#J-600 6/24/81

First Supplement to Memorandum 81-20

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

Attached to this memorandum as Exhibits 1-5 are (1) additional comments of the Commission's consultant Mr. Elmore concerning policy questions in the draft of the tentative recommendation relating to dismissal for lack of prosecution and (2) additional letters received from trial courts concerning procedures to enable the courts to weed out dormant civil cases on a mass basis. The comments and letters are summarized in this memorandum.

§ 583.430. Authority of court. Section 583.430 provides that in a motion to dismiss on a discretionary basis for delay in prosecution, the court may require, as an alternative to granting 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." Mr. Elmore (Exhibit 1) is strongly opposed to this provision--the standard is indefinite, it will be inconsistently applied, it will increase rather than reduce litigation over dismissal for lack of prosecution, and it will hinder the plaintiff's access to the court, partiularly where the plaintiff cannot afford to pay the penalty. Mr. Elmore also believes that fines and penalties for delay would be inadvisable. He believes the most that should be done is to authorize the court to require the plaintiff or plaintiff's attorney to pay to the defendant or the defendant's attorney a maximum of $500 for attorney's fees and costs in connection with the dismissal proceeding. The Comment would point out that an award of attorney's fees and costs is the exception and not the rule, and that case law allowing attorney's fees and costs for damage caused by the delay (see Hansen v. Snap-Tite, Inc., cited in the main memorandum) is overruled.

As drafted, the court authority to impose monetary sanctions in lieu of dismissal is limited to the situation where the defendant has moved to dismiss under the discretionary dismissal authority, in cases where the delay is not sufficiently long that mandatory dismissal would

be warranted. Mr. Elmore recommends (Exhibit 1, p. 5) that, if a limited sanction such as he proposes above is adopted, it be available as an alternative to dismissal for failure to timely serve summons under the mandatory dismissal provisions.

Mr. Elmore also recommends (Exhibit 1, p. 5) that the court be given authority to extend the time for trial of a civil action beyond the mandatory time for trial (5 years).

Article 5. Dismissal Calendar. We have received four additional letters from municipal courts concerning the need for procedures to weed out dormant civil cases. The responses in these four letters to our inquiries generally follow the pattern of the responses in the other letters we have received that are summarized in the main memorandum.

Generally dormant civil cases do not present a problem, although the San Bernardino County Municipal Court District (West Valley Division) (Exhibit 3) indicates they are a problem in that court. The nature of the problem appears to be primarily the cost of microfilming and storage of records. Most of the courts have no practice or rule for weeding out dormant cases although the San Bernardino court does make an effort on occasion to purge its files by dismissal and destruction. "This is not a systematic approach; it is on the contrary, haphazard. The reasons are expense and lack of manpower." (Exhibit 3).

Most of the courts do not think a periodic dismissal calendar would be useful; they are particularly concerned about the expense such a procedure would entail. The Berkeley-Albany Judicial District (Exhibit 4) is concerned about the impact on courtroom time of hearings by parties responding to dismissal calendars. Two respondents felt that dismissal calendars would not be cost-effective in their courts where files are processed manually, but might be cost-effective under a system of computer-maintained files. See Exhibits 4 (Berkeley-Albany Judicial District) and 5 (San Francisco Municipal Court). The Berkeley-Albany Judicial District suggested that as a housekeeping measure, authority for earlier destruction of court records might be more useful than a dismissal calendar.

Mr. Elmore suggests that a statute be enacted that would enable courts in their discretion to adopt local rules providing for dismissal

for lack of prosecution of cases in which the files show (1) no return of summons, answer, or general appearance 18 months after the complaint is filed or (2) if summons is returned or there is an answer or general appearance, the file shows no further activity for 18 months. The local rules could provide for a periodic master list for dismissal on the court's own motion, and would require the plaintiff to inform the court in writing or in person of any objection to the dismissal. A draft of this proposal appears at pages 5-6 of Mr. Elmore's letter (Exhibit 1).

