#J-600 9/9/82

Memorandum 82-84

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

At the July 1982 meeting the Commission reviewed the comments received on the tentative recommendation relating to dismissal of civil actions for lack of prosecution. The decisions made by the Commission as a result of this review are incorporated in the staff draft of a final recommendation. A copy of the staff draft is attached. Please mark any editorial suggestions you may have on the draft and return it to the staff at the meeting. Upon approval by the Commission, the staff will prepare the recommendation for printing and submission to the 1983 Legislature.

There are several areas of the draft that the staff believes require further Commission attention.

Dismissal for Failure to Timely Serve Summons

Under existing Code of Civil Procedure Section 581a summons must be served within three years after the action is commenced or the action is subject to dismissal. Compliance with the three-year service requirement is excused if service was impossible, impracticable, or futile. Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981), reinterprets this standard to excuse compliance if the plaintiff exercised "reasonable diligence" in attempting to achieve service within the three-year period. This is a flexible, subjective standard. Failure to discover the existence of a party until after the three-year period has run, for example, may be excusable under this standard.

Senate Bill 1150, an insurance industry sponsored bill, would overrule Hocharian by limiting the excuse of impossibility, impracticability, or futility to causes "beyond the plaintiff's control." The bill also makes clear that failure to discover relevant facts or evidence does not excuse compliance with the three-year statute.

§ 583.210 (time for service of summons). The Commission at the July meeting approved the thrust of Senate Bill 1150. However, the Commission also felt that three years is too short a time for completion of discovery. The Commission's proposal, incorporated in the staff draft, allows the plaintiff four years, rather than three, in which to

make service. But the Commission also decided to conform to the three-year period of Senate Bill 1150 if the bill passes.

Senate Bill 1150 has been enacted as Chapter 600 of the Statutes of 1982 and takes effect January 1. The staff has not revised the draft of the recommendation to conform to the three-year period of Senate Bill 1150 because we believe the Commission's four-year proposal makes a certain amount of sense. However, it must be recognized that as a practical matter the failure to conform to the newly-enacted legislation may generate strong and effective opposition to the Commission's proposal. The Commission should reconsider the policy of the four-year proposal and decide whether it is sufficiently important to pursue the change from three years to four.

§ 583.240 (computation of time). The Commission's consultant Mr. Elmore suggests that further study also be given to the concept that there is an excuse only for delay due to causes "beyond the plaintiff's control." See Exhibit 1, page 4. He states:

> The phrase is an ambiguous one, though used in a prior court of appeal case and by the minority in Hocharian. It would seem the purpose could reasonably be accomplished by the guideline of strict construction and failure to discover evidence. Does the phrase mean "plaintiff" or "plaintiff or counsel"? An answer must come to grips with the vexing question of how far a plaintiff should be charged with the attorney's errors and neglect and remitted to an often ineffective claim for attorney malpractice (that in turn requires the services of another attorney).

Mr. Elmore would delete the reference to causes "beyond the plaintiff's control" or at least attempt to further refine its meaning.

Discretionary Dismissal

Code of Civil Procedure Section 583(a) permits discretionary dismissal for want of prosecution if an action is not brought to trial within two years after it is commenced. The Commission's tentative recommendation would have permitted discretionary dismissal only after three years. At the July meeting the Commission decided not to permit discretionary dismissal at all, on the ground that the discretionary dismissal provision is not frequently used and that the mandatory four-year service and five-year trial requirements are adequate to take care of delay in prosecution. In a case where the defendant has not been served and does not wish to wait four years to obtain a dismissal, the Commission added a procedure to enable the defendant to make a demand on the plaintiff

for service and to obtain a dismissal if the plaintiff does not thereafter make service. See § 583.410 (dismissal after demand for service). In a case where the action has not been brought to trial and the defendant does not wish to wait five years to obtain a dismissal, the Commission felt that the defendant could always act to have the case set for trial.

The staff believes the Commission should reconsider this decision. Although the discretionary dismissal provision may not be used frequently, it is used. It provides authority to dismiss for delay in areas not covered by the other statutes. For example, the Commission decided not to deal expressly with delay in bifurcated trials because the general case law on handling partial trials is adequate. But the partial trial cases are discretionary dismissal cases, and with repeal of the discretionary dismissal provision no mechanism is available to handle the problem. Likewise, the Commission decided to repeal an existing provision for dismissal of an action if a default judgment is not taken within three years after service, on the assumption that general law on delay of prosecution is adequate to handle this problem. But with repeal of the discretionary dismissal provision, general law will not be adequate.

