#J-600 6/4/81

Memorandum 81-20

Subject: Study J-600 - Dismissal for Lack of Prosecution (Draft of Tentative Recommendation)

Attached to this memorandum is a staff draft of a tentative recommendation relating to dismissal of a civil action for lack of prosecution, drafted in accordance with the Commission's decisions made at the March 1981 meeting. In general the draft keeps existing law but codifies exceptions and excuses to dismissal that are now found in case law. The draft also adopts the posture of a moderate liberalization of the dismissal statutes in the form of a policy declaration in favor of trial on the merits, discretionary dismissal for failure to bring to trial after three rather than two years, and a one-year automatic extension of time to bring to trial upon affidavit of the plaintiff. This memorandum notes a few unresolved policy questions in the draft.

§ 583.330. Computation of time. Existing law provides an excuse for failure to bring an action to trial within five years if to do so was "impossible, impracticable, or futile." Section 583.330 preserves this excuse, but gives it a liberal interpretation by providing that the court shall make a reasonable allowance for the time of delay caused by "special circumtances that hindered the plaintiff." This is not inconsistent with existing case law, but does give the court more latitude in excusing delays. The Comment gives illustrations of the types of delay that would be excused under the more liberal standard. The Commission had deferred consideration of this point at the March meeting.

§ 583.340. Additional time upon affidavit. The plaintiff can obtain a one-year extension of time within which to bring an action to trial by filing under Section 583.340 an affidavit of good cause. As drafted, this procedure would be available to any plaintiff in any court. However, its main use would appear to be in situations where due to congested court calendars the plaintiff is unable to meet the statutory deadline. The affidavit procedure will avoid the need for a motion to advance the trial date and will avoid the need to argue the defense of impossibility, impracticability, or futility in response to the defendant's motion to dismiss. We could limit the affidavit procedure to

congested courts; however, the staff sees problems in trying to define a congested court and does not see any harm in allowing the affidavit procedure in all courts.

§ 583.430. Authority of court. Section 583.430 provides alternative sanctions to discretionary dismissal by the court--the court may as an alternative to dismissal make an award of costs, expenses, and attorney's fees against the plaintiff or the plaintiff's attorney. Does this provision go too far, or not far enough, and should it be extended to the mandatory dismissal provisions?

At the March meeting the Commission approved the concept that as an alternative to discretionary dismissal the court could impose a civil penalty on the plaintiff or the plaintiff's attorney. The staff has not drafted a penalty as such, but rather an allowance of costs and attorney's fees to the defendant. The staff draft takes this approach because of the lack of any standards for assessing a civil penalty, the hostility of the courts towards civil penalties, and because a civil penalty does nothing to help a defendant who is injured by the delay. At least one case has approved the concept of awarding costs and attorney's fees for damage to the defendant caused by delay. See Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

The Commission's consultant, Mr. Elmore, is now of the opinion that it would be inadvisable to permit monetary sanctions of any kind to be assessed against the plaintiff. See Exhibit O, attached. He is concerned that rather than exercising sound discretion for or against dismissal, a court will routinely impose a large assessment against the plaintiff which will be uneconomical for the plaintiff to comply with, thus forcing dismissal in many more cases.

Assuming the Commission decides to keep alternative sanctions to dismissal, Mr. Elmore also raises the policy question whether they should be applied to mandatory dismissal situations. If plaintiff fails to serve a return summons within three years, should the plaintiff be able to pay costs and attorney's fees and gain additional time? If the plaintiff fails to bring to trial within five years, should the plaintiff be able to pay costs and attorney's fees and gain additional time? The staff does not believe alternative sanctions are necessary or desirable in these situations under the Commission's draft--the maximum prescribed

time limits should be adequate in most cases and where they are not the liberal allowance of time for impossibility, impracticability, or futility is sufficient.

Article 5. Dismissal calendar. Pursuant to the Commission's direction, the staff has inquired of a sampling of trial courts whether procedures to enable the courts to weed out dormant civil cases on a mass basis would be useful. Specifically, we sent inquiries to 12 superior courts and 14 municipal courts, large and small, in both Northern and Southern California. So far we have received responses from five superior courts and eight municipal courts (see Exhibits 1-13, attached). The questions we asked and the responses we received are summarized below. We will supplement this memorandum as additional responses are received.

Are dormant civil cases a problem in your court? Most of the respondents felt that dormant civil cases are not a problem in their courts. Three respondents did indicate that dormant cases are a problem. In the courts where the cases are a problem, storage and microfilming of records were singled out as the major concerns. See, e.g., Exhibits 9 (Los Angeles Municipal Court) and 10 (Riverside County Superior Court).

Do you presently have a practice or local rule designed to weed out dormant civil cases? Most jurisdictions do not have a local practice or rule to weed out dormant civil cases, but some do. The Ventura County Superior Court (Exhibit 4) conducts an active program of issuing Orders to Show Cause Re Dismissal. The Central Orange County Municipal Court (Exhibit 6) purges civil cases whenever time and manpower will allow. Periodically in the Riverside County Superior Court (Exhibit 10) registers of actions are reviewed to ascertain whether a judgment or extension of time has been filed; if not, the action is listed on an order of dismissal (approximately 30 cases per order), which is approved and signed by the court, entered in the register of actions, and filed. The San Bernardino County Superior Court (Exhibit 11) routinely dismisses on its own motion cases in which the five-year statute has run.

The Oakland-Piedmont Municipal Court (Exhibit 8) in the past attempted to review the dockets to identify cases that are dormant for the purpose of creating a calendar for the judge to make an order of dismissal; this was motivated by statistical reasons for the purpose of Judicial Council

reporting, but since judicial staffing is based on filings and not dismissals, this is no longer done. The court does, however, destroy all records of a case 11 years after a judgment is entered or after filing if no judgment is entered, upon court order.

Most of the courts that have no practice or rule designed to weed out dormant civil cases cite manpower or expense as a factor, and even those courts that do have such a practice or rule note that it is implemented only as time and staffing demands permit.

Do you believe a procedure, such as a periodic dismissal calendar prepared under the direction of the court and implemented by mailed notice to the parties on a show-cause basis, would be helpful? Most respondents were negative about a dismissal calendar. A typical concern was that its cost would exceed its benefits, at public expense. See, e.g., Exhibits 3 (San Francisco Superior Court), 7 (San Diego County Superior Court), 10 (Riverside County Superior Court) and 11 (San Bernardino Superior Court). A few courts felt such a procedure would be helpful, however. See Exhibits 2 (Livermore-Pleasanton Municipal Court), 5 (West Kern Municipal Court), and 6 (Central Orange County Municipal Court), 12 (Fremont-Newark-Union City Municipal Court; "staffing would be required").

