Study J-1320 October 3, 2000

Memorandum 2000-71

Civil Procedure After Trial Court Unification
(Comments on Tentative Recommendation)

In July, the Commission approved a tentative recommendation on elimination of unnecessary procedural differences between limited and unlimited civil cases. This is one of several projects in the study of civil procedure after trial court unification that the Commission is jointly conducting with the Judicial Council. The background work on the proposal was prepared by Commission staff and staff from the Administrative Office of the Courts ("AOC"). In developing the proposal, the joint staff group considered preliminary information regarding probable responses to the proposed reforms within the Judicial Council and the AOC. Before approving its tentative recommendation, the Commission also considered comments from Prof. William Slomanson (one of the panelists for this joint study). Since the July meeting, the Commission has received the following new input on the proposal:

AOC staff has also provided information on how Judicial Council groups have reacted to the proposal. The Commission needs to consider these comments and determine whether to approve its proposal (as is, or with modifications) as a final recommendation, for printing and introduction in the Legislature in 2001. Alternatively, the Commission could wait until the December meeting to finalize the proposal.

RECAP OF THE TENTATIVE RECOMMENDATION

The tentative recommendation proposes seven different reforms:

(1) The same rules for pleading damages should apply in all actions for personal injury or wrongful death, regardless of the jurisdictional classification of the case.

(2) The distinction between attachment undertakings in limited and unlimited civil cases should be eliminated, and the amount of the initial undertaking increased to $10,000.

(3) The statutory protection regarding waiver of a jury demand should be extended to limited civil cases.

(4) The clerk of court should be permitted to record a satisfaction of judgment where there is an interest deficit of $10 or less in an unlimited civil case, not just in a limited civil case.

(5) The differentiation between limited and unlimited civil cases as to the amount of a creditor's undertaking where there is a third party claim should be eliminated.

(6) The same filing fee should be required for all confessions of judgment, regardless of the size of the claim.

(7) A provision on statutory interpretation should be added to negate any implied limitation on court authority in limited and unlimited civil cases.

OVERALL RESPONSE

Overall response to the proposal has been positive. Mr. Jones states:

> I think all these proposals are very sound and heartily endorse the idea of integrating the practices of the limited and unlimited courts. It will make things smoother for attorneys, pro pers and will make cross-training in the courts much simpler.

(Exhibit p. 1.) Similarly, Mr. Lomax says that on the whole, the report is "well reasoned" and he supports "most of its recommendations." (*Id.* at 2.) Feedback from Judicial Council groups also has been generally favorable.

SPECIFIC COMMENTS

Mr. Jones, Mr. Lomax, and Judicial Council groups have offered a number of suggestions about specific reforms:

Pleading Personal Injury and Wrongful Death Damages (Code Civ. Proc. §§ 425.10, 425.11)

Mr. Lomax has commented on the policy aspects of this reform, while a Judicial Council group has raised a technical concern.

Comments of Mr. Lomax

Mr. Lomax has "ambivalent feelings about the recommendation to conform the pleading requirements for personal injury complaints in limited cases to those in unlimited cases." (Exhibit p. 2 (footnote omitted).) On the one hand, he thinks "this recommendation will fill one gap in the existing statutory scheme." (*Id.* at 2.) He explains:

> It is not uncommon for a complaint for personal injury praying for damages "according to proof" to be filed in a limited case, in violation of section 425.10. Presumably, the attorneys filing these complaints are familiar with the pleading requirements for unlimited cases but are unaware of the different requirements for limited cases.
>
> A complaint failing to state the amount of damages filed in a limited case would be subject to a demurrer or a motion to strike if the defendant appeared in the action, but what are the consequences if the defendant defaults? None, and that is the gap in the existing law. If a complaint failing to state the amount of damages is filed in a limited case, the plaintiff cannot be compelled to serve a statement of damages on the defendant before default is taken, as is required by section 425.11(c), since section 425.11 does not apply to a limited case. This state of affairs could result in a defaulting defendant being subject to a judgment in a case in which he or she has not received notice of his or her maximum potential liability. This recommendation would remedy that situation.

