SELECT COMMITTEE ON TRIAL COURT DELAY

REPORT 2

Duties of Presiding Judges

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Sanctions for Failure to Appear at Trial or at Pretrial, Trial Setting, and Settlement Conferences

October, 1971

Select Committee on Trial Court Delay
Suite 7212 State Building
San Francisco, California 94102

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When civil justice is unduly delayed, people lose faith that the courts can resolve their disputes and they sense a widening gap between what they consider social justice and what they see going on in the courts.

*A tragic casualty of undue delay is the ideal of equal justice under law. When civil and criminal cases pile up to the extent that they now have in the United States, the judicial machinery becomes so overburdened that it cannot produce equal justice for all. Instead, it begins to yield unequal injustice for all.**

*Karlen, Judicial Administration, The American Experience, p. 78 (1970).

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THE WORK OF THE SELECT COMMITTEE ON TRIAL COURT DELAY

The Committee was appointed by Chief Justice Donald R. Wright on March 26, 1971 to investigate the causes of trial court delay in California, and between now and May 1, 1972, it will recommend solutions to the people of California and the public officials concerned with our system of justice. For these purposes the Committee has formed the following Subcommittees:

Civil	Judge William M. Gallagher (Chairman) Bennett W. Priest George R. McClenahan
Penal	Judge Charles H. Older (Chairman) Loren A. Beckley Wayne H. Bornhoft
Court Administration	Judge Homer B. Thompson (Chairman) John H. Finger George M. Murchison

The Committee is assisted in its deliberations by the following officials designated by their respective governmental bodies to participate in the Committee's deliberations: Senator Robert Lagomarsino; Assemblyman Jack Fenton; and Mr. Herbert Ellingwood, Legal Affairs Secretary to the Governor of California.

The Committee also is assisted by a fulltime professional staff: Larry L. Sipes, Director and Counsel to the Court Adminstration Subcommittee; Patrick J. Clark, Counsel to the Penal Subcommittee; and Charles G. McBurney, Counsel to the Civil Subcommittee. In addition, expert consultants are retained for any needed assistance.

The Committee's initial report was published in July, 1971 and recommended that court administrators be employed by the larger Superior Courts in California. To implement this recommendation the Committee endorsed Senate Bill 801, providing for administrators in all Superior Courts with seven or more judges, which now has been passed by both houses of the Legislature and signed into law by the Governor.

This second report contains interim proposals which the Committee recommends to alleviate some immediate delay problems. The Committee was assisted in the preparation of these proposals by staff-prepared background materials as well as by the experience and expertise of the Committee members and advisors. In addition, no proposal was submitted for consideration by the full Committee until it had been evaluated by the appropriate Subcommittee and recommended for full Committee approval. Although confronted with a one year deadline, the Committee in this manner intends to assure that each improvement it recommends is preceded by thorough and informed deliberations.

The Committee acknowledges with appreciation that its operations are funded by the Law Enforcement Assistance Administration through a grant by the California Council on Criminal Justice, supplemented to the extent of 10% by State funds.

RECOMMENDATIONS

DUTIES OF PRESIDING JUDGES

The duties of presiding judges set forth in the Judicial Council's recommended standards of judicial administration should, with minor modifications, be adopted by the Judicial Council as a rule of court.

PROCEDURES TO INDUCE MORE SETTLEMENTS OF CIVIL LITIGATION

I

A new section should be added to the Code of Civil Procedure providing that in all civil actions in the Superior Court in which money damages are sought, the parties shall enter into good faith pretrial settlement negotiations accompanied by written demands and offers filed with the clerk of the court, and that after trial, these demands and offers shall be presented to the court, which may in its discretion after a hearing award to any party, or apportion between the parties, all costs, attorneys' fees, expert witnesses' fees, or any of these, which were incurred after the demands and offers were filed, as well as interest on the amount of the judgment.

II

A new rule of court should be adopted requiring settlement conferences in all civil actions, except short causes, in Superior Courts consisting of more than two judges, to be held not more than four weeks and not less than three days prior to trial, with all attorneys, all parties, and a representative with authority to settle from all insurance companies required to attend, and with each party required to file all experts' reports, list all special damages, and make settlement offers or demands.

LIMITATION OF ORAL ARGUMENT IN SELECTED CIVIL MATTERS

A new rule of court should be adopted requiring that the following matters be submitted on written material filed, without appearances by counsel or parties, unless the court requests

oral argument or unless a written request for oral argument is made by a party and granted in the discretion of the court for good cause shown: all law and motion matters and all orders to show cause, including demurrers, discovery motions, orders to show cause regarding preliminary injunctions and receivers, and preliminary motions and orders to show cause in domestic relations proceedings.