Do you believe any other tools are necessary or desirable to handle dormant cases? Our respondents came up with a variety of suggestions. The Livermore-Pleasanton Municipal Court (Exhibit 2) felt that periodic dismissal calendars should suffice; a sophisticated data-processing system could be one alternative, but would not be cost effective. The San Francisco Superior Court (Exhibit 3) suggested a substantial filing fee (e.g. $100) which would be refundable upon dismissal, trial, or other disposition; this would be an inducement to motivate parties to voluntarily clear the dockets of dormant cases. The Central Orange County Municipal Court (Exhibit 6) would like to see a reduction of the mandatory retention period of civil records from 10 years to the periods applicable to criminal cases. The Los Angeles Municipal Court (Exhibit 9) would like to see a judgment enforceable for three or four years, with the possibility of extension.

The Ventura County Superior Court (Exhibit 4) makes a number of suggestions: (1) A fully computerized court information system would

facilitate preparation of dismissal notices and calendars; they have such a system currently in development stages. (2) Microfilming of cases dismissed for lack of prosecution should not be required; rather, a note in the Register of Actions that the case is dismissed and the files destroyed should be sufficient; perhaps an attorney should be required to keep case records for a period following last activity on the case. (3) The court should be able to dismiss an action on its own motion if an at issue menorandum is not filed within two years after commencement of the action.

Based on the responses so far received, it appears that a dismissal calendar type of requirement would not be desirable due to financial considerations. The staff also believes it would be inadvisable to statutorily encourage such programs on a discretionary basis since that would lead to local differences and a lack of uniformity among the various courts.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 0

GARRETT H. ELMORE
Attorney At Law
340 Lorton Avenue
Burlingame, California 94010
(415) 347-5665

May 15, 1981

Re: Study J-600- Dismissal For Lack Of Prosecution

Memo. to Mr. Sterling
From: Mr. Elmore

This lists certain points for the consideration (or further consideration) of the Commission and staff.

Sec.583.430(2). It is my strong view that the new act should not attempt to deal with an award for all or part of defendant's costs, actual expenses and reasonable attorney's fees "that have resulted from the delay." This will frustrate the present liberal law and require an immense amount of litigation. I am aware there is one case that imposed a "condition" (under the more "balanced" provisions of Rule 203.5) that defendant pay $10,000. as detriment to make amends. I doubt if it was ever paid. On the facts the motion should have been granted unconditionally. The present wording, in my view, should be omitted, leaving the problem to the courts to decide if the case referred to was correctly decided under the more general wording of Rule 203.5 OR it should be qualified severely:

> (2) Require as a condition of denial of dismissal that the plaintiff or the plaintiff's attorney at fault pay to the defendant or defendant's attorney a sum not in excess of $500. as a penalty (liquidated sum) for having caused unreasonable delay (without adequate excuse). (Requires smoothing out)

If a personal reference may be permitted, I drafted with others the "conditions" wording in Rule 203.5 after I had examined the New York "costs award" system then getting under way. But I primarily had in mind the court could set other conditions. In the last month I have reviewed the New York cases (Appellate Division). The highest award of "costs" I saw was $500. with awards of $50., $100. and $250. In a footnote in Powell, J's opinion in Roadway Express, Inc. v. Piper (1980) 65 L. Ed. 2d, 488, 100 S. Ct. 2464, the New York cases are said to involve "fines or costs" under inherent power (the opinion expressing no view). As illustrated by that case and by Bauguess v. Paine

22 Cal. 3d 626 (1978) there is considerable resistance to "sanctions" particularly where unlimited. I am told there is a bill to reverse the Bauguess case. The State Bar of California and Attorneys for Criminal Justice filed A/C in the Bauguess case and probably helped attain the result.

There are problems with attorney's fees sanctions in the case of litigants appearing as indigents. With the pressure from various sources, it is my concern that the "delay" law will be given a fresh new approach if the Staff wording is retained, i. e., shorter time for moving for discretionary dismissal, even though the court calendar could not accomodate one who did not make every time requirement or step contemplated by the rules of court.

Sec. 583.430. As you know, it has been my position that the "conditions" section should apply also to mandatory dismissals for failure to serve or bring to trial (not merely to discretionary dismissals).

Alternately, however, I suggest the trial court, under appropriate procedure, have jurisdiction to make an order extending time. The Commission did not favor this as to time for return of summons and perhaps in any aspect. It is disturbing that the court lacks powers to make an order as to time for trial when the courts are using procedures that are criticized in the opinion by Justice Kaufman you mentioned.

Local rule. The "returns" so far lead me to believe that for tentative circulation a provision could be drafted that outlines what a local rule (optional) could do. A shorter period than those specified in the Act for placing a matter on a dismissal calendar might have some use in particular areas and shorten the actual period for holding abandoned cases. The statute could start: "Nothing herein shall prevent a court.... by local rule ... from,..

Respectully submitted,

Garrett H. Elmore

Consultant

Exhibit 1

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-2
PALO ALTO, CALIFORNIA 94306
(415) 494-1335

April 28, 1981

Hon. John J. Lynch, Presiding Judge
LA Municipal Court, Inglewood District
One Regent Street
Inglewood, California 90301

Dear Judge Lynch:

The California Law Revision Commission, pursuant to a legislative directive, is presently engaged in a study of Code of Civil Procedure Sections 581a and 583, relating to dismissal of civil actions for lack of prosecution. For the purpose of this study it would be helpful to know the extent to which various courts initiate calendaring or other procedures to discover and eliminate dormant civil cases. The Annual Report of the Administrative Office of the California Courts states that, "From time to time individual courts purge their records by making such 'housekeeping' dismissals." 1980 Judicial Council Report 72 n.15.

The Commission would appreciate having the following information for your court:

(1) Are dormant civil cases a problem in your court? NO

(2) Do you presently have a practice or local rule designed to weed out dormant civil cases? If so, what is the practice or rule? If you presently have no such practice or local rule, is manpower or expense a factor? NO

(3) Do you believe a procedure, such as a periodic dismissal calendar prepared under the direction of the court and implemented by mailed notice to the parties on a show-cause basis, would be helpful? NO

(4) Do you believe any other tools are necessary or desirable to handle dormant cases? NO

The Commission would be greatly aided in its study if you could refer this inquiry to the administrative officer or other appropriate person who can give us the information desired. Thank you very much.