(*Id.*)

On the other hand, Mr. Lomax queries whether "legislation hastily adopted in the heat of the medical malpractice insurance crisis of a quarter century ago, and at the behest of a single, powerful special interest group, should be extended to apply to a broader class of cases for the sake of uniformity of practice and procedure." (*Id.*) He wonders whether the Commission is correct in concluding that it is unlikely that the special pleading rules for personal injury or wrongful death could be changed. "Do we know, beyond just a gut feeling, that [this is true]?" (*Id.*)

The Commission discussed this point in developing its tentative recommendation. Although it is difficult to predict how a proposal will fare in the Legislature, the sense of the Commission (based on its considerable collective experience) was that it would be unproductive to attempt to eliminate the special pleading rules for personal injury or wrongful death. Unless the Commission is

aware of new information on this point, **we would stick with the current approach.**

Technical Issue

The Joint Legislative Subcommittee of the Court Executives Advisory Committee and the Presiding Judges Advisory Committee (hereafter, "the Joint Legislative Subcommittee") recommended approval of the concept of extending the special pleading rules for personal injury and wrongful death to limited civil cases. In reaching this conclusion, however, the subcommittee noticed that a conforming revision should be made in Government Code Section 72055, which provides in part that the amount of the demand in a limited civil case "shall be stated on the first page of the paper immediately below the caption." This requirement would conflict with proposed Code of Civil Procedure Section 425.10(b), which states that in an action for personal injury or wrongful death "the amount demanded shall not be stated but the caption shall comply with Section 422.30."

This conflict could be eliminated by amending Government Code Section 72055 along the following lines:

> **Gov't Code § 72055 (amended). First filing fee in limited civil cases**
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> SEC. ____. Section 72055 of the Government Code is amended to read:
>
> 72055. (a) The total fee for filing of the first paper in a limited civil case, shall be ninety dollars ($90), except that in cases where the amount demanded, excluding attorney's fees and costs, is ten thousand dollars ($10,000) or less, the fee shall be eighty-three dollars ($83). ~~The~~ Except as provided in Code of Civil Procedure Section 425.10, the amount of the demand shall be stated on the first page of the paper immediately below the caption.
>
> (b) This section applies to the initial complaint, petition, or application, and any papers transmitted from another court on the transfer of a civil action or proceeding, but does not include documents filed pursuant to Section 491.150, 704.750, or 708.160 of the Code of Civil Procedure.
>
> (c) The term "total fee" as used in this section and Section 72056 includes any amount allocated to the Judges' Retirement Fund pursuant to Section 72056.1, any automation fee imposed pursuant to Section 68090.7, any construction fee imposed pursuant to Section 76238, and the law library fee established pursuant to Article 2 (commencing with Section 6320) of Chapter 5 of Division 3 of the Business and Professions Code. The term "total fee" as used

in Section 72056 includes any dispute resolution fee imposed pursuant to Section 470.3 of the Business and Professions Code. The term "total fee" as used in this section also includes any dispute resolution fee imposed pursuant to Section 470.3 of the Business and Professions Code, but the board of supervisors of each county may exclude any portion of this dispute resolution fee from the term "total fee."

(d) The fee shall be waived in any action for damages against a defendant, based upon the defendant's commission of a felony offense, upon presentation to the clerk of the court of a certified copy of the abstract of judgment of conviction of the defendant of the felony giving rise to the claim for damages. If the plaintiff would have been entitled to recover those fees from the defendant had they been paid, the court may assess the amount of the waived fees against the defendant and order the defendant to pay that sum to the county.

Comment. Section 72055 is amended to reflect the special rules for pleading damages in personal injury and wrongful death cases (Code Civ. Proc. §§ 425.10, 425.11). Technical changes are also made for conformity with preferred drafting style.

The proposed amendment of Section 425.10 should also be revised to read:

Code Civ. Proc. § 425.10 (amended). Contents of complaint

SEC. ____. Section 425.10 of the Code of Civil Procedure is amended to read:

425.10. (a) A complaint or cross-complaint shall contain both of the following:

~~(a)~~ (1) A statement of the facts constituting the cause of action, in ordinary and concise language.

~~(b)~~ (2) A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages ~~be~~ is demanded, the amount ~~thereof~~ demanded shall be ~~stated, unless the~~ stated.