LIMITATION OF DISQUALIFICATION OF JUDGES FOR PREJUDICE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6

Code of Civil Procedure Section 170.6 should be amended to permit, in civil and criminal cases involving multiple parties, only one motion to disqualify to be made by each group of parties, such as all coplaintiffs, and then only if all of the parties in that group join in the motion.

SANCTIONS FOR FAILURE TO APPEAR AT TRIAL OR AT PRETRIAL, TRIAL SETTING, AND SETTLEMENT CONFERENCES

Code of Civil Procedure Section 581 and Rule of Court 217 should be amended to give the court discretion, on its own motion or on the motion of a party, (1) to dismiss the case of a plaintiff, or strike the answer of a defendant, who without good cause fails to appear for trial, or who appears and refuses to proceed or is unable to proceed, and (2) to impose other specified sanctions on a party who without good cause fails to prepare for, appear at, of participate in the pretrial conference, trial setting conference, settlement conference, or trial.

COMMENTS

DUTIES OF PRESIDING JUDGES

Each Superior and Municipal Court must have a Presiding Judge.* He is chosen, customarily for one year, by rotation or election. Certain statutes direct the Presiding Judge to perform general duties such as distributing the business of the court among the judges, prescribing the order of business of the court, or assigning judges to their respective departments.** His remaining duties are specified in statewide rules promulgated by the Judicial Council, with supplementation by local court rules.

The Committee is studying whether trial court delay can be reduced by improving the tenure, methods of selection, qualifications, and duties of Presiding Judges. The Committee's conclusions will be reported in conjunction with its recommendations concerning the broader subjects of court organization and administration. However, the Committee, as an interim step to strengthen the powers and duties of the Presiding Judge, proposes that:

> **The duties of Presiding Judges set forth in the Judicial Council's recommended standards of judicial administration should, with minor modifications, be adopted by the Judicial Council as a Rule of Court.**

The recommended rule is identical to Section 2 of the Recommended Standards of Judicial Administration with these exceptions:

(a) Substitution of the word "shall" for "should" in the initial line makes the provisions mandatory thereby assuring compliance with the provisions by local courts;

(b) Statewide uniformity of court hours and a full working day are promoted by the addition to subdivision

*Gov. Code, § § 69508 & 72271.

**Gov. Code, § § 69508 & 72272.

(a) of the requirement that regular court sessions convene not later than 9:30 a.m. for commencement of trials and continue until at least 4:30 p.m. with a recess from 12:00 noon to 1:30 p.m., except when the judge is engaged in other judicial assignments ordered by the Presiding Judges; and

(c) Subdivision (g) is modified by the addition of the requirement that when a judge disqualifies himself from a judicial assignment his reasons must be stated in writing and concurred in by the master calendar judge or Presiding Judge thus encouraging effective calendar control and discouraging unwarranted rejections of proper assignments.

The provisions of the proposed rule provide as follows and are not intended to supersede other existing rules except to the extent that the Judicial Council may find they conflict*:

DUTIES OF PRESIDING JUDGE

In superior and municipal courts the presiding judge shall:

(a) have prepared with the assistance of appropriate committees of the court such local rules as are required to expedite and facilitate the business of the court, including the establishment of times for convening regular sessions of the court not later than 9:30 a.m. for commencement of trials which shall continue to 12:00 noon, reconvene at 1:30 p.m. and continue at least until 4:30 p.m. except for other judicial assignments ordered by the presiding judge; submit such proposed rules for consideration of the judges of the court and upon approval have the proposed rules published and submitted to the local bar for consideration and recommendations; and thereafter have the court officially adopt the rules and file a copy with the Judicial Council as required by Section 68071 of the Government Code;

*See Cal. Rules of Court 227, 245 (a) (3) & (5), 246 (b), 247, 515, 533 (a) (3) – (5).