Sincerely,

Nathaniel Sterling

Nathaniel Sterling
Assistant Executive Secretary

NS:jcr

Exhibit 2

LIVERMORE-PLEASANTON MUNICIPAL COURT

39 SO. LIVERMORE AVENUE
P. O. BOX 552
LIVERMORE, CALIFORNIA 94550
(415) 447-0256

JOHN A. LEWIS, JUDGE
MARK L. EATON, JUDGE

GEORGE E. MEESE
CLERK/ADMINISTRATOR

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California

Dear Mr. Sterling,

In reply to your letter of April 28, 1981 re: dismissal of civil actions for lack of prosecution, I offer the following;

(1) Dormant cases are not now a problem at this court.

(2) This court does not have a practice or local rule designed to weed out dormant cases. Manpower and expense are both factors in this regard.

(3) The procedure described in question three, would be helpful.

(4) Periodic dismissal calendars should suffice. I do not believe that a sophisticated data-processing system to track cases would be cost effective, although that could be one alternative.

Yours truly,

George E. Meese

GEM/ds

Exhibit 3

Superior Court of California

San Francisco

FREDERICK J. WHISMAN
EXECUTIVE OFFICER
CITY HALL 480
(415) 558-3169

May 4, 1981

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

Your letter of April 28th has been referred to me by Presiding Judge Constine.

In reply to the four questions in your letter, my answers are "no" to the first three and "yes" to the fourth.

There is a possibility that the California Law Revision Commission, in its attempt to set up some sort of calendaring system to meet the "problem" of dormant cases, may find itself suggesting a solution which is more onerous than the problem.

Dormant cases which are on file in the office of a county clerk present no real problem to the court because they do not become part of the civil active list. Though they may be somewhat of a storage problem to the clerk, the dormant cases do not come to the actual attention of the judges of the Superior Court. Even if all dormant files are weeded out, what is really accomplished if they are still on file and taking up the same storage space?

If it were possible to develop a system whereby non-prosecuted cases could be dismissed or weeded out, we should avoid legislating a bureaucracy more costly than that caused by the dormant files themselves. What is needed is a self-activating device which will motivate dismissal of a case that has been settled or abandoned by the litigants.

The best inducement for self-activation is a monetary one. I would suggest the Commission consider an increase of filing fees by a substantial sum like $100.00, all of which would be refunded to the filing party upon the dismissal, trial or other disposition of a case.

In no way would I recommend the establishment of another calendaring system to notify, set for hearing and hear the hundreds of

cases each year which are properly abandoned by the parties. If they do not wish to pursue a case, why should the taxpayer pay for procedures to purge such files?

Yours truly,

F. J. Whisman

Frederick J. Whisman

FJW/jrs

Exhibit 4

CHAMBERS OF
The Superior Court
HALL OF JUSTICE, VENTURA COUNTY GOVERNMENT CENTER
800 SOUTH VICTORIA AVENUE
VENTURA, CALIFORNIA 93009
(805) 654-2257

May 5, 1981

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

Dismissal of Civil Actions Under CCP Sections 581 et seq;
Your Inquiry of April 28

Your subject inquiry, addressed to Presiding Judge Jerome H. Berenson of this Court, has been referred to this office for response.

Please be advised that this Court has always conducted an active program of issuing Orders to Show Cause Re Dismissal pursuant to the subject sections of the CCP, though this effort has been intermittent and frequently completed only as clerical time permits. At this writing, however, we are completely up to date on our OSC re dismissal processing, and have dismissed all qualifying cases except those wherein appearances were made and good cause shown at the OSC hearing (these latter are very, very few in number). The necessary manpower required to manually review the court's Register of Actions for potentially qualifying cases, and to subsequently pull and review each case file, prepare and mail the OSC and to prepare the OSC calendar, is certainly substantial and does create some problem for us in effectively processing these dismissals. The best tool to facilitate these matters would be a fully computerized court information system (which we currently have in development stages), that would permit ready identification of qualifying cases based on CCP criteria, with automated preparation of notices and calendars.

Even more of a problem than the clerical work required to process these matters, is the fact that "dormant" or "closed" cases must still be laboriously reviewed, prepared and microfilmed prior to their destruction, even though the case has never progressed to the at issue stage. The records administrator's question is why the courts should provide such a convenient and expensive permanent filing system for the "junk" cases that respective counsel probably do not maintain in their own files for any substantial period of time. A solution would seem to be a provision for destruction without filming of the files of dismissed cases, as though they had never been filed in the first instance. The most that should be required is a note in the Register of Actions that the case is dismissed and destroyed. If not already a matter of law, and given sufficient concern regarding same, perhaps all attorneys should be required to keep their case records for some given period of time following last activity on the case.

The only further suggestion I would make is for a reduction of the period of inactivity prior to which an OSC or dismissal may be issued, perhaps to as little as two years. Further, rather than application of all of the existing CCP criteria, I would urge that dismissal be permitted following the noticed OSC hearing, of any case where the at issue memorandum is not filed within two years of the date of the filing of the complaint. With the great current clamor for the attention of the courts by serious Civil litigants, I see no reason why the courts or the legislature should permit or encourage the dalliance and lack of attention of parties and counsel to the proper prosecution of civil matters. Frequently, of course, the actions are merely filed to comply with the statute of limitations, then insufficient effort made to determine whether there is actually law suit potential, and if determination is made in the negative, the courts are seldom advised. Let's put litigants on notice that filing a civil action in the courts, particularly the Superior Courts, is serious business!

Thanks very kindly for the opportunity to comment on this matter.

Respectfully yours,

Hank Rodgers
Executive Officer of Superior Court

HR:ld
cc: Hon. Jerome H. Berenson, Presiding Judge
Robert H. Hamm, County Clerk
Calendar Management Section, Phyllis Bentley

Exhibit 5

WEST KERN MUNICIPAL COURT DISTRICT

JUSTICE BUILDING
1215 Truxtun Avenue
Bakersfield, California 93301
Telephone (805) 861-2411

May 6, 1981

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. Sterling:

In answering the questions contained in your letter of April 28, 1981, I submit the following:

1. Dormant civil cases are not really a problem in our Court.

2. We do not have a local rule or practice designed to weed out dormant civil cases, although we feel that there are a number of dormant cases that should, in fact, be weeded out. The primary reason is we simply do not have the manpower to set up such a procedure.