(b) Notwithstanding subdivision (a), if an action is brought ~~in the superior court~~ to recover actual or punitive damages for personal injury or wrongful death, ~~in which case~~ the amount ~~thereof~~ demanded shall not be stated, ~~except in a limited civil case~~ but the caption shall comply with Section 422.30. If the demand, excluding attorney's fees and costs, is ten thousand dollars ($10,000) or less, the caption shall also state that fact.

Comment. Section 425.10 is amended to conform the pleading requirements in limited and unlimited civil cases. In an action for personal injury or wrongful death, the amount demanded should not be stated in the complaint, but if the case is a limited civil case

> the caption of the complaint must identify it as such as required by Section 422.30.
>
> If the amount demanded in an action for personal injury or wrongful death is $10,000 or less, the caption must also disclose as much, because the filing fee pursuant to Government Code Section 72055 depends on whether the demand exceeds $10,000.
>
> Technical changes are also made for conformity with preferred drafting style.

Undertaking to Obtain Writ of Attachment or Protective Order (Code Civ. Proc. § 489.220)

The tentative recommendation proposes that the distinction between attachment undertakings in limited and unlimited civil cases should be eliminated, and the amount of the initial undertaking increased to $10,000. The Joint Legislative Subcommittee recommended approval of this reform. The Commission has not received any other new input specifically directed to this proposal. **No revision appears necessary.**

Waiver of Jury (Code Civ. Proc. § 631)

Several issues have been raised regarding the proposed revision of Code of Civil Procedure Section 631, which pertains to waiver of a jury trial.

Memorandum to Set

Section 631(b) currently provides certain protections in "a superior court action, other than a limited civil case, if a jury is demanded by either party *in the memorandum to set the cause for trial* and the party, prior to trial, by announcement or by operation of law, waives a trial by jury …." (Emphasis added.) The tentative recommendation would delete this reference to the memorandum to set the cause for trial. The proposed Comment states in part:

> The reference is obsolete because an at-issue memorandum is no longer required in most cases. See R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

Mr. Jones reports that he "has no objection to this change, but would like [the Commission] to know that the assumption underlying the change may be inaccurate." (Exhibit p. 1.) "In Orange County, at-issue memorandums are still widely used." (*Id.*) Mr. Jones suggests polling other courts "to determine the extent to which this form is still in use." (*Id.*)

Such a poll might be useful, but a simpler approach may also work. Regardless of whether courts still use at-issue memorandums, there is no need to refer to them in Section 631. The purpose of the provision is to provide statutory protections where one party has relied on another party's jury demand. It is not necessary to specify how the demand was made. Thus, it is appropriate to delete the statutory reference to at-issue memorandums even if such memorandums are still in use in some courts. **The Comment should be revised, however, to be less precise regarding the extent to which at-issue memorandums are still used:**

> The reference is unnecessary and may also be obsolete because in many cases an at-issue memorandum is no longer required ~~in most cases~~. See R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

Notice of Waiver

The proposed amendment of Section 631(b) provides:

> (b) If a jury is demanded by a party and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then *that party shall promptly notify all other parties of the waiver, in writing or in open court.* Each party adverse to the party who waived the trial by jury has five days following receipt of the notice of the waiver to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due. *If the party who waived a trial by jury does not promptly notify all other parties of the waiver, any other party, or the clerk or judge, may provide notice of the waiver, but is not required to do so.* Where a party receives more than one notice of the waiver, the five-day period to file and serve a demand for a trial by jury and to deposit advance jury fees commences on receipt of the first notice.

(Emphasis added.)

Mr. Jones supports the concept of allowing the court to provide notice of the waiver if the party who waives a jury fails to do so. (Exhibit p. 1.) He explains that proposed Section 631(b)

> … places the burden of notice on the party who has waived the jury trial, whether they have done so "by announcement or by operation of law." I have no objection to this, but as a practical matter, it is unlikely that most people will follow through on this. 99% of the jury waivers I have seen were due to the person's failure to deposit fees. Therefore, I applaud you for leaving the courts the flexibility to generate waiver notices.