Mr. Elmore points out that such local rules would not be compulsory. Although they might result in some non-uniformity among the courts, the non-uniformity "is offset by the possible incentive to dismiss cases in which plaintiffs have 'lost their zeal' at an earlier time." (Exhibit 1, p. 6).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

June 6, 1981

Re: Study 6-1600- Dismissal For Lack Of Prosecution -
Supplement To Letter Supplement Of May 15, 1981 of Consultant

To: Mr. Sterling
From: Mr. Elmore

The following updates my letter of May 15, enumerating three points on which I have requested consideration or further consideration by the Commission and staff:

Sec. 583.430 (a) (2). The wording in the present staff draft permitting as a condition of denial of a motion to dismiss the requirement that plaintiff or plaintiff's attorney pay to the defendant a sum 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" states an indefinite standard (what "delay," what "actual expenses" what "costs," what is meant by "resulting from"?) It is the writer's strong feeling that wording of this type, however useful in other situations, 1-will be unfortunate, 2- will trench upon the "access to the courts" rule, 3-will be applied so inconsistently that the objective of taking out some of the litigation now surrounding the dimissal motions will not be accomplished. Moreover, we have problems with the "in forma pauperis " civil litigant.

As to other approaches: My Consultant's Report did not set out the problems in referring to a "fine" or "civil penalty." It did note "procedural" problems and that sanctions had not worked very well. Later research indicates that imposing a "fine"

brings forth contentions of right to jury trial, proof beyond a reasonable doubt and the criminal connotations. Presently, the State Bar has a documented proposal to permit "fines" in lieu of, or in addition to reproval, suspension or disbarment of attorneys. Part of the background material refers to the difference between civil penalties and fines. Fines are not now generally found in state agency authority. Express legislative sanction is needed. It seems to have been little granted, according to the State Bar material. The California Supreme Court has not acted upon the State Bar "fine" proposal. It would be in the form of a judicial rule rather than legislative authority.

The Bauguess case (22 Cal. 3d 626 (1978) cited in the May 15 letter struck down an inherent "sanction" order against an attorney for expense caused by alleged improper conduct causing two wasted days of trial. The A-C's were the State Bar and Attorneys for Criminal Justice in support of thatposition. (The trial court and court of appeal had sustained the "sanction." There is said to be a legislative bill (Mr. McAllister) to restore the court's "sanction" authority). The United States Supreme court case (Roadway Express, Inc. (1980) cited also in the May 15 letter indicates a conservative view toward imposing attorney's fees or sanctions that may affect the independence of the Bar or access to the courts.

The use of "civil penalty" does not seem apt in this situation. It usually is found in regulatory laws as an alternate to criminal sanctions or in consumer protection laws. In the Glen-

eagle case (62 Cal. App. 3d 543) Justice Kingsley, for the majority, noted in dicta 1-the suggestion in Daly v. County of Butte, 227 Cal. App. 2d 380, a leading case for trial on the merits, that a prior default may be vacated and substantial justice done "by imposing reasonable counsel fees"on the party causing the delay as a condition for granting relief. Thus, it is said, there was no showing injury will result from trial on the merits and the defendant was "not unduly prejudiced" by failure to bring the action to trial. When a default is set aside on condition, it is said, the condition usually is - payment of attorney's fees and costs for obtaining the judgment that was set aside.* In speaking of the Hanson case, the Kingsley opinion notes that the amount was 1 per cent of amount claimed and that it was compensation for added work of defendant's counsel after settlement talk had caused preparation for trial to cease. Finally, opinion states, the"assessment," if imposed, shouldbe fair and reasonable in accord with actual damage and should not be in the nature of a penalty or liquidated damages.