(b) designate one of the judges as acting presiding judge to act in his absence or inability to act, in courts that do not have an elected assistant presiding judge or an administrative judge;

(c) designate the judge to preside in each department including a master calendar judge when that is appropriate, and designate an assistant presiding judge for each district, or branch court, in courts having more than one district or branch;

(d) assign to a master calendar judge any of the duties that may more appropriately be performed by that department;

(e) apportion the business of the court among the several departments of the court as equally as possible;

(f) reassign cases assigned to any department to any other department as convenience or necessity requires;

(g) require that the judge to whose department a case is assigned for trial shall accept such assignment unless he is disqualified therein or unless he deems that in the interest of justice the case should not be tried before him for other good cause, stated in writing to and concurred in by the master calendar judge or the presiding judge;

(h) require that when a judge has finished or continued the trial of a case or any special matter assigned to him, he shall immediately notify the master calendar judge or the presiding judge of that fact;

(i) prepare an orderly plan of vacations and attendance at schools, conferences and workshops for judges and submit it to the judges for consideration. (Twenty-one court days a year is a proper vacation period and attendance at a California school, conference or workshop for judges shall not be deemed vacation time if such attendance is in accord with such plan and has the prior approval of the presiding judge.);

(j) call such meetings of the judges as may be needed;

(k) appoint such standing and special committees of judges as may be advisable to assist in the proper performance of the duties and functions of the court;

(l) supervise the administrative business of the court and have general direction and supervision of the attaches of the court;

(m) prepare and submit to the judges for consideration personnel rules and regulations for non-civil-service court employees to insure that such employees will be recruited, selected, promoted, disciplined, removed or retired on the basis of merit;

(n) provide for proper liaison between the court and other governmental and civic agencies;

(o) require any judge who intends to be absent from his court one-half day or more to notify the presiding judge of such intended absence reasonably well in advance thereof; and

(p) when appropriate, meet with or designate a judge or judges to meet with any committee of the bench, bar and news media to review problems and to promote understanding of the principles of fair trial and free press, under paragraph 9 of the "Joint Declaration Regarding News Coverage of Criminal Proceedings in California," as approved for submission on January 16, 1970, and adopted by the State Bar of California and the California Freedom of Information Committee.

PROCEDURES TO INDUCE MORE SETTLEMENTS OF CIVIL LITIGATION

In every civil case disposed of by trial rather than by pretrial settlement, there is an expenditure of judicial time and taxpayer money which is wasted if the case could have been fairly and justly settled short of trial. The Committee believes that this kind of waste is substantial, since a significant number of civil cases apparently go to trial when they could have been fairly settled had the appropriate conditions existed.

In view of overcrowded court calendars and in order to use our limited judicial resources efficiently, it seems imperative that the Legislature and the courts foster what the Committee believes are appropriate conditions for pretrial settlements in civil litigation: good faith negotiations between informed parties advised by experienced attorneys and, if necessary, by an experienced judge, all against a background of clearly defined and significant monetary sanctions for unreasonable failure to settle. The Committee therefore recommends (1) a statute

requiring pretrial settlement negotiations, offers, and demands in Superior Court civil actions and providing appropriate and substantial monetary sanctions for unreasonable failure to settle those actions, and (2) a rule of court requiring comprehensive in-court settlement conferences in civil actions in multi-judge Superior Courts. The Committee is satisfied that these two recommendations, taken together, will achieve a much greater number of pretrial settlements with a substantial savings in court time and a material reduction in court congestion. The following sections describe in detail these recommendations and the Committee's reasons for so recommending.

I

A new section should be added to the Code of Civil Procedure providing that in all civil actions in the Superior Court in which money damages are sought, the parties shall enter into good faith pretrial settlement negotiations accompanied by written demands and offers filed with the clerk of the court, and that after trial, these demands and offers shall be presented to the court, which may in its discretion after a hearing award to any party, or apportion between the parties, all costs, attorneys' fees, expert witnesses' fees, or any of these, which were incurred after the demands and offers were filed, as well as interest on the amount of the judgment.

There are at present some statutory incentives to settlement negotiations and pretrial settlements. Code of Civil Procedure Sections 1031, 1032, and succeeding subsections presently provide that a prevailing party in a civil case shall recover certain costs of litigation as a matter of right. Code of Civil Procedure Sections 997 and 998 presently provide that any party may make a written pretrial settlement offer and that, if the offer is not accepted and the party to whom the offer is made fails to obtain a more favorable judgment, the court may order the latter party to pay the offeror's costs and expert witnesses' fees.

California case law also encourages settlement to a limited extent. The recent case of *County of Los Angeles* v. *Ortiz** held that expert witnesses' fees may be recoverable costs in eminent

*17 Cal. App. 3d 164 (hearing granted by Supreme Court, June 21, 1971).

domain actions, even in the absence of any statutory authority. Whether the Supreme Court agrees with this decision remains to be seen, but the decision clearly illustrates a trend toward awarding fees if a party is compelled to litigate by another party's unreasonable refusal to settle.