Perhaps these cases could be handled under "inherent authority" of the court. And perhaps the inherent authority doctrine could even be codified, as advocated by the Commission's consultant, Mr. Elmore. See Exhibit 1, page 2. The staff has included such a codification in Section 583.150 (relation of chapter to other law or authority). But the staff believes it is preferable simply to retain the existing statute permitting discretionary dismissal, with its clear standard and its well developed case law interpretation.

Mr. Elmore also believes that the discretionary dismissal provisions should be restored. He points out that, in addition to the pressure repeal of discretionary dismissal would place on inherent authority, discretionary dismissal serves a useful purpose where there is a question as to time computation under the five-year mandatory dismissal statute. He would like to see authority for discretionary dismissal for failure to bring to trial within three years, combined with authority for discretionary dismissal if service is not made after a demand by the defendant. See Exhibit 1, pages 3-4.

As a matter of practical politics, once again, it is unlikely the Commission will be able to convince the insurance industry that the discretionary dismissal provisions do not serve a useful purpose. In

addition, recent legislation relies on and expands the discretionary dismissal provision for the purpose of implementing court calendar management local rules. See discussion below. The staff would restore to the recommendation of the discretionary dismissal provisions. A draft is attached as Exhibit 2.

Local Rules

Assembly Bill 3784, which appears as if it will be enacted this session, permits Superior Courts to adopt local rules, enforceable by dismissal, designed to expedite and facilitate the business of the court. A copy of the bill is attached as Exhibit 3.

The Commission had previously decided not to authorize adoption of local rules because a survey showed a general lack of interest on the part of the courts and because local rules would destroy uniformity in the state court system. At this point, the staff suggests the Commission simply follow developments under Assembly Bill 3784, making clear in the dismissal statute that dismissal may occur, apart from the dismissal statute, under local rules. This is also the view of the Commission's consultant, Mr. Elmore. See Exhibit 1, page 1.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

#J-600 9/9/82

STAFF DRAFT

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.

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).

In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint 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. Cont. Ed. Bar 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 continuous appellate litigation interpreting, clarifying, and rewriting the statutes--hundreds of cases, the notation of which requires more than 100 pages in the annotated codes.

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 process of 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.

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

2. See Comment, The Demise (Hopefully) of an Abuse: The Sanction of Dismissal, 7 Cal. W. L. Rev. 438, 455-56 (1971).

3. See Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

4. Id., 2 Cal.3d at 566, 468 P.2d at ___, 86 Cal. Rptr. at ___. See also Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

Dismissal for Failure to Make Service

Section 581a(a) requires that summons be served "and return made" within three years after the action is commenced. The requirement that a return be made within the statutory period is taken literally, even though there may be no question that service has been made.[1] The purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.[2] The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The proposed law eliminates the return requirement.[3]

A major problem with the three-year service requirement is that unless discovery is completed and all potential defendants identified within that time, it is not possible to serve newly-discovered defendants.[4] Recent legislation, however, provides that failure to discover relevant facts or evidence does not excuse compliance with the three-year service requirement.[5] The economics of litigation and the realities of the five-year trial date in many courts dictate that discovery and trial

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1. See, e.g., Kaiser Found. Hosp. v. Superior Court, 49 Cal. App.3d 523, 122 Cal. Rptr. 432 (1975); Bernstein v. Superior Court, 2 Cal. App.3d 700, 82 Cal. Rptr. 775 (1969); Beckwith v. Los Angeles County, 132 Cal. App.2d 377, 282 P.2d 87 (1955). See also Highlands Inn, Inc. v. Gurries, 276 Cal. App.2d 694, 81 Cal. Rptr. 273 (1969) (risk of loss in mail on plaintiff).

2. Nor does the return requirement appear to shift the burden of proof of service. Whether service was in fact made within the three-year period is a question of proof. The return of summons does not help materially in this respect.