3. We believe the suggestion raised in your No. 3 would be helpful to the Court.

4. We really cannot answer this because the dormant file in civil matters has not been a problem, therefore, we have really not given it too much thought.

Very truly yours,

Walter H. Condley
Presiding Judge

WHC/jcd

Exhibit 6

EDWARD W. BACZEK
CLERK AND
ADMINISTRATIVE
OFFICER

P. O. BOX 1138

Municipal Court

CENTRAL ORANGE COUNTY JUDICIAL DISTRICT
700 CIVIC CENTER DRIVE WEST
SANTA ANA, CALIFORNIA 92701
TELEPHONE: 834-3575 AREA CODE: 714

May 7, 1981

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

With reference to your letter dated April 28, 1981, the following information is submitted:

1) Dormant civil cases are a problem in the Central Orange County Municipal Court.

2) Time and manpower permitting, civil cases are purged whenever the preceding will allow. Manpower is more predominant than is the expense.

3) A periodic dismissal calendar (at least semi-annual) would definitely aid the court in performing a routine purge of dormant civil cases.

4) An additional tool that would assist the court in handling dormant civil cases would be to reduce the mandatory retention period of 10 years to those that currently apply to criminal matters. In so doing, office space, which is at a premium, would be gained.

Very truly yours,

Edward W. Baczek

Edward W. Baczek
Clerk/Administrative Officer

EWB:ss

Exhibit 7

The Superior Court
OF THE
State of California
COUNTY COURTHOUSE
SAN DIEGO CALIFORNIA 92101

CHAMBERS OF THE PRESIDING JUDGE

MAILING ADDRESS
POST OFFICE BOX 2724
SAN DIEGO, CALIFORNIA 92112

May 8, 1981

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

I have your letter of April 28, 1981 relating to dismissal of civil actions for lack of prosecution. The questions posed and my answers are as follows:

Question (1). Are dormant civil cases a problem in your court?

Answer: No.

Question (2). Do you presently have a practice or local rule designed to weed out dormant civil cases?

Answer: No.

If you presently have no such practice or local rule, is manpower or expense a factor?

Answer: Work involved is more than benefit.

Question (3). Do you believe a procedure, such as a periodic dismissal calendar prepared under the direction of the court and implemented by mailed notice to the parties on a show-cause basis, would be helpful?

Answer: No.

Question (4). Do you believe any other tools are

necessary or desirable to handle dormant cases?

Answer: No.

Very truly yours,

GILBERT HARELSON

GH/sv

Exhibit 8

MUNICIPAL COURT
OAKLAND-PIEDMONT JUDICIAL DISTRICT
OAKLAND, CALIFORNIA 94604

IN CHAMBERS
WILLIAM F. LEVINS, JUDGE

May 13, 1981

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. Sterling:

Pursuant to your letter of April 28, 1981 to Winifred L. Hepperle, the Clerk of this court has written me the enclosed memo.

If there are any questions in connection herewith, please feel free to contact Mr. Dickey directly.

Sincerely yours,

William F. Levins

William F. Levins

WFL:ac

cc: Wendy Hepperle, Office of Court Services
George R. Dickey, Oakland-Piedmont Municipal Court

Oakland-Piedmont Municipal Court
Intra-Departmental Memo

Date : May 13, 1981

To : Judge Levins

From : George R. Dickey

Subject: Dismissal of Civil Actions for Lack of Prosecution

Following is an answer from the clerk's prospective to the four questions posed in the letter from the California Law Revision Commission dated April 28, 1981, relating to dismissal of civil actions for lack of prosecution.

Question #1. No.

Question #2. No. Manpower and expense is a factor.

Question #3. No.

Question #4. No.

As you are aware, our present practice merely leaves the dismissal of the civil action, pursuant to 581 and 581a, to one of the parties to make a motion to dismiss if the other side attempts to proceed beyond the statutory time limit.

At the present time, the clerk's office does not review the dockets to identify these cases that are dormant for the purpose of creating a calendar for the judge to make an order of dismissal.

In the past years, the clerk's office used to attempt to do that as best they could, however, the motivation for that was the fact that the court's report to the Judicial Council includes a report of dismissals within the category of adjudication of cases. As a practical matter, the number of dismissals plays no part in the determination of the judicial staffing for any courts since that is based upon filings and not adjudication.

At the present time, the clerks in the Civil Division, as part of their normal duties, check the Register of Actions covering complaints filed eleven years previously. All actions wherein eleven years have elapsed since the date of entry of judgment or since the date of filing if no judgment has been entered are destroyed upon the order of the judge. The clerk makes a list of those actions wherein eleven years have not elapsed and determines the correct year for destruction and makes a list of those cases. The list is used to remove all files that are on the list and these files are filed in a special place in the file room by date of years of destruction. All of the remaining files are destroyed.

Based upon recent statutory law permitting the destruction of permanent records, we will continue to use the eleven-year criteria and ultimately destroy all court records pertaining to the case. It would appear to be a very effective way to take care of dormant civil cases that fit within those timeframes since there will be no record in our court of the fact that the case was even filed.

GRD:ac

Memo 81-20

Exhibit 9

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
JAMES F. NELSON, PRESIDING JUDGE

TELEPHONE - (213)
974-6204

May 14, 1981

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94306

Dear Mr. Sterling:

In response to your letter of April 28, 1981, I am able to offer the following observations.

The storage of more than one million dormant civil cases is an enormous and continuous problem to us. We do not have a local practice or rule to weed out dormant civil cases. We have neither manpower nor money resources to accomplish a systematic project. It is these same personnel and economic restrictions which makes it practically unfeasible for us to prepare a dismissal calendar with appropriate notice and hearing as was suggested by your letter.

Surveys have indicated that 86% of the writs issued for this court are for cases less than 3 years old. Therefore it seems wasteful to retain files for a period grossly beyond three or four years. A change in the appropriate Code of Civil Procedure sections making a judgment valid for three or four years with possibility of extension would mean that our older files could be destroyed as early as six years from the date of filing which would greatly alleviate our problems without the necessity of noticing a hearing in each case.

Thank you for giving us the opportunity to respond to your inquiry.

