Study J-1300 August 9, 1999

Memorandum 99-55

Trial Court Unification: Status of Future Study Issues

This memorandum is a progress report on the Law Revision Commission's joint study with the Judicial Council on revising civil procedure to take advantage of trial court unification.

As we previously reported, members of the panel of consultative experts selected for this study (Prof. Walter Heiser, Prof. Deborah Hensler, Prof. David Jung, Prof. J. Clark Kelso, Prof. Richard Marcus, Hon. William Schwarzer, and Larry Sipes) met on June 9, 1999, for a brainstorming session with Judicial Council and Commission staff members. This was a very productive meeting, in which the group shared many different ideas.

Since that meeting, Judicial Council and Commission staff have jointly prepared a list of "Issues and Ideas From June 9, 1999 Brainstorming Meeting" (Exhibit pp. 1-8). We are in the process of distributing that list to the meeting participants and to invitees who were unable to attend the June 9 meeting (Prof. William Slomanson and Prof. Keith Wingate). Judicial Council staff have also prepared a 28-page transcript of the meeting, which probably will be distributed only on request, due to its bulk.

The attached list divides the issues and ideas into three major categories: "Jurisdictional Limits and Distinctions," "Discovery Reform / Case Management," and "Multidoor Courthouse / ADR." These categories overlap to some extent, but we nevertheless believe the breakdown is helpful. If Commissioners or others have suggestions on better means of dividing the issues and ideas into categories, we would like to hear them.

The attached list includes some but not all of the concepts that were discussed at the Commission's June meeting, as well as many other ideas. (See Minutes, June 24-25, 1999, pp. 11-12.) The following ideas proposed by Commissioners are not included in the list:

- Eliminating disparities in filing fees.
- Using smaller juries for smaller cases.
- Using simplified evidentiary rules in cases that are not economic to litigate, to help enable parties to pursue such cases without incurring prohibitive litigation expenses.

• Making the appeal path for a case dependent upon the result obtained, at least to some extent.

• Creating regional appellate divisions.

• Increasing the extent to which appellate divisions render written opinions.

• Using a "notice of intended action" approach in specified circumstances, as is done in bankruptcy cases.

• After all the trial courts have unified, revisiting the question of whether the law/equity distinction makes sense for purposes of jurisdictional classification.

We did not ask to have these concepts inserted in the attached list, because that would not fairly reflect the content of the June 9 brainstorming session. We have, however, notified the Judicial Council that they should be considered as this study moves forward.

Judicial Council and Commission staff are in the process of finalizing a cover letter to be distributed with the attached list. We expect to ask the meeting participants and invitees to:

(1) Provide input on the contents of the list, such as additional ideas to consider, sources to consult, persons to contact, problems to take into account, suggestions on methodology, or other advice.

(2) Rate the ideas on the list or otherwise express their opinions on which ideas are most worth pursuing and which are less deserving of attention.

(3) Explain why they prefer some ideas over others.

It would be helpful if Commissioners or other interested persons could do the same, preferably by the beginning of September.

Before the Commission's upcoming meeting in San Diego, Commission staff are scheduled to have a conference call with Judicial Council staff about the best means of structuring this study and dividing up work. We will report to the Commission about the results of that discussion at the upcoming meeting.

Respectfully submitted,

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ISSUES AND IDEAS FROM JUNE 9, 1999
BRAINSTORMING MEETING

A. JURISDICTIONAL LIMITS AND DISTINCTIONS

Policy questions

1. Should there be separate rules for small cases? If so, is there a theoretical and/or empirical basis for specifying the criteria for differentiating between cases (e.g., setting an amount-in-controversy limit)? (p. 12)[1]

2. Would changes in small claims or economic litigation limits or other procedural changes increase the number of pro per actions? Is that desirable or not? (pp. 6, 18–19)

3. If small claims procedures are used for more cases (cases with higher amounts in controversy) what is the tradeoff in quality of justice? What if economic litigation procedures are used in more cases? (p. 19)

Further background work

4. What types of procedures are used in civil cases in states that have unified their trial courts?

    a. Are these procedures similar to our economic litigation procedures, our general procedures for civil cases, or a combination of the two?

Empirical research

5. What is the break-even point for cost of litigation versus recovery? (p. 12)

6. How many traditional superior court cases result in a judgment of $25,000 or less (the maximum for a limited civil case)?