3. The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

4. Cf. Hocharian v. Superior Court, 28 Cal.3d 714, 720-21, 621 P.2d 829, ___, 170 Cal. Rptr. 790, ___ (1981) ("As every litigator knows, the prosecution or defense of a lawsuit involves the difficult problem of balancing the effectiveness of any given tactic or procedure against its cost in terms of time and expense. Even the attorney who utilizes every reasonable and cost-effective discovery procedure must acknowledge the possibility that he or she will fail to discover the identity of a potential defendant within the statutory three-year period.").

5. Code Civ. Proc. § 581a(f)(2), as enacted by 1982 Cal. Stats., ch. ___ [SB 1150].

preparation may not reasonably be expected to occur in many cases until well past the three-year cut-off.[6] For this reason the proposed law preserves the rule that failure of discovery is not an excuse, but requires that service of summons be made within four, rather than three, years after commencement of the action.

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;[7] 1982 legislation declares that it is.[8] The 1982 legislative declaration is contrary to the general principle that mandatory procedural rules are not jurisdictional.[9] Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack. The proposed law makes clear the service requirement is mandatory but not jurisdictional.[10]

Dismissal for Failure to Bring to Trial

Although Code of Civil Procedure Section 583 is clear that an action must be brought to trial within five years after it is commenced, it is unclear what acts amount to being "brought to trial" for purposes of the statute. The cases have held, for example, that impaneling a

6. This is particularly true in personal injury cases, which are frequently involved in disputes over dismissal for lack of prosecution. The precise extent of the injuries and amount of damages may not be possible to ascertain in such cases for several years. As a result the parties may delay discovery and other trial activities in anticipation of a possible settlement.

7. Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, ___ n.3, 170 Cal. Rptr. 790, ___ n.3 (1981).

8. Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. ___ [SB 1150].

9. See, e.g., 1 B. Witkin, California Procedure, Jurisdiction §§ 3, 180, 184 (2d ed. 1970).

10. The same rule also applies to the bringing to trial requirement.

jury or swearing the first witness is sufficient to satisfy the requirement that the action be brought to trial.[1] A practice has developed that when the five-year period is about to expire an action is "brought to trial" and then immediately continued until a convenient trial date. Such a practice may be a practical necessity in congested trial courts. In recognition of this practice the statute that defines when an action is brought to trial should prescribe a procedure that does not consume judicial resources or the resources of the parties.

The proposed law adopts the rule that an action is brought to trial when it is actually called for trial in the trial court and the plaintiff signifies readiness to proceed. This provides a clear statutory statement of the time the action is brought to trial that is non-resource consuming. The statutory statement is not exclusive, however, and does not affect other acts by which an action is in fact brought to trial.[2]

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

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1. See, e.g., Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

2. See, e.g., 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 101 (judgment on demurer) and 102 (summary judgment) (2d ed. 1971).

1. Code Civ. Proc. § 581a(c).

2. Mustalo v. Mustalo, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

3. AMF Pinspotters, Inc. v. Peek, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1979).

4. General Ins. Co. of America v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1978).

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 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.

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 provision is unrealistic in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the

5. Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25 (1945).

6. Jacks v. Lewis, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

7. Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co., 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

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, 84 P.2d 1062 (1939).

1. Code Civ. Proc. § 583(a). This provision has been construed to apply to failure to serve and return summons. 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).

action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.[2] Moreover, the discretionary dismissal provision does not 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 relied on their inherent powers to dismiss.[3]

The discretionary dismissal provision is unnecessary and is not continued in the proposed law. The mandatory periods for serving summons and bringing an action to trial are more realistic limitations on delay in prosecution under current litigation conditions.

The proposed law provides other remedies for the defendant in place of discretionary dismissal where the plaintiff is not diligent in prosecuting the action. Under the proposed law, the defendant may serve on the plaintiff a demand that summons be served within 60 days. If the plaintiff fails to so serve the defendant, the defendant may have the action dismissed.[4] This is a more certain and effective procedure for obtaining diligent prosecution than discretionary dismissal, and minimizes consumption of judicial resources. The proposed law also makes clear that the dismissal remedies are not the defendant's exclusive remedies for lack of diligent prosecution; the defendant may act at any time to bring the action to trial or advance the case for trial.[5]

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

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

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

4. This provision is based on New York CPLR § 3012(b).

5. Code Civ. Proc. § 594(1); Rules of Court 225, 513.

1. See discussion under "Introduction," above.

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 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 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 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 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]

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

3. Code Civ. Proc. § 581a(a)-(b).

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).