It seems very clear that with a sharp division of opinion as to the merits of a strict or liberal enforcement of statutes requiring diligence, the "condition" authority may be used to bring about a mixed bag, i. e., plaintiff who delays "somewhat"may have s trial on the merits upon condition plaintiff "pays." The writer

* Hansen v. Snap Tite, Inc. 23 Cal. App. 3d 208 (1972). This case involves talk of a one per cent settlement that later was not agreed to by certain other persons interested in the attorney's fees claimed by the suit. The facts were unusual. Only "delay" after a certain date was considered.

firmly opposes the present wording in the staff draft as inviting claims for damages for delay to such extent the framework of the present case law is apt to be affected. See also "policy" statement in Sec. 583.130 based on case statements that do not include the "fine,""penalty" or "sanction" framework.

RECOMMENDATION: It is believed that the Tentative Recommendation should avoid providing a statutory system of "fines," "sanctions" or "civil penalties," certainly until the California law is clarified. The adverse effect of opening up the litigation to substantial claims of "damages resulting from delay" should preclude giving statutory recognition to such a potential claim, notwithstanding the Hansen language and holding.

An award for or on account of attorney's fees and costs limited to a particular motion or step in litigation is well recognized.** An adaptation of this concept is here possible. It will accord with the New York approach of "modest" awards of "costs and attorney's fees.

A draft follows:

Sec. 583.430. Conditional Orders

(a) In a proceeding for dismissal of the action ( ) pursuant to this article ( ), the court may impose reasonable conditions upon the dismissal or continued prosecution of the action to effectuate substantial justice.

(b) When it is in the interest of substantial justice to do so, the court may permit the action to be continued only if the plaintiff or plaintiff's counsel

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**See CCP § 473 ("The court may, upon such terms as may be just, relieve a party...from a (default) and cases thereunder.

pays to defendant or defendant's counsel a sum to be fixed by the court but not in excess of $500. for attorney's fees and costs in connection with the proceeding for dismissal.

(c) (Incorporate present (b)).

The Comment should reflect that the Hansen ruling is not being continued and that the award of attorney's fees and costs should be the exception and not the rule. Reference can be made to the New York cases cited in Consultant's Report.

Another approach (that is less satisfactory in the writer's opinion) is to leave out all reference to attorney's fees (and money "conditions."). This would leave the matter to judicial decisions under Rule 203.5. Whether Hansen would be followed or distinguished would be up to the courts).

Sec. 583.430 . Broader scope. If the narrower text proposed above is included (not the staff text), the writer believes the "conditions" should apply where service of summons is not mad within the three year mandatory period. However, the same priority is not perceived as to this recommendation,

In the May 15 letter, it was suggested the court be given jurisdiction to extend time of "mandatory" trial date. This suggestion is renewed.

Local rule- Article 5-

It is the writer's recommendation that the Tentative Recommendation include provisions substantially as follows:

Article 5-Local Rules

§ 583.510.Dismissal Calendars. Nothing in this chapter prevents a superior, municipal or justice court from adopting local

rules pursuant to which plaintiffs or their attorneys may be required in person or in writing to inform the court of any objection they have to the dismissal without prejudice of the action for lack of prosecution, together with an explanation of the reason for the apparent inactivity in the action. The rules may provide for a periodic master list of actions proposed for dismissal on the court's own motion. No action shall be subject to dismissal pursuant to such rules unless the file shows no return of summons, answer, general appearance or equivalent in the period of 18 months after commencement of the action against the particular defendant or unless the file shows no activity for a period of 18 months after return of summons, answer, general appearance or equivalent of a defendant.

It is the writer's belief that such provisions "round out" the proposed Act. The provisions are not compulsory. Though some non-uniformity may result, it is offset by the possible incentive to dismiss cases in which plaintiffs have "lost their zeal" at an earlier time.

Respectfully submitted,

Garrett H. Elmore

Exhibit 2

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

Winifred L. Hepperle, Director
Alameda County Office of Court Services
County Courthouse
1225 Fallon Street
Oakland, California 94612

Dear Ms. Hepperle:

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? ND

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

(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? ND

(4) Do you believe any other tools are necessary or desirable to handle dormant cases? ND

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

Dormant civil cases don't constitute a problem in a small court like ours.