(*Id.*) **In light of his support, no revision of this aspect of the proposal appears necessary.**

Trigger for Five-Day Period

Mr. Jones also points out that Section 631(b) gives adverse parties "five days following *receipt* of the notice of the waiver to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due." (Emphasis added.) He considers it "problematic to base the timing of this on receipt rather than service." (*Id.*) He urges the Commission to "consider that since all methods of delivery are subject to delay or failure, and since it is difficult and sometimes impossible to verify the reception date of a document, it would be better to see this section conform to the rest of the code, where response time runs from the date of service." (*Id.*)

This is a good point. **Perhaps the time period should run from the date of giving notice:**

> (b) If a jury is demanded by a party and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then that party shall promptly notify all other parties of the waiver, in writing or in open court. Each party adverse to the party who waived the trial by jury has five days ~~following receipt of the notice of the waiver~~ after notice of the waiver is given to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due. If the party who waived a trial by jury does not promptly notify all other parties of the waiver, any other party, or the clerk or judge, may provide notice of the waiver, but is not required to do so. Where ~~a party receives~~ more than one notice of the waiver is given to a party, the five-day period to file and serve a demand for a trial by jury and to deposit advance jury fees commences on ~~receipt~~ giving of the first notice.
>
> ….
>
> **Comment.** Subdivision (b) of Section 631 is amended to apply to both limited and unlimited civil cases. This codifies existing law. See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 & Comment. For unlimited civil cases, see Section 88. For waiver of a jury in a criminal case, see Cal. Const. art. I, § 16.
>
> Subdivision (b) is also amended to delete the reference to the memorandum to set the cause for trial. The reference is obsolete because an at-issue memorandum is no longer required in most cases. See R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

As amended, subdivision (b) also clarifies that the party who waives a jury after demanding one is responsible for providing notice of the waiver. If that party fails to provide notice of the waiver as required, another party (or the clerk or judge) is permitted but not required to provide the notice instead. Failure to provide timely notice may be grounds for a continuance or other remedial action. See Leslie v. Roe, 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157 (1975).

Finally, the amendment provides that the time period for demanding a jury trial and depositing jury fees runs from the date of giving notice rather than from the date of receiving notice. This is intended to facilitate proof of whether a jury demand is timely. For extension of the five-day period where notice is given by mail or Express Mail, see Section 1013.

2000 Legislation

Section 631(a)(5) was recently amended by Assembly Bill 2866 (Migden). This amendment is unrelated to the Commission's proposed reforms of Section 631(b), **but it should be reflected in the Commission's proposal.**

In-Depth Study of Jury Waivers

The Joint Legislative Subcommittee recommended approval of the concept of extending the protections of Section 631(b) to limited civil cases. The subcommittee also recommended, however, that the procedures governing jury waivers be studied in-depth before proceeding with a legislative proposal.

It may be appropriate to undertake such an in-depth review, particularly if appears that the Judicial Council is unlikely to support any reform until such a review is conducted. This may mean, however, that a reform of Section 631 will not be ready for introduction in 2001. If the Commission prefers to proceed with a proposal now, the following amendment would incorporate the various revisions recommended above:

Code Civ. Proc. § 631 (amended). Waiver of trial by jury

SEC. ____. Section 631 of the Code of Civil Procedure is amended to read:

631. (a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:

(1) By failing to appear at the trial.

(2) By written consent filed with the clerk or judge.

(3) By oral consent, in open court, entered in the minutes or docket.

(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or

within five days after notice of setting if it is set without notice or stipulation.

(5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). An advance jury fee deposited pursuant to this paragraph may not exceed a total of one hundred fifty dollars ($150).

(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if allowed by law) of the jury accrued up to that time.

(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any.

(b) ~~In a superior court action, other than a limited civil case, if~~ If a jury is demanded by ~~either party in the memorandum to set the cause for trial~~ a party and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then ~~all adverse parties shall have five days following receipt of the notice of the waiver~~ that party shall promptly notify all other parties of the waiver, in writing or in open court. Each party adverse to the party who waived the trial by jury has five days after notice of the waiver is given to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due. If the party who waived a trial by jury does not promptly notify all other parties of the waiver, any other party, or the clerk or judge, may provide notice of the waiver, but is not required to do so. Where more than one notice of the waiver is given to a party, the five-day period to file and serve a demand for a trial by jury and to deposit advance jury fees commences on giving of the first notice.

(c) When the party who has demanded trial by jury either (1) waives the trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or (2) fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party by either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit the fees, was made, or by failing promptly to deposit the fees described in paragraph (6) of subdivision (a).