Stipulation extending time. The time within which service must be made, 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 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

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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).

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 Pac. 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).

waiver and estoppel is not generally reflected in the dismissal statutes.[16] 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 futile.[17] 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.[18] Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.[19] The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and liberally construed as applied to the bringing to trial requirement in recognition of the fact that service is ordinarily within the plaintiff's control (particularly if the statutory limit is increased from three to four years) whereas bringing a case to trial frequently is hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory

16. But see Code Civ. Proc. § 581a(f)(1), as enacted 1982 Cal. Stats. ch. ___ [SB 1150].

17. 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); Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

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

19. Code Civ. Proc. § 581a(f)(2), as enacted 1982 Cal. Stats. ch. ___ [SB 1150].

period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.[20] The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;[21] it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

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 it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.[22] 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.[23] The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.[24] In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.[25]

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20. See, e.g., State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

21. See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

22. See, e.g., Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); 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).

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

24. 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).

25. See, e.g., 4 B. Witkin, California Procedure, Proceedings Without Trial § 80 (2d ed. 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~~ . This subdivision does not apply if affirmative relief has ~~not~~ been sought by the cross-complaint of the defendant ~~, and provided further that~~ or if there is ~~no~~ a 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 action~~ enforce the liability 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,~~ except 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 583.110-583.420. 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.

36259/NZ

SEC. 2. Section 581a of the Code of Civil Procedure [, as amended by 1982 Cal. Stats. ch. 600,] 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 the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

(b) No action heretofore or hereafter commenced by cross/complaint shall be further prosecuted, and no further proceedings shall be had therein, and all action 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 motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.

(f) Except as provided in this section, the provisions of this section are mandatory and are not excusable, and the times within which

~~acts are to be done are jurisdictional. Compliance may be excused only for either of the following reasons:~~

~~(1) Where the defendant or cross-defendant is estopped to complain.~~

~~(2) Where it would be impossible, impracticable, or futile to comply due to causes beyond a party's control. However, failure to discover relevant facts or evidence shall not excuse compliance.~~

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), 583.220 (general appearance), and 583.250 (mandatory dismissal). The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.230 (extension of time) and 583.240 (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. Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.240 (computation of time).

The substance of subdivision (e) is continued in Section 583.220 (general appearance).

The substance of subdivision (f) is continued in Sections 583.140 (waiver and estoppel), 583.240 (computation of time), and 583.250 (mandatory dismissal). The portion of subdivision (f) that declared the times to be jurisdictional is superseded by Section 583.250 (mandatory dismissal).

36263/NZ

SEC. 3. Section 583 of the Code of Civil Procedure [, as amended by 1982 Cal. Stats. ch. ___,] is repealed.

~~583. (a) The court, in its discretion, on motion of a party or on its own motion, 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. Subdivision (a) of former Section 583 is not continued. But see Sections 583.420 (dismissal after demand for service) and 583.150 (remedies not exclusive) and Comments thereto. The substance of subdivisions (b), (c), and (d) is continued in Sections 583.320 (time for trial), 583.330 (time for new trial), 583.340 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.350 (computation of time).

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 an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) "Complaint" includes a cross-complaint or other initial pleading.

(c) "Court" means the court in which the action is pending.

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced.

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced.

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. See, e.g., Innovest, Inc. v. Bruckner, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981) (dismissal of cross-complaint). 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), (d), and (e) are new.

§ 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 part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, e.g., Big Bear Mun. 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); Rules of Court 1233 (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 inconsistent with the character of a special proceeding 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. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, 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., Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal. Rptr. 790, 621 P.2d 829 (1981); 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 continues and expands a provision of former Section 581a(f)(1), as enacted by 1982 Cal. Stats. ch. 600. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, e.g., Southern Pac. 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, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); Borglund v. Bombardier, Ltd., 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); Holder v. Sheet Metal Worker's Internat. Assn., 121

Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

405/798

§ 583.150. Relation of chapter to other law or authority

583.150. This chapter does not limit or affect any of the following:

(a) The authority of a superior court to dismiss an action or impose lesser sanctions pursuant to a rule of court adopted pursuant to Section 575.1.

(b) A rule of the Judicial Council adopted pursuant to statute authorizing a court to dimiss an action or impose lesser sanctions.