7. How many cases that could be decided in small claims court are being taken to municipal court (or filed as limited civil cases and not as small claims cases)? How many cases that are over $5,000 are being taken to small claims courts? How many cases that could be brought as limited civil cases are being filed as unlimited civil cases? (pp. 5–6, 10, 18–19)

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[1] Page number references are to pages in the summarized transcript of the discussion, third version (Jun9tapemin3.doc).

8. Who is using small claims procedures in California? (There is data on this but it is not current.) (p. 19)

    a. Are there cases filed as limited civil cases that are within the small claims jurisdictional limit? (pp. 10, 18–19)

Possible reforms, recommendations

9. Keep the amount in controversy trigger because it is a good proxy and easy to apply. (pp. 15, 17–18)

10. Apply the same procedures to all civil cases. (p. 12)

11. Raise the small claims jurisdictional limit so more people will have that option. (pp. 18–19)

12. Raise the amount-in-controversy limit for economic litigation procedures. (p. 6)

13. Apply different amount in controversy requirements to different types of cases (for example, employment disputes versus contract disputes).

14. Experiment with the small claims procedure Judge Schwarzer proposed for federal court, or some variant of this procedure. (p. 19)

B. DISCOVERY REFORM / CASE MANAGEMENT

Policy questions

1. How much "should" be spent on discovery? This is a policy question; data won't answer it. (p. 15)

2. Should we attempt to have more procedures put in the Rules of Court rather than statutes? (pp. 15–16, 24–26)

    a. Interest groups have an interest in keeping procedures in the statutes. This may be even stronger if some procedural rules are specific to certain types of cases. (p. 16)

    b. Appellate rules used to be in statute but are now in Rules of Court. (pp. 25–26)

Further background work

3. Compare discovery rules, economic litigation rules, and delay reduction rules. (This could be a research project for students.)

4. How does the complexity of California's rules of civil procedure compare with that in other states? (p. 25)

Empirical research

5. To what extent have parties, attorneys, and courts been satisfied with economic litigation procedures? (p. 16)

    a. How do economic litigation procedures affect litigation costs?

    b. To what extent are limited civil cases withdrawn from economic litigation procedures?

6. How do the effects of economic litigation differ from/relate to the effects of delay reduction? Could a "hybrid" be developed? (pp. 6–7)

7. To what extent does the cost of discovery prevent some cases from being litigated, or fully litigated? (pp. 5–6, 18)

8. How much discovery actually occurs in cases subject to economic litigation procedures? (pp. 12, 17)

    a. How much discovery occurs in other cases in California? (pp. 17–18)

b. To what extent does the amount in controversy relate to the amount of discovery in a case? (pp. 12, 17)

9. How much discovery abuse occurs in California? (p. 14)

   a. In what kinds of cases is abuse most common? (p. 14)

   b. In what kinds of cases is discovery most often used well? (p. 14)

10. What is the impact of discovery referees? (p. 11)

    a. Is there any data on incentives to keep costs down?

11. Do former municipal court judges enforce procedural rules differently from judges who were on the superior court prior to unification? (p. 27)

12. What has been the impact of broad discovery limitations (such as Illinois' waivable three-hour limit on depositions) in other jurisdictions? (pp. 18–19)

13. What are the effects of mandatory disclosure requirements used in some jurisdictions?

<u>Possible reforms, recommendations</u>

14. Move delay reduction and similar provisions out of the Government Code and into the Code of Civil Procedure. (p. 9)

15. Create a hybrid of delay reduction and economic litigation procedures, perhaps linking quick trial dates to use of economic litigation procedures. (pp. 7, 16-17)

16. Permit parties to consent to use of economic litigation procedures. (p. 17)

17. Apply modified version of economic litigation to all cases except small claims cases, with numbers adjusted so most cases would not exceed allowable pretrial activities, and with exception if judge orders or parties agree. (pp. 12, 16–18)

    a. Limits should be low enough to have an impact, but getting political support might require adjusting upward. (p. 18)

18. Impose waivable limits on discovery (for example, Illinois 3-hour limit on depositions, proposed federal 7-hour limit on depositions). (p. 18)

19. Limit discovery in large cases, where discovery abuse is most common. (p. 18)

20. Use criteria other than amount in controversy to determine which procedures apply to a case. This is already done in some areas (for example, unlawful detainer, family law, administrative cases). (pp. 12, 15)

    a. There is a risk of creating artificial distinctions and more work. (p. 15)