The Committee believes that the law should explicitly require good faith pretrial settlement negotiations backed up by more substantil monetary incentives designed to encourage fair settlement of civil litigation. The Committee recommends the enactment of a new Section 1032.7 of the Code of Civil Procedure:

> Section 1032.7 (a) The parties to a civil action (including civil actions pending at the time of enactment of this section) in the superior court in which a party seeks money damages shall negotiate in good faith for a settlement prior to trial, and each party shall make at least one offer to settle to each opposing party.
>
> (b) Each party, before the commencement of trial or before the conclusion of any settlement conference, whichever occurs first, shall execute, serve, and file in an appropriately marked sealed envelope a written statement listing his lowest demand or highest offer made to each opposing party, and the lowest demand or highest offer made to him by each opposing party. These envelopes may not be opened, and the contents of these statements may not be disclosed, until the court has ruled on all motions for a new trial, or until the time for making that motion has expired.
>
> (c) Within 5 days after the court has ruled on all motions for a new trial or after the time for making that motion has expired, the trial court may on its own motion, and shall on the motion of a party, order a hearing to determine whether to grant awards authorized by subdivision (e). The hearing shall be within 10 days of that order, and the court's decision shall be within 5 days of the hearing.
>
> (d) At this hearing the court shall receive evidence of attorneys' fees, expert witnesses' fees, costs, expenses, settlement negotiations, and other facts relevant to the propriety of an award. In making its decision the court shall consider the demands and offers contained in the written statements filed, the amount of the judgment, all proceedings in the action, and the evidence introduced at trial and at the hearing.
>
> (e) The court may after the hearing award to a prevailing or nonprevailing party, or apportion between the parties, all or part of the costs, attorneys' fees, and expert witnesses' fees, or any portion thereof, which were incurred after the date of filing the written statement required in subdivision (b) above, and interest on the amount of the judgment from any date subsequent to the filing of the complaint.
>
> (f) The clerk shall, within two days after a determination of these awards, insert the amount in the judgment and conform the copies.

The scope of this new Section 1032.7 includes all civil actions in Superior Court in which a party seeks money damages, such as cases involving personal injuries, debt collection, breach of contract, eminent domain, and the like. It would not include domestic relations proceedings, injunction proceedings, or other actions where money damages are not sought.

The mechanism of the proposed statute is simple. It requires good faith settlement negotiations and one or more successive demands or offers from each party in a civil case. If settlement nonetheless proves impossible, the lowest demand or highest offer of each party is recorded in writing and presented to the trial court after trial. The court examines the highest offers and lowest demands of the parties, along with other facts and evidence described in the statute, and determines if the parties have in fact conducted good faith settlement negotiations and made reasonable attempts to settle. If the court determines that one or more parties were unreasonable in these matters, the court may in its discretion award to any party, or apportion between the parties, certain costs and fees, as well as interest on the judgment, or any portion thereof.

The Committee believes that this statute will encourage bonafide attempts at settlement on the part of all parties to an action. Attorneys' fees and experts' fees, for example, often loom large in the considerations litigants give to settlement, and the possibility of an award of these fees against a party who

refuses a reasonable settlement offer should be a major incentive to serious and good faith settlement negotiations. The Committee is confident that the proposed legislation will result in more settlements and in earlier settlements, all with a substantial savings in court trial time.

As an example of the statute in operation, consider a case in which settlement negotiations are fruitless, plaintiff's lowest demand is $50,000, defendant's highest offer is $5,000, and a trial produces a verdict for the plaintiff in the amount of $45,000. After the trial, the trial judge examines the demand, the offer, the judgment rendered, the evidence heard at the trial, the proceedings in general, the costs and fees incurred by the parties, and the settlement negotiations undertaken. If the court finds, based on its examination of these items, that the defendant was unreasonable or acting in bad faith in making an offer of no more than $5,000, the court may then order the defendant to pay the plaintiff's costs, attorneys' fees, and expert witnesses' fees which were incurred after a specified date, or any portion thereof, along with interest on the amount of the judgment from any date after the complaint was filed.

The concept of recovery of attorneys' fees, experts' fees, and costs is not new in our judicial system. The statutes mentioned above (C.C.P. §§997, 998, 1031, and 1032) call for awards of experts' fees and costs, and there are other existing provisions in the Code of Civil Procedure for recovery of attorneys' fees in various types of actions.* It is also common for contracts to provide for an award of attorneys' fees and costs in any action instituted to enforce the contract.