Very truly yours,

James F. Nelson
Presiding Judge

JFN:mg

Exhibit 10

OFFICE OF
COUNTY CLERK and RECORDER
4050 MAIN STREET
P.O. BOX 431
RIVERSIDE, CALIFORNIA 92502
TELEPHONE: (714) 787-6151

DONALD D. SULLIVAN
County Clerk & Recorder
WILLIAM E. CONERLY
Assistant County Clerk
& Recorder

May 15, 1981

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

Attn: Nathaniel Sterling, Assistant Executive Secretary

Gentlemen:

Your letter of April 28, 1981 concerning dismissal of actions for lack of prosecution under Sections 581a and 583 of the Code of Civil Procedure has been referred to this office. We respond as follows:

(1) Are dormant civil cases a problem in your court?

Yes, to the extent that accountability and storage must be maintained until dismissed or microfilmed.

(2) Practice or rule to weed out dormant civil cases?

To facilitate microfilming and destruction of older case files, the court has allowed dismissal of dormant cases under the provisions of Section 583(b) CCP, only. Manpower (or the expense for such manpower) is a factor in that staffing in this office is minimal and does not allow much time for extra-ordinary activities. Periodically, time and availability of personnel permitting, registers of actions for civil and family law cases are reviewed to ascertain whether a judgment or extension of time has been filed. If neither, the case number, title and nature of the action is listed on an Order of Dismissal (approximately 30 cases per order). Upon approval and signature of the order by the court and entry in the Register of Actions, a copy of the order is placed in each court file with the original order being maintained in the Court's Miscellaneous Order file (Dismissals).

If this practice were to be required on a routine basis, additional funding would be necessary to provide necessary manpower.

(3) Would it be helpful to have a procedure such as a periodic dismissal calendar with notice and/or show cause basis?

NO. Section 583(b), under which our above described procedure is authorized, does not require that the Court give notice, such requirement would make the process unnecessarily cumbersome.

We believe it is appropriate that the provisions of Sections 581(a) and 583 (a), (c) and (d) not be disturbed in that they require the parties to notice the motions.

The adoption of a procedure of periodic dismissal through a specific calendar procedure and notices by the clerk would require the court to assume the responsibility of the litigants and generate additional financial burden at the expense of the general public for which there is no public benefit. The additional ministerial burden and staffing necessary for such a program would be far in excess of any benefits.

(4) Additional tools to handle dormant cases?

No.

Comment: In the past 29 years of my association with the court, I would observe that rules, policies and statutues have proliferated to the point of impracticality. In whatever action the Commission may decide to take, I would urge that the primary consideration be simplification rather than any action which would add to the burden of the ministerial function.

Yours very truly,

Donald D. Sullivan
County Clerk & Recorder

DDS:dmc
cc: Hon. Frank Moore

DAVID L. BAKER
Superior Court Executive Officer
(714) 383-3956

COUNTY OF
SAN BERNARDINO

DEBORAH KANTER
Asst. Superior Court Executive Officer
(714) 383-1673

Courthouse, Third Floor, Room 326
351 North Arrowhead Avenue
San Bernardino, CA 92415

May 21, 1981

Nathaniel Sterling, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

In response to your inquiry of April 28, dormant civil cases are not a problem in this Court. Cases in which the 5-year statute has run are routinely dismissed on the Court's motion. It was the consensus of the settlement judges of this Court that any benefits which may be derived from a periodic dismissal calendar would be minimal in comparison with the expense, manpower, and court time necessary to implement a program of this nature.

While dormant civil cases are not a problem in this Court, we would nevertheless be interested in receiving a copy of your study upon its completion.

Very truly yours,

DAVID L. BAKER, Superior
Court Executive Officer

DLB:ms

cc: Judge Roy E. Chapman
Judge Patrick J. Morris

Exhibit 12

FREMONT–NEWARK–UNION CITY MUNICIPAL COURT

39439 PASEO PADRE PKWY., P. O. BOX I
FREMONT, CALIFORNIA 94538

GEORGE S. HAGAN
Clerk of the Court
and
Administrative Officer

May 29, 1981

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Committee
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. Sterling:

Winifred Hepperle, Director of the Alameda County Office of Court Services, has asked this Court to respond to your April 28, 1981 request for information regarding civil cases.

The questions are answered below in the order they were given:

(1) Dormant cases are not a major problem in this Court. While most move through the Court with a reasonable pace, some do sit idle. It would become a problem if cases were destroyed regularly.

(2) No formal rule has been formulated regarding dormant civil cases. The Court does have a serious manpower and expense problem.

(3) Yes, a periodic dismissal calendar would be helpful for dormant cases. However, staffing would be required to pursue this regularly.

Should further information be necessary, please advise.

Sincerely,

George S. Hagan
Clerk Administrator

GSH/as

cc: W. Hepperle, OCS

Memo 81-20

Exhibit 13

STATE OF CALIFORNIA — EDMUND G. BROWN JR., Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-2
PALO ALTO, CALIFORNIA 94306
(415) 494-1335

April 28, 1981

Hon. James J. Alfano, Presiding Judge
North Orange County Municipal Court
1275 North Berkeley Avenue
P.O. Box 5000
Fullerton, California 92635

Dear Judge Alfano:

The California Law Revision Commission, pursuant to a legislative directive, is presently engaged in a study of Code of Civil Procedure Sections 581a and 583, relating to dismissal of civil actions for lack of prosecution. For the purpose of this study it would be helpful to know the extent to which various courts initiate calendaring or other procedures to discover and eliminate dormant civil cases. The Annual Report of the Administrative Office of the California Courts states that, "From time to time individual courts purge their records by making such 'housekeeping' dismissals." 1980 Judicial Council Report 72 n.15.

The Commission would appreciate having the following information for your court:

(1) Are dormant civil cases a problem in your court? No

(2) Do you presently have a practice or local rule designed to weed out dormant civil cases? If so, what is the practice or rule? If you presently have no such practice or local rule, is manpower or expense a factor? NO

(3) Do you believe a procedure, such as a periodic dismissal calendar prepared under the direction of the court and implemented by mailed notice to the parties on a show-cause basis, would be helpful? NO

THIS WOULD Require considerable (erroneous) effort we cannot keep up with current workload

(4) Do you believe any other tools are necessary or desirable to handle dormant cases? NO

The Commission would be greatly aided in its study if you could refer this inquiry to the administrative officer or other appropriate person who can give us the information desired. Thank you very much.