21. An alternative is allowing the judge to determine which procedures apply to a case, based on (1) specified criteria, or (2) all the facts and circumstances of the case.

    a. Best track "in light of all the circumstances" allows judge to use various/intangible factors. (p. 16)

22. Expand the use of the single assignment system. This lets the judge get to know the case better and thus manage it better. (p. 15)

23. Simplify the Code of Civil Procedure. (pp. 15, 24–25)

    a. The Federal Rules of Civil Procedure may provide a good model; many states base their rules on these.

    b. Simpler rules may improve case management because the judge has more room for discretion. (pp. 15, 24–25)

24. Eliminate discovery referees or tighten restrictions on use of discovery referees. (pp. 9, 11)

C. MULTIDOOR COURTHOUSE / ADR

Policy questions

1. What role should ADR play in a revision of civil procedures? (pp. 19–23)

    a. Quality of procedure should not be compromised simply because less money is at stake. (p. 20)

    b. How should remuneration for neutrals be structured so that the incentives are appropriate? (p. 23)

    c. Should certain kinds of cases be encouraged to use certain kinds of ADR? (p. 23)

2. Is there a role for user fees as a way to regulate and/or generate revenue? (p. 10)

Further background work

3. How do ADR programs in use in California compare with ADR used in other jurisdictions? What are the trends? (pp. 20–21)

Empirical research

4. To what extent have parties, attorneys, and courts been satisfied with judicial arbitration procedures? (pp. 20, 22)

5. What ADR programs are in use in California (including those developed at the local level)? How are they working? (ADR subcommittee is doing some work on this.) (pp. 19–21)

    a. How do they vary in practice in different counties? (pp. 20–21)

    b. Has unification changed the types of ADR actually available, or how the programs work? (p. 20)

    c. What are the trends?

6. How do judicially arbitrated cases in which there is a request for a trial de novo differ from cases in which there is not such request? (p. 22)

7. What are the financial incentives for neutrals in ADR programs? How do those financial incentives affect the programs? (pp. 10, 22–23)

Possible reforms, recommendations

8. Make judicial arbitration optional. (p. 22)

9. Use criteria other than amount in controversy to determine which ADR procedures apply to a case. (p. 20)

10. User's fees in some form/some cases. (Incentives are contrary for private referees.) (p. 10)

11. Have mediators donate their time for the first 1-2 hours of mandatory mediation; parties would have to pay the mediator's normal rate if they decide to continue to mediate. (p. 23)

Methodology

12. Mediation, early neutral arbitration, judicial arbitration, and perhaps other ADR programs should be studied as a unit, not in isolation. (p. 21)

13. Develop a survey to ask courts what ADR programs they have. (p. 21)

14. Collect information on ADR programs at a statewide conference of judges and court administrators who have oversight of ADR programs. (p. 21)

D. OTHER ISSUES

Policy questions

1. If procedures are revised for unified courts, how should that affect courts that are still divided as municipal and superior? Consider LA. (p. 3)

Empirical research

2. Are there practices (as opposed to statutorily or rule-mandated structures, such as ADR, economic litigation, delay reduction) that play a role in the efficiency and/or effectiveness of some California courts? What are they and how well do they work? How are they affected by unification? (p. 7)

3. To what extent have unified superior courts actually implemented unification in practical terms? (pp. 7, 27–28)

    a. Which courts in California are "truly unified"?

    b. Which courts are unified in name but not fully in substance? In what ways?

    c. How do courts in these two categories compare?

4. Why has the total number of cases filed decreased in current years, in California and elsewhere? What factors correlate with, and could explain, this change? (p. 11)

5. What percentages of what kinds of cases filed actually go to trial? (p. 23) (Prof. Marcus has an article on this.)

Methodology

6. Legislate for the middle, not for the extremes. (p. 14)

7. Before requesting data from courts or other sources, we should identify all of the different types of data we want to collect, rather than subjecting sources to multiple requests for information. (p. 21)

8. Use incentives in gathering information, such as conferences (for cross-fertilization of ideas) or summary of info in exchange for survey information. (p. 21)

9. Generate ideas, open up to various perspectives before we start winnowing out suggestions and narrowing proposals. (p. 5)