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*Failure to provide discovery: C.C.P. §2034 (b), (c), and (d);
Default judgments on contracts providing for fees: C.C.P. §585 (1);
Interpleader: C.C.P. §§386 and 386.6;
Trust deed foreclosure or trustee's sale: C.C.P. §§580 (c) and 726;
Libel or slander actions (limited to $100): C.C.P. §836;
Partition suits: C.C.P. §796;
Small wage claims: C.C.P. §1031; and
Injunction against water diversion: C.C.P. §532.

The Judicial Reform Committee of the Los Angeles Superior Court in February of 1971 recommended enactment of a statute of the kind here proposed, although with its application extended only to motor vehicle cases. The Committee feels that all civil cases in which money damages are sought contribute to court congestion and are as susceptible to settlement as motor vehicle cases, and the Committee includes all these cases in the proposed statute.

This statute would supersede Code of Civil Procedure Sections 997, 998, and 1032 in all cases in which it is applicable, and those sections should be amended to reflect this fact.

II

A new Rule of Court should be adopted requiring settlement conferences in all civil actions, except short causes, in Superior Courts consisting of more than two judges, to be held not more than four weeks and not less than three days prior to trial, with all attorneys, all parties, and a representative with authority to settle from all insurance companies required to attend, and with each party required to file all experts' reports, list all special damages, and make settlement offers or demands.

California Rule of Court 207.5 provides for a "settlement conference" in any Superior Court civil case in which a conference is requested by any party to the case. The settlement conference contemplated in the present rule consists of an informal meeting of all attorneys in the case before a judge who attempts to achieve a settlement of the case at that time. A properly conducted settlement conference very often results in a settlement, and the Committee has concluded that the settlement conference can be an even more useful and successful procedure for encouraging settlement if its scope and content are enlarged and it is required in all civil cases except short causes.

A settlement conference gives the court itself a definite opportunity to encourage settlement and to lend its expertise and persuasion to settlement negotiations. The judge often provides the exact catalyst necessary to accomplish an acceptable settlement. The attorneys and the parties, in formulating their settlement postures, usually give great weight to a judge's reaction to the case as it is presented by the pleadings and by the persons at the settlement conference. It is the rare case that

does not warrant the most serious effort at settlement, and the extra judicial time required for settlement conferences should be far outweighed by the significant number of cases in which trial is avoided by settlement. The court should be afforded this opportunity to lend its expertise and encouragement to settlement in every civil case, with the exception of short causes, which can be disposed of more efficiently without a settlement conference.

The timing of settlement conferences is very important. The conference is not designed to settle cases immediately after filing, nor to settle cases before discovery has been completed. It is designed to provide a forum in which it can be determined upon complete information and final analysis whether the case can be settled or whether it must be tried. Its purpose is not to start negotiations, but to complete them. The Committee therefore recommends holding the settlement conference not more than four weeks and not less than three days prior to the trial date, since only at this time will each party have prepared his case to a point where accurate analysis and evaluation is possible, without the additional expenditure of time and money necessary for final trial preparations.

Attendance of all attorneys, all parties, and representatives with authority to settle from all insurance companies involved is necessary to provide an opportunity for a free and frank exchange of information and opinions among all interested persons, from the judge to the parties. The parties should be required to lay most of their cards on the table – file all experts' reports, list all special damages, and make settlement offers or demands. Only in this way can informed and good faith negotiations take place, with the judge fully able to make his expertise and influence felt.

Mandatory settlement conferences should be confined to courts in which there are more than two judges. In courts with only one or two judges, serious problems of fairness and prejudice might arise if the judge who participated in and encouraged settlement negotiations were also required to conduct the trial of the case if it were not settled. This can be avoided in a multi-judge court, and the smaller courts wishing to have mandatory conferences could also provide for them by local rule and arrange for inter-county exchange of judges to handle the conferences.

The Committee has prepared a recommended series of rules compatible with the format of the present Rules and intended to replace present Rule 207.5. This series of rules, numbered 207.3 through 207.7, incorporates the recommendations and ideas set forth above and is self-explanatory in its other details:

Rule 207.3 – Cases in which a settlement conference shall be held

In each county with a Superior Court consisting of more than two judges, a settlement conference shall be held in every civil case other than short causes set for trial under Rule 207.1. In all other counties, settlement conferences and settlement calendars shall be governed by Rule 207.5, except that in these counties settlement conferences may be required in all cases by local rule. The settlement procedures provided in these rules are not intended to be exclusive, and local settlement procedures are expressly authorized if they do not conflict with these rules or the procedures herein established.