(c) Dismissal of an action or imposition of lesser sanctions under inherent authority of the court in cases where this chapter does not otherwise apply and where the dismissal or sanctions are appropriate, applying the policy and principles of this chapter.

Comment. Section 583.150 makes clear that although this chapter is by its terms limited in scope, it does not affect other law or authority relating to delay in prosecution. This chapter does not deal with the general problem of delay in the various stages of litigation but only with delay in serving summons or bringing an action to trial.

This chapter does not continue provisions of former law that authorized discretionary dismissal for delay in prosecution. See former Section 583(a); Rules of Court 203.5. The former provisions are replaced by a provision enabling the defendant to demand expedition (see Section 583.410--dismissal after demand for service) and are supplemented by general provisions of law (such as the right of the defendant to set or advance trial date). Moreover, the case law recognizes, and Section 583.150 codifies, the inherent authority of the court in matters not covered by this chapter. See, e.g., Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968); Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

26960

§ 583.160. Transitional provisions

583.160. (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 583.160 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.

26969

Article 2. Mandatory Time for Service of Summons

§583.210. Time for service of summons

583.210. (a) The summons and complaint shall be served upon a defendant within four years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service need not be made within the time the summons and complaint must be served upon a defendant, but whether or not so made, proof of service shall be made to the court if relevant to a motion to dismiss under this article.

Comment. Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. Unlike the former provisions, Section 583.210 requires service within four, rather than three years and does not require return of summons within that time. For exceptions and exclusions, see Sections 583.220 (general appearance), 583.230 (extension of time), and 583.240 (computation of time). Section 583.210 is consistent with Section 411.10 (civil action commenced by filing complaint) and applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 ("action" and "complaint" defined). Section 583.210 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, 364 P.2d 681, 15 Cal. Rptr. 817 (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); Lesko v. Superior Court, 127 Cal. App.3d 476, 179 Cal. Rptr. 595 (1982).

38884

§ 583.220. General appearance

583.220. The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in

the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.220 extending the time within which service must be made.

(b) 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.

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

Comment. Section 583.220 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 purpose of this section 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 706, 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. Section 583.220 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

§ 583.230. Extension of time

583.230. The parties may by written stipulation extend the time within which service 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 for dismissal.

Comment. Section 583.230 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

§ 583.240. Computation of time

583.240. In computing the time within which service 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.

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

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception 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.

Subdivision (d) continues the substance of subdivision (f)(2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence and in light of the extension of the statutory service requirement from three to four years. See Section 583.210 (time for service). Contrast Section 583.350 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130--plaintiff must exercise diligence--and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

27422

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

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

(2) 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, after notice to the parties.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) supersedes a portion of former Section 581a(f) (requirements jurisdictional) and codifies case law. See, e.g., Hocharian v. Superior Court, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, ___ n.3, 170 Cal. Rptr. 790, ___ n.3 (1981).

404/675

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. "Brought to trial" defined

583.310. (a) If an action is called for trial and the plaintiff announces readiness to proceed, the parties may stipulate or the court may order that the action is brought to trial for the purpose of this article without further act of the plaintiff, whether or not a continuance is thereafter granted.

(b) Nothing in subdivision (a) limits any other act by which an action may be brought to trial for the purpose of this article.

Comment. Subdivision (a) of Section 583.310 is intended to provide a simple and mechanical test by which it can be ascertained whether an action has been brought to trial, short of impaneling a jury or swearing a witness, for the purpose of applying the time periods prescribed by this article.

Subdivision (b) makes clear that the procedure prescribed in subdivision (a) is not exclusive, and any other act that constitutes an action being brought to trial is sufficient for this article. See, e.g., Hartman v. Santamarina, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982) (impaneling jury); Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006 (swearing witness); 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 101 (judgment on demurrer) and 102 (summary judgment) (2d ed. 1971).

28763

§ 583.320. Time for trial

583.320. An action shall be brought to trial within five years after the action is commenced against the defendant.

Comment. Section 583.320 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

§ 583.330. Time for new trial

583.330. (a) 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.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310.

Comment. Section 583.330 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

36265

§ 583.340. Extension of time

583.340. 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 for dismissal.

Comment. Section 583.340 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.

§ 583.350. Computation of time

583.350. 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.