Sincerely,

Nathaniel Sterling

Nathaniel Sterling
Assistant Executive Secretary

NS:jcr

#J-600 5/37/82

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.[1] The major effect of these statutes is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.[2]

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.[3]

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.[4]

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.[5]

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.[6]

The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit along to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint

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1. In addition, Rule 203.5 of the California Rules of Court prescribes the procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

2. Code Civ. Proc. § 581a(a).

3. Code Civ. Proc. § 581a(c).

4. Code Civ. Proc. § 583(b).

5. Code Civ. Proc. § 583(c)-(d).

6. Code Civ. Proc. § 583(a).

rather than before the plaintiff files the complaint.[7] They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on clogged calendars.[8]

The policy of the dismissal statutes conflicts with another strong public policy--that which seeks to dispose of litigation on the merits rather than on procedural grounds.[9] As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.[10] The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.[11] The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.[12] The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

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7. See, e.g., Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 546, 105 Cal. Rptr. 339, 503 P.2d 347 (1972); Dunsmuir Masonic Temple v. Superior Court, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

8. See, e.g., Ippolito v. Municipal Court, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

9. See, e.g., Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

10. See, e.g., discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. CEB 1978).

11. For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

12. Since the two dismissal statutes were first enacted around the turn of the century there has been a continuing stream of appellate

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a continuing liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.[1] In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.[2] In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.[3] The current judicial attitude has been stated by the Supreme Court:[4] "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

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litigation interpreting, clarifying, and rewriting the statutes--hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

1. See Breckenridge v. Mason, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and cases following.

2. See Comment, The Demise (Hopefully) of an Abuse: The Sanction of Dismissal, 7 Calif. West. L. Rev. 438, 455-456 (1971).

3. See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

4. Id., 2 Cal.3d at 566, 468 P.2d at ___, 86 Cal. Rptr. at ___.

Automatic Extension of Time for Trial

If the plaintiff intends to proceed with the action but the mandatory time within which trial must be brought upon penalty of dismissal is approaching, the plaintiff will ordinarily take some action to satisfy the mandatory statute, such as move the court to advance the date for trial or swear in a witness and take testimony.[1] A plaintiff who intends to proceed with the action should have available a simpler and more direct means of avoiding dismissal in this situation. The proposed law permits the plaintiff to file an affidavit extending the time for trial an additional year. The plaintiff must state in the affidavit the belief that the action is meritorious and that the plaintiff intends to bring the action to trial before the one-year extension has expired. The automatic extension of time upon the plaintiff's affidavit will reduce court time in hearing motions to advance trial date and in "commencing" and then continuing a trial for purposes of satisfying the mandatory dismissal statute. In cases where the plaintiff's delay was due to the impossibility, impracticability, or futility of bringing the action to trial, the affidavit procedure will mitigate the need to litigate that issue.[2]

Time for Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.[1] This period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss made for failure to bring to trial two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[2] The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

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1. See, e.g., discussion in Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 105 Cal. Rptr. 339, 503 P.2d 1347 (1972).

2. See discussion under "Excuse where prosecution impossible, impracticable, or futile," below.

1. Code Civ. Proc. § 583(a).

2. See discussion under "Policy of Statute," above.

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have had to rely on their inherent powers to dismiss.[3] The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make unnecessary reliance on inherent powers and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure to serve and return summons.[4] The proposed law clarifies and codifies this rule.

Other Sanctions than Dismissal

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing upon the plaintiff a lesser sanction than dismissal.[1] This authority gives the court flexibility to condition denial of dimissal upon such terms as payment of expenses and counsel fees to the adverse party that result from unreasonable delay.[2] On the other hand, it may be equitable to require the defendant to make a limited waiver of the statute of limitations, as a condition to dismissing the action. The proposed law makes the authority of the court to impose sanctions other than dismissal explicit.

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3. See, e.g., Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

4. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

1. Rule 203.5. See discussion in Lopez. v. Larson, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

2. See, e.g., Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.[1] The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,[2] that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing,[3] that a stipulation excuses compliance even if unfiled,[4] and that a judgment entered after the three-year period may not be set aside on collateral attack.[5]

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,[6] and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.[7]

The dismissal provision for failure to obtain a default is not well understood, nor does it appear to be supported by compelling reasons of

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1. Code Civ. Proc. § 581a(c).

2. Mustalo v. Mustalo, 37 Cal. App.3d 580, ___ Cal. Rptr. ___ (1974).

3. AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, ___ Cal. Rptr. (1979).

4. General Insurance Co. of America v. Superior Court, 15 Cal.3d 449, ___ (1978).

5. Phillips v. Trusheim, 25 Cal.2d 913, _____ (1945).

6. Jacks v. Lewis, 61 Cal. App.2d 148, ___ P.2d ___ (1943).

7. Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, ___ Cal. Rptr. ___ (1979).

orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.[8] The dismissal provision should be repealed in the interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.[1] The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.[2] The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The three-year requirement for service and return of process does not apply if the defendant makes a general appearance in the action.[3] The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time

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8. Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, e.g., Merner Lumber Co. v. Silvey 29 Cal. App.2d 426, ___ P.2d ___ (1939).

1. See discussion under "Introduction," above.

2. See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

3. Code Civ. Proc. § 581a(a)-(b).

to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.[4] A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the general jurisdiction of the court.[5] The proposed law makes clear that the service and return requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service and return is a motion to dismiss for failure to timely serve and return summons.[6] The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default judgment does not transform the motion into a general appearance.[7]

Stipulation extending time. The time within which service must be made and returned, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.[8] The requirement that the stipulation be filed is unduly restrictive;[9] parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.[10] The proposed law permits an extension of time upon presentation to the court

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4. See, e.g., Knapp v. Superior Court, 70 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

5. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

6. Code Civ. Proc. § 581a(e).

7. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease v. City of San Diego, 93 Cal. App.2d 705, 209 P.2d 845 (1949) (motion to set aside default judgment and dismiss).

8. Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

9. See, e.g., Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

10. See, e.g., Obgerfeld v. Obgerfeld, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.[11] However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.[12] This difference in treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a stipulation,[13] has failed to assert the statute,[14] or has acted in a manner that misleads the plaintiff.[15] The existence of the excuses of waiver and estoppel is not reflected in the dismissal statutes. The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or

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11. Code Civ. Proc. § 583(c)-(d).

12. See, e.g., Neustadt v. Skernswell, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

13. See, e.g., Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

14. See, e.g., Southern Pacific v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962).

15. See, e.g., Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

futile.[16] Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.[17] The proposed law expressly recognizes an excuse for delay caused by a stay or injunction of proceedings and by litigation over the validity of service, as well as delay caused by the impossibility, impracticability, or futility of timely prosecution for other reasons.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[18] The proposed law is drafted to make clear this flexibility.