Rule 207.4 – Setting for settlement conference

Every settlement conference shall be set for a date not more than four weeks and not less than three days prior to the date set for trial. In all cases in which a settlement conference is to be held pursuant to Rule 207.3, the settlement conference date shall be set in the same manner and at the same time as the trial date is set according to these rules, and notice of the settlement conference date shall be given in the same manner and at the same time as notice of the trial date is given.

Rule 207.5 – Settlement calendar in Superior Courts with two or fewer judges

If the local rules do not require settlement conferences in all cases other than short causes, the Superior Court in each county where there are no more than two judges shall establish and maintain a settlement calendar pursuant to this Rule. When a civil case has been on the civil active list for 30 days, or at such other time as may be provided by local rule, the clerk shall send all parties to the case an invitation to attend a settlement

conference. The case shall then be placed on the settlement calendar if one or more of the parties not later than 20 days prior to the date set for pretrial or trial setting conference, or if no pretrial or trial setting conference is required, not later than 20 days prior to the date set for trial advises the clerk in writing that he accepts the invitation. The clerk shall notify all other parties of the acceptance. The court may in any event, and upon the joint request of all parties shall, order a particular case to be placed on this settlement calendar at any time.

This rule shall not operate to delay the setting of cases for pretrial or trial setting conference, or for trial.

Rule 207.6 – Duties of attorneys and parties in respect to settlement conferences

(a) Each party in a case shall attend the settlement conference, unless excused by the court prior to the conference for good cause shown. The attorney for each party shall attend the conference. If a party is represented by a firm of attorneys or by more than one attorney, an attorney responsible for the case shall attend the conference. If a party in a case is insured, a representative from the insurance company with authority to settle the case shall attend the conference.

(b) At the settlement conference, each party shall file with the court and supply each other party with a copy of the following: a list of all special damages claimed together with all supporting documents or information, a statement of all general damages claimed, and the most current reports of all experts consulted. If possible, these lists, statements, and reports shall be exchanged among the parties and filed with the court at least five days prior to the settlement conference.

(c) Each person attending the settlement conference shall have a thorough knowledge of the case and shall be prepared to discuss it, make settlement offers and demands, and participate in good faith settlement negotiations.

(d) Each party at the settlement conference shall execute, serve, and file the written statement required by Code of Civil Procedure Section 1032.7, if this statement has not already been executed, served, and filed.

Rule 207.7 – Conduct of settlement conferences

Settlement conferences shall be held informally before a judge in the courtroom or in chambers. The judge shall conduct a review of the case, along with a discussion of the items filed by the parties pursuant to Rule 207.6 (b). The judge shall entertain settlement offers and demands and shall actively participate in settlement negotiations.

The settlement conference may be continued from time to time by the judge, except that the conference may not be continued past three days before the trial date. If the case is not settled at the conference, no reference shall thereafter be made to any settlement discussions made at the conference, except in subsequent settlement proceedings and in subsequent proceedings pursuant to Code of Civil Procedure Section 1032.7.

LIMITATION OF ORAL ARGUMENT IN SELECTED CIVIL MATTERS

The Committee has considered the advisability of eliminating or limiting oral argument in certain civil proceedings in order to conserve available court time. The Committee makes the following recommendation, based on the considerations set forth below the recommendation:

> **A new Rule of Court should be adopted requiring that the following matters be submitted on written material filed, without appearances by counsel or parties, unless the court requests oral argument or unless a written request for oral argument is made by a party and granted in the discretion of the court for good cause shown: All law and motion matters and all orders to show cause, including demurrers, discovery motions, orders to show cause regarding preliminary injunctions and receivers, and preliminary motions and orders to show cause in domestic relations proceedings.**

Experience indicates that most issues in law and motion, discovery, preliminary injunction, and receivership matters are decided by determining the applicable law and not by resolving factual disputes. Legal arguments are presented more efficiently

and expeditiously by written briefs rather than by oral arguments, which seem only rarely to affect these proceedings. Indeed, in Los Angeles the judges handling law and motion matters furnish written notes of their proposed decisions to the parties and then usually hear oral argument only by the party against whom a proposed ruling runs, with few proposed rulings changed by the oral argument. Experience also shows that in domestic relations matters orders made on properly completed questionnaires and affidavits rarely differ from orders made after hearings, which are generally routine but which occupy considerable time of judges and commissioners.