Comment. Subdivision (a) of Section 583.350 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. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.350 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. Contrast State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

29636

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.360 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). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Article 4. Discretionary Dismissal After Failure to Serve Summons

§ 583.410 Dismissal after demand for service

583.410. (a) A defendant who has not been served with the summons and complaint or made a general appearance in the action may serve on the plaintiff a demand that service of the summons and complaint be made within 60 days thereafter.

(b) The demand shall be in writing and shall include all of the following:

(1) A statement that if the plaintiff does not make service of the summons and complaint within 60 days after service of the demand, the defendant may move the court for dismissal of the action pursuant to this section.

(2) The business address, if any, and the residence address of the defendant and the days and hours at which the defendant may customarily be found at the address.

(3) Whether the defendant is willing to accept service pursuant to Section 415.30 of the Code of Civil Procedure.

(4) Any other information relevant to effecting service.

(c) If the plaintiff does not make service of the summons and complaint within 60 days after service of the demand, or such additional time as is allowed by the court or by the defendant, the defendant may move to dismiss the action. The court may grant or deny the motion, with or without conditions, giving due consideration to the merits of the action, the reasons for the delay in service, the presence or absence of prejudice to the defendant from the delay in service, the policy stated in Section 583.130, and such other factors as may be relevant.

(d) A demand or motion made under this section is not a general appearance in the action.

(e) In the absence of a showing of continuous and intentional failure to make service after demand, no action shall be dismissed under this section until one year after commencement of the action.

Comment. Section 583.410 replaces former Section 583(a), which was held to apply to delay in making service. 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)). Under Section 583.410 dismissal is made only after demand by the defendant and failure of the plaintiff to make service. The demand may be made at any time after commencement of the action. Section 583.410 is derived in part from New York CPLR § 3012(b).

EXHIBIT 1

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

September 6. 1982

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

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

Dear Members, Mr. DeMoully and Mr. Sterling:

By this letter, I undertake to make several points and, in one instance, respectfully ask further consideration, as to actions on July 22-23.

1. Effect of Stirling Bill (A. B. 3784). First, this bill is an enabling bill, limited to superior courts. It is intended to have local rules designed to expedite and facilitate the business of the superior court adopting them. The rules "may" provide for the supervision and judicial management of actions from the day they are filed. Local rules are not to be inconsistent with law or with Judicial Council rules.Penalties (more properly "sanctions") are similar to those in the Civil Discovery Act with the addition of a statement of intent that "if a failure to comply with the rules is the responsibility of counsel, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense"Since some time will elapse before the shape of the "local rules" in one or more superior courts will be known, it is recommended the LRC proposed statute "make a place" for such rules, subject to possible change if the rules progress. Second, it is believed the Final Recommendation should expressly refer to the Stirling bill"s authorization and note that the rules, when adopted, published and filed, will impose other requirements for the court adopting them. Second,in Consultants opinion, A. B. 3784 itself reflects considerable background study but whether superior court committees will be able to come up with workable rules, acceptable to the bench and bar generally,in short order seems doubtful. Again, there may be technical procedural requirements to be met in imposing "responsibility" or "penalty" upon counsel. However, the attitude of the California Supreme Court may be more favorable now.

Your Consultant, therefore, would proceed with the present Act. It must be recognized there is potential for future inconsistency.

Alternative. If consistent with your general policy, the Final Recommendation might indicate a "reserved" section or subsection for rules authorized by (the Stirling Bill) with Comment that the Commission will recommend a specific treatment of such rules, if and when their format becomes generally known.

2. Inherent Power Basis In General And Specifically. Though inherent power of a court to dismiss for unreasonable delay in serving summons, bringing the action to trial or (possibly) failing to obtain "answer" (Pleading) or default judgment within three years is an attractive idea, the present California approach seems to recognize inherent power 1-only when not inconsistent with statute; 2-when the harsh remedy of dismissal is appropriate for a rule violation, as where the case is placed on a "dismissal calendar" for failure to appear at a trial setting or other conference as required by rule, and plaintiff makes only a token showing or no showing in opposition to dismissal. There is a limited area for dismissal under inherent power where the statutes are not directly in point because of a gap; for example, will contest proceedings where there is no real attempt to proceed for almost a year.