(d) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.

Comment. Subdivision (b) of Section 631 is amended to apply to both limited and unlimited civil cases. This codifies existing law. See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 &

Comment. For unlimited civil cases, see Section 88. For waiver of a jury in a criminal case, see Cal. Const. art. I, § 16.

Subdivision (b) is also amended to delete the reference to the memorandum to set the cause for trial. The reference is unnecessary and may also be obsolete because in many cases an at-issue memorandum is no longer required. See R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, *Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

As amended, subdivision (b) also clarifies that the party who waives a jury after demanding one is responsible for providing notice of the waiver. If that party fails to provide notice of the waiver as required, another party (or the clerk or judge) is permitted but not required to provide the notice instead. Failure to provide timely notice may be grounds for a continuance or other remedial action. See Leslie v. Roe, 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157 (1975).

Finally, the amendment provides that the time period for demanding a jury trial and depositing jury fees runs from the date of giving notice rather than from the date of receiving notice. This is intended to facilitate proof of whether a jury demand is timely. For extension of the five-day period where notice is given by mail or Express Mail, see Section 1013.

Satisfaction of Judgment (Code Civ. Proc. § 685.030)

The tentative recommendation proposes that the clerk of court should be permitted to record a satisfaction of judgment where there is an interest deficit of $10 or less in an unlimited civil case, not just in a limited civil case. The Joint Legislative Subcommittee recommended approval of this reform. The Commission has not received any other new input specifically directed to this proposal. **No revision appears necessary.**

Undertaking of Creditor in Case of Third Party Claim (Code Civ. Proc. §§ 720.160. 720.260)

The tentative recommendation proposes that the differentiation between limited and unlimited civil cases as to the amount of a creditor's undertaking where there is a third party claim should be eliminated. The Joint Legislative Subcommittee recommended approval of this reform. The Commission has not received any other new input specifically directed to this proposal. **No revision appears necessary.**

Confession of Judgment (Code Civ. Proc. § 1134)

The tentative recommendation proposes that the same filing fee should be required for all confessions of judgment, regardless of the size of the claim. Mr. Lomax supports this recommendation, but suggests that the idea be incorporated in a comprehensive proposal on filing fees rather than pursued as a separate reform:

> Whether the filing fee for a confession of judgment in an unlimited civil case remains more than the filing fee for a confession of judgment in a limited civil case is not, I think, very important; but I do think a decision on this issue should be deferred pending the Judicial Council study and report (under Gov. Code § 70219) on court fees. While I support the recommendation to equalize the confession of judgment filing fees for limited and unlimited cases, this recommendation is an example of the piecemeal approach employed in the past that has led us to the inconsistent, disjointed scheme of court fees we face today.

(Exhibit p. 2.)

We have discussed this suggestion with AOC staff, who have been seeking internal input on how to handle this matter. They have been told that the Civil and Small Claims Advisory Committee may be forming a working group on fee issues. **We expect to have further information on this matter at the Commission's meeting.**

Implied Court Authority in Limited and Unlimited Civil Cases

The tentative recommendation would add the following provision to the Code of Civil Procedure:

> **Code Civ. Proc. § 89 (added). Implied court authority in limited and unlimited civil cases**
>
> SEC. ____. Section 89 is added to the Code of Civil Procedure, to read:
>
> 89. (a) The existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same court authority does or does not exist in an unlimited civil case.
>
> (b) The existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same court authority does or does not exist in a limited civil case.
>
> **Comment.** Section 89 is added to provide guidance in interpreting statutory provisions that expressly authorize particular conduct in a limited civil case but are silent as to an unlimited civil

case, or vice versa. See, e.g., Section 402.5 (transfer of limited civil case).

The Joint Legislative Subcommittee recommended approval of this reform. The Commission has not received any other new input specifically directed to this proposal. **No revision appears necessary.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

COMMENTS OF JOHN JONES

Comments on Tentative Recommendation July 2000, #J-1320: Elimination of unnecessary procedural differences between limited and unlimited civil cases.

I think all these proposals are very sound and heartily endorse the idea of integrating the practices of the limited and unlimited courts. It will make things smoother for attorneys, pro pers and will make cross-training in the courts much simpler. I've noticed that you are including CCP 631 for possible amendment. I have some comments to make about that particular section, not only as to the changes you might propose, but as to other parts of the section that lack clarity.