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.[19] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[20] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings that are in the nature of a civil action and adversary in character.[21]

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16. See, e.g., Wyoming Pac. Oil v. Preston, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); Crown Coach Corp. v. Superior Court, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972).

17. See, e.g., cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

18. See, e.g., Watson v. Superior Court, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); J.A. Thompson & Sons, Inc. v. Superior Court, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1968); Fisher v. Superior Court, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

19. See, e.g., Big Bear Municipal Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

20. See, e.g., Section 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

21. See, e.g., 4 B. Witkin, California Procedures, Proceedings Without Trial § 80 (1971).

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

An act to amend Section 581 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, relating to dismissal of civil actions for lack of prosecution.

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

SECTION 1. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1.~~ (a) By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge; provided, that affirmative relief has not been sought by the cross-complaint of the defendant, and provided further that there is no motion pending for an order transferring the action to another court under the provisions of Section 396b. If a provisional remedy has been allowed, the undertaking shall upon ~~such~~ dismissal be delivered by the clerk or judge to the defendant who may have ~~his~~ an action thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall be~~ is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

~~2.~~ (b) By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1~~ (a) and ~~2 of this section~~ (b) shall be granted unless, upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained upon order of the court after notice to ~~such~~ the attorney.

~~3.~~ (c) By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to

amend it within the time allowed by the court, and either party moves for ~~such~~ dismissal.

~~4.~~ (d) By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

~~5.~~ (e) The provisions of subdivision ~~1 of this section~~ (a) shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ the action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ (a) , after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

~~6.~~ (f) By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.430. A dismissal for lack of prosecution is without prejudice. See, e.g., Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); Hill v. San Francisco, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial; Stephan v. American Home Builders, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

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SEC. 2. Section 581a of the Code of Civil Procedure is repealed.

~~581a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether~~

~~named as a party or not, unless, if a summons is not required, the cross-complaint is served within three years after the filing of the cross-complaint or unless, if a summons is required, the summons on the cross-complaint is served and return made within three years after the filing of the cross-complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service would otherwise have to be made has made a general appearance in the action.~~

~~(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.~~

~~(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such a motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.~~

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service and return) and 583.240 (mandatory dismissal). The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.220 (extension of time) and 583.230 (computation of time).

Subdivision (c) is not continued. The provision was not well understood and was subject to numerous implied exceptions in the case law.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.230 (computation of time).

The substance of subdivision (e) is continued in Section 583.210(b) (time for service and return).

SEC. 3. Section 583 of the Code of Civil Procedure is repealed.

~~583. (a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.~~

~~(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).~~

~~(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years~~

~~after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(e) For the purposes of this section, "action" includes an action commenced by cross-complaint.~~

~~(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.~~

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.310 (time for trial), 583.320 (extension of time), and 583.350 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.330 (computation of time).

26813

SEC. 4. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110. Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes a cause of action or claim for affirmative relief.

(b) "Complaint" includes cross-complaint, petition, complaint in intervention, or other papers by which an action is brought.

(c) "Defendant" includes cross-defendant, respondent, or other party against whom an action is brought.

(d) "Plaintiff" includes cross-complainant, petitioner, complainant in intervention, or other party by whom an action is brought.

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. As used in this chapter, "action" does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), and (d) are new.

26814

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or that part of a special proceeding that is in the nature of a civil action and is adversary in character except to the extent the special proceeding provides a different rule or the application would be inappropriate.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, e.g., Big Bear Municipal Water Dist. v. Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rule 1233, Cal. Rules of Court (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inappropriate in special proceedings such as a decedent's estate. See, e.g., Horney v. Superior Court, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition a special proceeding may prescribe different rules. Cf. Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

405/434

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. In the case of conflict, the policy favoring the right of parties to make stipulations in their own interests and the

policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

26815

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 is new. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, e.g., Southern Pacific v. Seaboard Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 276 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211 (1971) (estoppel to assert failure to timely serve and return summons).

26960

§ 583.150. Transitional provisions

583.150. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter.

(b) This chapter does not affect an order dismissing an action made before the effective date. A motion for dismissal made before the effective date is governed by the applicable law in effect immediately before the effective date of this chapter and for this purpose the law in effect immediately before the effective date of this chapter continues in effect.

Comment. Section 583.150 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extend practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

Article 2. Mandatory Time for Service and Return

§ 583.210. Time for service and return

583.210. (a) The summons and complaint shall be served upon a defendant and return or other proof of service shall be made within three years after the action is commenced against the defendant. For purposes of this subdivision an action is commenced at the time the complaint is filed.

(b) This section does not apply if the defendant enters into a stipulation in writing or otherwise makes a general appearance in the action. For purposes of this section none of the following constitutes a general appearance in the action:

(1) A stipulation extending the time within which service and return must be made pursuant to this article.

(2) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(3) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Subdivision (a) of Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. For exceptions and exclusions, see subdivision (b) (general appearance) and Sections 583.220 (extension of time) and 583.230 (computation of time). Subdivision (a) applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Subdivision (a) applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, e.g., Austin v. Mass. Bonding & Ins. Co., 56 Cal.2d 596, 15 Cal. Rptr. 817, 364 P.2d 681 (1961); Elling Corp. v. Superior Court, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); Warren v. A.T. & S.F. Ry. Co., 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971).

Subdivision (b) continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purposes of this chapter by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1965) (motion to quash and dismiss); Pease

v. City of San Diego, 93 Cal. App.2d 705, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Subdivision (b) applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 ("action" and "defendant" defined).

999/318

§ 583.220. Extension of time

583.220. The parties may by written stipulation extend the time within which service and return must be made pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion [or proceeding] for dismissal.

Comment. Section 583.220 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive.

27237

§ 583.230. Computation of time

583.230. In computing the time within which service and return must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service and return.

(c) The validity of service or return was the subject of litigation by the parties.

(d) Service and return, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.230 continues the substance of subdivision (d) of former Section 581a. Subdivisions (b) and (d) are based on exceptions to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

§ 583.240. Mandatory dismissal

583.240. If service and return are not made in an action within the time prescribed in this article:

(a) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(b) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not.

Comment. Section 583.240 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this section are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel).

28763

Article 3. Mandatory Time for Bringing Action to Trial

§ 583.310. Time for trial

583.310. An action shall be brought to trial within the later of the following times:

(a) The action shall be brought to trial within five years after the action is commenced against the defendant.