It is believed the proposed Act should refer narrowly to inherent power. A draft section was submitted in the exhibit(Memo. 82-48, Ex. 10) attached to Mr. Sterling's report of March 31, 1982, considered at the July, 1982, meeting. However, the writer's draft wording now appears too broad. It should be disregarded.

It was the writer's intent to refer only to the use of inherent power to fill in chinks, so to speak, in the present statutory framework, and not to recognize the court's inherent power in other cases, a broad spectrum that could range from time to serve a summons, to time to serve an at issue memorandum, to failure to attend a pre-trial, trial setting or settlement conference. Also, a further draft by the writer in a recent memorandum to staff requires narrowing in wording, to confine it to "filling in the chinks" in the Act itself.

In Consultant's view, it is beyond the scope of the present study to draw a completely new statute on delay in prosecution of actions; attempting in such statute to deal with other forms of delay than the three types in present CCP 581a and CCP 583. It is unwise in the writer"s opinion to grant a "blank check" to the courts in the form of provisions in the Act that would enable the courts to govern the subject "in cases not provided for"-by individual decisions (unsatisfactory) or by local rules. Also, the Stirling Bill grants rule making power (or "confirms" such power) only in a limited area-superior courts. *

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* The writer is opposed to a "demand" procedure generally, unless carefully limited-such as "demanding" that a default judgment be taken within so many days, when plaintiff is entitled to a default.

3. Proposed Repeal Of Discretionary Dismissal-CCP 583 (a) And Rule 203.5. Consultant respectfully urges the July decision to make this deletion be reviewed and changed, as follows:

First,Sec. 583 (a) and in consequence Rule 203.5, Cal. Rules of Court adopted as of 1970 by the Judicial Council pursuant to 1969 statutory authorization, should be retained but minimum time for seeking dismissal increased from 2 to 3 years after action commenced. However, the time for service of summons should not be included (contrary to present case law interpretation).

In brief, repeal of the present Sec. 583 (a) will automatically delete the "modern" rule adopted by the Judicial Council (Rule 203.5) and leave a void. Itis likely this void will be filled by attempts to use the court's inherent power. It is difficult to draft provisions that say the court may exercise inherent power in minor respects (see under 2, above) but not in an area where there is a complete void , namely, that long occupied by "discretionary dismissal" statute and,more recently,by Judicial Council rules.

It does not appear wise to rely solely upon repeal of Section 583 (a) and Comment, if the intent is to prohibit a discretionary or any involuntary dismissal short of the maximum period for bringing the action to trial.

A statement of legislative intent or a direct statutory provision that on and after January 1, 1984, discretionary dismissals are abolished would seem required, to displace inherent power(if such is the intent). The legislative reaction to such an approach seems dubious.

Lastly, retention of the discretionary dismissal serves a purpose. It permits a dismissal where there is a question as to time computation of the five year period (mandatory dismissal).

If the minimum is high enough (three years suggested), it is not likely many "early" motions will be made.Shifting the burden to the defendant to show dismissal is proper also would clarify the present law and minimize motions.

Second,New Article 2.5 (Sec. 583.410) headed "Discretionary Dismissal For Failure To Servce Summons" should be added. However, the provisions based upon a "demand" for service should be less strict than the "mandatory" staff draft. See Consultant"s draft outlined in a memorandum to Mr. Sterling of 9/2/82, pp. 5,6.

If no minimum time limit is stated (such as one year), it is likely a substantial number of cases will be dismissed after a "demand". Example: Attorney is on a trip or on trial or suffers from unreliable office assistance.

The draft wording sent to Mr. Sterling (see above) also permits alternative court orders of less than dismissal and contains some criteria to be considered; however, they are less elaborate than under Rule 203.5.

It is to be noted that the New York procedure for demanding a copy of the complaint when summons has already been served is familiar to the practicing bar. In California, there is a long history of comparatively lax requirements for service of summons.Only by interpretation is the (two year minimum) "brought to trial" statute (Sec. 583 (a)) is there authority for moving to dismiss for failure to serve summons after two years. The principal California statute has been Sec. 581a (the three year "maximum" statute).

If it is determined to recommend,as to service of summons, the mandatory "demand" statute such as the staff proposal initially drafted after the July, 1982, meeting, there should 1- be "lead time" for the Bench and Bar to become acquainted with the new practice; and 2-a "time shortening" seems clearly involved, in view of Hocharian, and a reasonable grace period should be included in the new statute to permit service under the pre-existing law (as interpreted).