The Committee believes that oral argument in these matters should be limited to occasions in which the court deems it advantageous. This limitation should result in a significant decrease in court time required to process these pretrial proceedings, along with a resulting material increase in court time available for trials. In addition to the time saved in handling these matters without appearances, the proposed procedure would also encourage or compel attorneys to prepare better memoranda and briefs – a desirable improvement likely to save further judicial time. The procedure may also result in a general reduction of attorneys' fees in a case, since expensive in-court time is eliminated.

The Judicial Reform Committee of the Los Angeles Superior Court has made a similar recommendation that suggests implementation by legislation. The Committee urges that the recommendation could and should be implemented by the Judicial Council through the more flexible approach of adopting a new Rule of Court. Although the present format of the California Rules of Court would require three separate rules to effect the procedure recommended here (a rule for the Superior Court, an identical rule for the Municipal Court, and a third rule for domestic relations matters), along with minor amendments to existing rules, the Committee sets forth here a single rule defining the contemplated change:

Rule 203.7 – Limitation on oral argument

Law and motion matters and orders to show cause, including but not limited to demurrers, discovery motions, and orders to show cause regarding preliminary injunctions and receivers, as

well as all preliminary motions and orders to show cause in proceedings under the Family Law Act, shall be submitted and determined on written materials filed and served, without appearances by the parties or by their attorneys, unless within 10 days of filing and service the court requests oral argument or a written request for oral argument is made by a party and granted in the discretion of the court, for good cause shown.

It is explicit in the proposed rule that the court may require oral argument in a particular case. There are some complex cases in which the written briefs or other materials raise questions in the judge's mind which can best be discussed and answered in oral argument, and the court should retain the discretion to call for oral argument when deemed necessary or desirable. In addition, the rule provides that a party desiring oral argument may request it in writing giving written reasons why oral argument should be held. If the court determines from the written reasons submitted that the party has shown good cause for oral argument, the court may order it.

LIMITATION OF DISQUALIFICATION OF JUDGES FOR PREJUDICE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.6

Section 170.6 prohibits a judge or commissioner of any trial court from trying any civil or criminal matter involving contested issues of fact or law where any party or attorney files a motion supported only by a sworn statement that the judge or commissioner before whom the matter is pending is prejudiced against the (1) party, (2) the attorney, or (3) the interests of either of them. The party or the attorney must believe it is impossible to obtain a fair and impartial trial or hearing before the challenged judge or commissioner but it is not necessary to specify any grounds to support the allegation of prejudice. If such a motion is presented the judge or commissioner automatically is removed from the proceedings which are then assigned to another judge or commissioner.

It must be noted that the provisions of Section 170.6 supplement Section 170, subdivision 5, which provides for

disqualification of a judge or commissioner for prejudice after a party has proven the fact of prejudice by competent evidence in an adversary proceeding before another judge. Section 170.6 therefore is gratuitous in that it permits a party or counsel to disqualify one judge or commissioner merely by asserting under oath, without further proof, that the judge or commissioner is prejudiced.

In an apparent effort to avoid abuse, Section 170.6, subdivision (3) limits the number of motions as follows:

> "...Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding."

The California Supreme Court has interpreted this quoted portion as permitting each coplaintiff or codefendant to make separate motions so long as their interests are adverse.* The court reasoned that one motion for "each side" is permitted, and, where the coplaintiffs or codefendants have substantially adverse interests there are more than two sides in the case.

The Committee has concluded that this is an undesirably broad view because Section 170.6 motions have been and may be used for delay and "judge shopping" in actions involving multiple parties. The Committee therefore recommends that:

> **Code of Civil Procedure Section 170.6 should be amended to permit, in civil and criminal cases involving multiple parties, only one motion to disqualify to be made by each group of parties, such as all coplaintiffs, or their attorneys, and then only if all the parties in the group, or their attorneys, join in the motion.**

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*Pappa v. Superior Court, 54 C.2d 350, 353 P.2d 311 (1960); Johnson v. Superior Court, 50 C.2d 693, 329 P.2d 5 (1958).

To implement this recommendation the Committee proposes that the last sentence in Section 170.6 (3) be amended to provide as follows:

> ...Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in any one action or special proceeding involving multiple parties a motion may be made only if all the coplaintiffs, codefendants, similar parties, or counsel for the parties in one of these groups, join in making the motion.

This proposal recognizes that class actions and criminal cases involving numerous defendants are recent developments which are placing great strains upon the resources of our judicial system. This strain becomes excessive if, for example, 35 codefendants arrested in a riot each makes a Section 170.6 motion, asserting that his interests are adverse to those of the other defendants. The resulting delay would be intolerable and substantial judicial time would be wasted. These parties might also use Section 170.6 to try to find a judge whom they regard as favorable to their position. These abuses would be corrected by the recommended amendment.