(b) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

Comment. Subdivision (a) of Section 583.310 is drawn from a portion of subdivision (b) of former Section 583. Subdivision (b) is drawn from

portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.320 (extension of time), 583.330 (computation of time), and 583.340 (additional time upon affidavit).

36265

§ 583.320. Extension of time

583.320. The parties may by written stipulation extend the time within which an action must be brought to trial pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion [or proceeding] for dismissal.

Comment. Section 583.320 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, e.g., cases cited in Good v. State, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316, _____ (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive.

36249

§ 583.330. Computation of time

583.330. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile. In making a determination pursuant to this subdivision the court shall make a reasonable allowance for the period of delay caused by special circumstances that hindered the plaintiff in bringing the action to trial within the time prescribed in this article.

Comment. Subdivision (a) of Section 583.330 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law "impossible, impractical, or futile" standard, but prescribes a more liberal interpretation of the standard. See Section 583.130 (policy statement). Under subdivision (c) special circumstances would include such factors beyond the control

of the party as death (contrast Anderson v. Superior Court, 187 Cal. 95, 200 Pac. 963 (1921)), illness (contrast Singelyn v. Superior Court, 62 Cal. App.3d 972, 133 Cal. Rptr. 486 (1976)), or necessary absence of a party or counsel for a party (see, e.g., Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665 (1946)), cessation of law practice by counsel, disqualification, disbarment, or suspension of counsel, abandonment of the interests of the party by counsel without the participation or acquiesence of the party, loss of position on trial calendar (cf. Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12 (1958)), and congested trial calendar (see e.g., Goers v. Superior Court, 57 Cal. App.3d 72, 129 Cal. Rptr. 29 (1976)). Subdivision (c) would also enable the court to make an allowance for such matters as delay occasioned by numerous parties or pleadings (see, e.g., Brunzell Constr. Co. v. Wagner, 2 Cal.3d 545, 86 Cal. Rptr. 297, 468 P.2d 553 (1970)), severance of a cause or issue for separate trial (cf. Pasadena v. Alhambra, 33 Cal.2d 908, 207 P.2d 17 (1949)), requirement for or pendency of arbitration (see, e.g., Section 1141.17; Brown v. Engstrom, 89 Cal. App.3d 513, 152 Cal. Rptr. 628 (1979)), desirability of awaiting determination of an issue in another case (cf. Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981 (1951)), and prior entry of judgment in the action by default or by action other than trial (see, e.g., Maguire v. Collier, 49 Cal. App.3d 309, 122 Cal. Rptr. 510 (1975)).

405/848

§ 583.340. Additional time upon affidavit

583.340. (a) The time within which an action must be brought to trial pursuant to this article is extended for one year without court order or other court action if before expiration of the time the plaintiff files the affidavit prescribed in this section. An extension of time may be made pursuant to this section only once and the extension applies to all parties to the action whether or not they have joined in the affidavit.

(b) The affidavit shall state in substance all of the following:

(1) The plaintiff believes the action is meritorious.

(2) The plaintiff has not abandoned the action.

(3) The plaintiff in good faith intends to bring the action to trial within one year after expiration of the time within which the action must otherwise be brought to trial.

(4) The estimated date to which the time is extended.

(c) The plaintiff shall serve a copy of the affidavit on the other parties who have appeared in the action, together with a statement of the date the affidavit was filed. Failure to make service does not

affect the extension of time. The statements in the affidavit may not be controverted except for the statement of the estimated date to which the time is extended.

(d) Nothing in this section affects discretionary dismissal of an action pursuant to Article 4 (commencing with Section 583.410), the right of the parties to extend time by written stipulation pursuant to Section 583.320, or the computation of time before or during the extension in the manner prescribed in Section 583.330.

Comment. Section 583.340 is new.

29636

§ 583.350. Mandatory dismissal

583.350. An action shall be dismissed by the court on its own motion or on motion of the defendant if the action is not brought to trial within the time prescribed in this article.

Comment. Section 583.350 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion).

36267

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion). Section 583.410 prescribes the exclusive authority of a court to order discretionary dismissal for delay in prosecution of an action. See, e.g., Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr.

305 (1968) (two-year statute limits court's inherent power to dismiss for want of prosecution at any time). Nothing in Section 583.410 limits any applicable remedies for abuse of process by a party.

36266

§ 583.420. Time for discretionary dismissal

583.420. The court may dismiss an action pursuant to this article for delay prosecution in any of the following circumstances:

(a) Service and return are not made one year before the time within which service and return must be made pursuant to Article 2 (commencing with Section 583.210).

(b) The action is not brought to trial two years before the time within which an action must be brought to trial pursuant to Article 3 (commencing with Section 583.310).

(c) A new trial is granted and the action is not again brought to trial one year before the time within which an action must again be brought to trial pursuant to Article 3 (commencing with Section 583.310).

Comment. Subdivision (a) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service and return. See, e.g., Black Bros. Co. v. Superior Court, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service and return) (disapproved on other grounds in Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

Subdivision (b) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (c) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, e.g., Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn., 71 Cal. App.3d 706, 139 Cal Rptr. 651 (1977).

36268

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may do any of the following if to do so appears to the court appropriate under the circumstances of the case:

(1) Require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(2) Require as a condition of denial of dismissal that the plaintiff or the plaintiff's attorney pay to the defendant a sum to be fixed by the court as a reasonable allowance for all or part of a defendant's costs, actual expenses and reasonable attorney's fees that have resulted from the delay.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to tentative rulings and provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement).

Subdivision (a)(1) permits the court to condition granting of dismissal on such matters as waiver by the defendant of a statute of limitations or dismissal by the defendant of a cross-complaint, and to condition denial of dismissal on such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

Subdivision (a)(2) codifies the rule that the court may condition denial of dismissal upon payment by the plaintiff or the plaintiff's attorney of the defendant's costs, expenses, and attorney's fees. See, e.g., Hansen v. Snap-Tite, Inc., 23 Cal. App.3d 208, 100 Cal. Rptr. 51 (1972).

36269

[Article 5. Dismissal Calendar]

[Note. This article is reserved for a procedure for the courts to weed out dormant cases on a mass basis. An example of such a procedure would be a dismissal calendar on which a case that has not been brought to trial within a certain period of time will be placed, with notice to the parties to show cause why the case should not be dismissed for lack of prosecution. Whether such a procedure should be adopted and the precise content of such a procedure has been deferred pending receipt of information from local court administrators.]