that avenue of redress for wrongs.

The Beaudreau decision has profound implications for the principle of access to courts for resolution of disputes. The decision reduces the expense of litigation and removes an impediment to the citizen's ability to sue. It eliminates the preferred position heretofore accorded public officials when they are parties defendant in civil litigation.

Indigent persons, as a whole, have more claims against government agencies than do members of affluent communities. The classes insulated from suit by the Government Code are the ones against whom the poor most often have legally redressable claims; they constitute a highly significant group of potential defendants.

Governmental entities are the agencies which, with a high degree of regularity, obstruct access to and attainment by citizens of valuable benefits and rights. They are least eligible for or deserving of insulation from judicial scrutiny.

The courts constitute a monopoly for hearing lawsuits and for settling disputes after internal administrative processes have been exhausted. Citizens increasingly are compelled to seek changes in or

nullification of governmental policy and practices through the judicial system since internal policy modifications and alterations in conduct are seldom made in the interest of the unrepresented, non-influential citizen.

Litigation is the procedure made available, and highly commended, in our societal structure for redress of legal wrongs. It is the policy of our system of justice to guarantee a remedy for transgressions against legally protected rights, and society has a compelling interest in deterring self-help and other destructive extra-judicial personal remedies which aggrieved individuals might choose if the doors of the courts are closed to them. Such artificial requirements as those which are embodied in §§ 947 and 951 are of insufficient importance to outweigh the value either to the individual or to society of maintaining the courts as forums for settlement of disputes.

Deterrents to litigants and their lawyers which adequately protect State interests in preventing vexatious and unmeritorious litigation include the following principles, procedures, remedies and sanctions: summary judgment and motion to strike where it is claimed that an action has no merit (Lincoln v. Didak (1958) 162 Cal:App.2d 625, 631); inherent power of courts to dismiss actions for lack of merit or because of vexation (Cunha v. Anglo-California Nat'l. Bank (1939) 34 Cal.App.2d 383, 391-392; Crawley v. Modern Faucet Mfg. Co. (1955) 44 Cal.2d 321, 324-325); res judicata raised by appropriate procedure such as demurrer; injunction or bill of peace to prevent multiplicity of actions that are barred by res judicata or which involve common questions of law and fact; consolidation of multitudinous actions; recovery by injured party through action for the tort of malicious prosecution or abuse of process; disciplinary sanctions against attorneys for prosecuting frivolous litigation; monetary sanctions against attorneys and their clients for dilatory or frivolous tactics in the course of litigation. Also see the "Vexatious Litigant Statute" (Code of Civil Procedure §§ 391-391.6).

Denying to public entities and their employees the summary procedures in §§ 947 and 951 would do no more than relegate them to the financial risks borne by defendants generally. And such denial would not relieve a plaintiff from the obligation of paying costs that might eventually properly be taxed against him.

There is no increased risk of non-payment of costs when the government is the defendant over such risk in cases involving non-governmental parties. The courts work no less efficaciously for

lack of pre-adjudication remedies to assure payment of costs to the prevailing party.

By judicial doctrine and increasingly by statutory provision, citizens are accorded standing to sue for the purpose of monitoring government agencies or vindicating legislative policy. In this state, C.C.P. §526a provides standing for a taxpayer to oversee governmental actions in order to prevent illegal expenditures of public funds. C.C.P. §526a as well as the principle of the private attorney general suing to effectuate public policy would be seriously impaired were replacement legislation for Government Code §§947 and 951 to be enacted.

The lack of an economically measurable interest on the part of any individual member of the public and the difficulties inherent in complex public interest litigation make the economics of citizen suits a serious problem. Cost bonds add to the economic burden.

Monetary gain is not the objective of plaintiffs in such litigation. Hence, even were they able to post security for costs, the economics of the situation would serve as an effective deterrent to initiation of public interest lawsuits. For the indigent and near-indigent, the economics pose an insuperable bar.

Public interest or citizen suits are designed to effectuate public policy and create widespread benefit to society. The purpose of allowing citizens to sue as "private attorneys general" is to encourage socially desirable litigation to vindicate public policies. Conditioning access to the courts upon posting of security to cover defendants' costs subverts these purposes.

In closing, I reiterate that, before final decision, the Legislature should have the opportunity to assess the impact of alternatives in terms of all the people who are to be affected by proposed legislation. This cannot be accomplished without full study and invitation to comment.

Sincerely,

ERNEST L. AUBRY
Attorney at Law

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