4. Proposed Section 583.230 (d).Consultant respectfully suggests further study should be given to the inclusion of "beyond the plaintiff's control" in provisions relating to service of summons.The phrase is an ambiguous one, though used in a prior court of appeal case and by the minority in Hocharian.It would seem the purpose could reasonably be accomplished by the guideline of strict construction and failure to discover evidence.Does the phrase mean "plaintiff" or "plaintiff or counsel"? An answer must come to grips with the vexing question of how far a plaintiff should be charged with the attorney's errors and neglect and remitted to an often ineffective claim for attorney malpractice (that in turn requires the services of another attorney).

Consultant would not perpetuate the phrase, at least without a difficult further description, even though it is in the recent Beverly Bill that has been signed.

Respectfully submitted,

Garrett H. Elmore
Consultant

EXHIBIT 2

28276

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 on its own motion or on motion of the defendant 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).

28277

§ 583.420. Time for discretionary dismissal

583.420. The court may not dismiss an action pursuant to this article for delay in prosecution except in one of the following circumstances:

(a) Service is not made within two years after the action is commenced against the defendant.

(b) The action is not brought to trial within three years after the action is commenced against the defendant.

(c) A new trial is granted and the action is not again 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 two 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 two 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 two years after the retmittitur is filed by the clerk of the trial court.

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. 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) (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).

28282

§ 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 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.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to 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). The authority of the court to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

EXHIBIT 3

AMENDED IN SENATE AUGUST 18, 1982
AMENDED IN ASSEMBLY AUGUST 5, 1982
AMENDED IN ASSEMBLY AUGUST 2, 1982

CALIFORNIA LEGISLATURE—1981-82 REGULAR SESSION

ASSEMBLY BILL No. 3784

Introduced by Assemblyman Dave Stirling

April 15, 1982

An act to amend Section 583 of, and to add Sections 575.1 and 575.2 to, the Code of Civil Procedure, relating to trials.

LEGISLATIVE COUNSEL'S DIGEST

AB 3784, as amended, D. Stirling. Civil procedure: pretrial proceedings.

Existing law empowers every court to provide for the orderly conduct of proceedings before it.

This bill would authorize the adoption of local superior court rules, according to specified procedures, designed to expedite and facilitate the business of the court and would provide for the consequences of failure to comply with such rules. The bill would also revise the authority of a court to dismiss an action for want of prosecution and would require the Judicial Council to adopt rules for obtaining dismissals as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

SECTION 1. Section 575.1 is added to the Code of Civil Procedure, to read:

575.1. The presiding judge of each superior court may

prepare with the assistance of appropriate committees of the court, proposed local rules designed to expedite and facilitate the business of the court. The rules need not be limited to those actions on the civil active list, but may provide for the supervision and judicial management of actions from the date they are filed. Rules prepared pursuant to this section shall be submitted for consideration to the judges of the court and, upon approval by a majority of the judges, the judges ~~may~~ *shall* have the proposed rules published and submitted to the local bar for consideration and recommendations. After a majority of the judges have officially adopted the rules, 61 copies shall be filed with the Judicial Council as required by Section 68071 of the Government Code and the local rules shall also be published for general distribution. Rules adopted pursuant to this section shall not be inconsistent with law or with the rules adopted and prescribed by the Judicial Council.

SEC. 2. Section 575.2 is added to the Code of Civil Procedure, to read:

575.2. *(a)* Local rules promulgated pursuant to Section 575.1 may provide that if any counsel, ~~or the~~ *a party represented by counsel, or a* party if in pro se, fails to comply with any of the requirements thereof, the court on ~~notice and motion~~ *motion of a party or on its own motion* may strike out all or any part of any pleading of that party, or, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature as ~~the court may deem just~~ *otherwise provided by law*, and may order that party or his or her counsel to pay to the moving party the reasonable expenses in making the motion, including reasonable attorney fees.

(b) It is the intent of the Legislature that if a failure to comply with these rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto.

SEC. 3. Section 583 of the Code of Civil Procedure is amended to read:

583. (a) The court, in its discretion, on motion of a party or on its own motion, 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.