§631(b) strikes through the language pertaining to memos to set based upon the assumption that the usage of these forms has been rendered obsolete by delay reduction. (Cf. Page 9, Line 17.) I have no objection to this change, but would like you to know that the assumption underlying the change may be inaccurate. In Orange County, at-issue memorandums are still widely used. It may be useful to poll the other courts to determine the extent to which this form is still in use.

This paragraph also places the burden of notice on the party who has waived the jury trial, whether they have done so "by announcement or by operation of law." I have no objection to this, but as a practical matter, it is unlikely that most people will follow through on this. 99% of the jury waivers I have seen were due to the person's failure to deposit fees. Therefore, I applaud you for leaving the courts the flexibility to generate waiver notices.

However, the language of the statute gives people 5 days from the receipt of the notice to step forward and keep the jury trial going. I've always thought it problematic to base the timing of this on receipt rather than service. If it is within the scope of your work to address this concern, please consider that since all methods of delivery are subject to delay or failure, and since it is difficult and sometimes impossible to verify the reception date of a document, it would be better to see this section conform to the rest of the code, where response time runs from the date of service.

"All statements contained herein are the statements of the individual user and do not constitute or express the official opinion of the County of Orange Superior Court. In addition any statement contained herein, should not be taken as official legal advice or rulings."

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July 21, 2000

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

ELIMINATION OF UNNECESSARY PROCEDURAL DIFFERENCES BETWEEN LIMITED AND UNLIMITED CIVIL CASES

I offer the following comments on the draft staff report.

On the whole, I think the report is well reasoned and I support most of its recommendations. I do have comments on two of the recommendations, however.

Confession of Judgment (Code Civ. Proc., §1134)

Whether the filing fee for a confession of judgment in an unlimited civil case remains more than the filing fee for a confession of judgment in a limited civil case is not, I think, very important; but I do think a decision on this issue should be deferred pending the Judicial Council study and report (under Gov. Code, §70219) on court fees. While I support the recommendation to equalize the confession of judgment filing fees for limited and unlimited cases, this recommendation is an example of the piecemeal approach employed in the past that has led us to the inconsistent, disjointed scheme of court fees we face today.

Pleading Personal Injury and Wrongful Death Damages (Code Civ. Proc., §§425.10, 425.11)

I have ambivalent feelings about the recommendation to conform the pleading requirements for personal injury* complaints in limited cases to those in unlimited cases.

*While Code of Civil Procedure sections 425.10 and 425.11 apply to actions for both personal injury and wrongful death, with respect to limited civil cases, for all practical purposes, this discussion is limited to personal injury actions, since wrongful death actions are unlikely to be filed as limited civil cases.

If nothing else, I think this recommendation will fill one gap in the existing statutory scheme. It is not uncommon for a complaint for personal injury praying for damages "according to proof" to be filed in a limited case, in violation of section 425.10. Presumably, the attorneys filing these complaints are familiar with the pleading requirements for unlimited cases but are unaware of the different requirements for limited cases.

A complaint failing to state the amount of damages filed in a limited case would be subject to a demurrer or a motion to strike if the defendant appeared in the action, but what are the consequences if the defendant defaults? None, and that is the gap in the existing law. If a complaint failing to state the amount of damages is filed in a limited case, the plaintiff cannot be compelled to serve a statement of damages on the defendant before default is taken, as is required by section 425.11(c), since section 425.11 does not apply to a limited case. This state of affairs could result in a defaulting defendant being subject to a judgment in a case in which he or she has not received notice of his or her maximum potential liability. This recommendation would remedy that situation.

On the other hand, all of this begs the question of whether legislation hastily adopted in the heat of the medical malpractice insurance crisis of a quarter century ago, and at the behest of a single, powerful special interest group, should be extended to apply to a broader class of cases for the sake of uniformity of practice and procedure. Do we know, beyond just a gut feeling, that "it is unlikely that the rule [prohibiting stating the amount of damages in the complaint] could be eliminated"? (Draft rep., p. 19.)

Thank you for the opportunity to present my views.

Very truly yours,

MARK LOMAX