Comments by Dick Benas
Clerk-Administrator

I concur - George E. McDonald
Judge 6-10-81

Exhibit 3

CHAMBERS OF SAN BERNARDINO
San Bernardino County
Municipal Court District
WEST VALLEY DIVISION

MARTIN A. HILDRETH, JUDGE

1050 WEST SIXTH STREET
ONTARIO, CALIFORNIA 91762

June 4, 1981

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 inquiry of April 28, 1981, our Court Clerk's Office has given me some information.

Question No. 1: Are dormant civil cases a problem in your Court?

Answer: Yes.

Question No. 2: Do you presently have a practice designed to weed out dormant civil cases?

Answer: We make effort on occasion to purge our files by dismissal and destruction. This is not a systematic approach; it is on the contrary, haphazard. The reasons are expense and lack of manpower.

Question No. 3: Do you believe a procedure, . . . would be helpful?

Answer: Yes, as long as it does not entail added expense or need additional manpower.

If any additional information is required, please let us know.

Sincerely,

Martin A. Hildreth

MARTIN A. HILDRETH, Supervising Judge
Municipal Court, West Valley Division

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Exhibit 4

MUNICIPAL COURT
Berkeley-Albany Judicial District
County of Alameda, State of California

Mario H. Barsotti
Carol S. Brosnahan
George Brunn
Dawn B. Girard
Judges of Municipal Court

Charles E. McCain
Clerk of Municipal Court
Telephone: 644-6975
2120 Grove Street
Berkeley, California 94704

June 10, 1981

Nathaniel Sterling
Asst. Executive Secretary
Calif. Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. Sterling:

In response to your inquiry regarding dismissal of civil actions pursuant to 581a and 583 CCP,

1) Dormant civil cases are not a significant problem in our court.

2) We do not have a practice or local rule designed to weed out dormant cases. While staffing level and expense are factors, we have not really addressed such record purges.

3) Personally, I do not see dormant cases as a problem of significant magnitude to warrant such special procedures which may well prove not to be cost effective and might not significantly improve efficiency. Given an operation of large size with established computer assistance capable of generating automatic notice, such calendars might indeed be practical and thus helpful. But given manual operations or those where only indexing is computerized, the additional manual work on the one hand or the system development on the other would prove expensive. The impact on already limited courtroom time for such hearings might well be significant.

4) Since under present statutes, these dormant cases may not be destroyed until 10 years after the date the complaint was filed, the value of dismissal is limited since the records must still be retained. Perhaps authority for earlier destruction of such records would have significantly greater merit as a housekeeping mechanism.

Very truly yours,

Charles E. McCain

Charles E. McCain
Clerk Administrator

CM/aa

cc: Carol Brosnahan, Presiding Judge
Wendy Hepperle, Director/Office of Court Services

Exhibit 5

The Municipal Court

San Francisco, California

ROY L. WONDER
PRESIDING JUDGE

June 16, 1981

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

Dear Mr. Sterling:

You have asked for our reaction to dismissal of civil actions for failure to prosecute under CCP Section 581a and 583 in your letter of April 28, 1981.

Since civil cases are maintained manually in our court, it is not economically feasible to attempt to purge out cases under 581a or 583 CCP. The cost to pull the cases, send notices and dismiss on the court's own motion would be quite high. Cases, therefore, are just left in the files until the 10 year limitation is reached and the cases then destroyed.

With a computer program it would be possible to program to separate out cases where certain criteria were not met. For example, cases with no return of summons after three years or those which are not brought to trial in five years, could be separated out, notices produced by the computer and calendared for dismissal on the court's own motion.

However, the cost of that procedure under a computer program and necessary court time would have to be measured against simply microfilming all cases and after a certain period of time, destroying the original file to save storage costs, and then maintaining the microfilm until it could be purged after the ten year limitation was reached. Microfilming in this manner is now authorized by law and would be the most cost effective program.

Sincerely yours,

Roy L. Wonder

Roy L. Wonder
Presiding Judge

RLW/tw