In reaching the decision to recommend limiting the number of Section 170.6 motions in multi-party actions the Committee recognized that the statute confers a privilege rather than a right. The recommended restriction of this privilege impressed the Committee as reasonable when balanced against the present needs of our judicial system.

SANCTIONS FOR FAILURE TO APPEAR AT TRIAL OR AT PRETRIAL, TRIAL SETTING, OR SETTLEMENT CONFERENCES

The Committee has perceived that courts too often cannot avail themselves of procedures useful in controlling their own business because in many cases these procedures must be initiated by litigants or their attorneys. In many areas, the court must wait for the motion of a party before it can take action which, though it may benefit a party, is intimately related to a just and speedy disposition of the court's overall business. For example, as discussed above, a formal settlement conference cannot presently be convened by a court unless requested by a party.

In order to place more management tools in the hands of the court, the Committee makes the following recommendation based on the observations set forth below:

> **Code of Civil Procedure Section 581 and Rule of Court 217 should be amended to give the court discretion, on its own motion or on the motion of a party, (1) to dismiss the case of a plaintiff, or strike the answer of a defendant, who without good cause fails to appear for trial, or who appears and refuses to proceed or is unable to proceed, and (2) to impose other specified sanctions on a party who without good cause fails to prepare for, appear at, or participate in the pretrial conference, trial setting conference, settlement conference, or trial.**

When an attorney wishes to postpone a trial for reasons which are inadequate or improper to persuade the court to order a continuance of the trial, he will often send a completely unprepared associate, or even his own client, to appear at the very time set for trial to assert that the attorney is unable to proceed to trial, thereby coercing the continuance which would not have been granted had it been requested in the orderly course of the court's business. There are also other circumstances in which one or more parties fail to appear for trial without good cause. Under present law, unless the opposing attorney requests a dismissal, the court has no alternative but to continue these cases, place them off the trial calendar, or order them to trial with one party unprepared to proceed. Opposing

attorneys seldom request dismissal, since they often find themselves in the same situation hoping for similar treatment. They often have agreed beforehand not be request a dismissal. In fact it is a too frequent occurrence for neither attorney to appear for trial, confident that in such circumstances the court will have no alternative but to continue the case or place it off the trial calendar. The court has scheduled a judge, court personnel, and a courtroom for the case, and it if cannot find another matter to fill the gap, these people and facilities will sit idle and the regular disposition of the court's affairs will be interrupted.

The Committee has concluded that to afford the court better control over its own trial calendar, to make the court's policy regarding continuances more effective, and to discourage the disruptive and wasteful tactics described above, the court should be armed with the power to dismiss a case on its own motion for failure to appear at trial and be prepared to proceed, without relying on a party in the case to so move. The Committee also believes that just as the court should be able to dismiss an absent plaintiff's case, so should the court be able to strike an absent defendant's answer. If a defendant fails to appear for trial, the court must postpone the trial or order the case tried with the defendant absent, with a verdict for the plaintiff virtually a foregone conclusion. This latter procedure takes court time, however, and the same result would be achieved by striking the defendant's answer and entering his default. The Committee therefore recommends an appropriate amendment incorporating these changes be made to Code of Civil Procedure Section 581 (3), which governs dismissal for failure to appear at trial.

For the same reasons that the court should be allowed to impose sanctions on its own motion for failure to appear at trial, so should the court be able to impose sanctions on its own motion for failure to appear at certain pretrial proceedings. Furthermore, the Committee believes that the court should be able to impose sanctions other than dismissal for failure to appear at trial. The Committee therefore recommends that the Judicial Council adopt a Rule of Court giving the court discretion on its own motion or on the motion of a party, to impose specified sanctions for failure to appear at, prepare for, or participate in pretrial conferences, trial setting conferences, settlement conferences, or trial. The Committee recommends

that present Rule of Court 217, which now provides limited sanctions regarding pretrial conferences only, be replaced by the following Rule 217:

Rule 217. Sanctions in respect to pretrial proceedings

Any failure of a person to prepare for, appear at, or participate in a scheduled pretrial conference, trial setting conference, settlement conference, or trial, unless good cause is shown for the failure, is an unlawful interference with the proceedings of the court. The court may, on its own motion or on the motion of any party, impose these sanctions for the interference: contempt citations; fines; and awards of costs, actual expenses, attorneys' fees, or any thereof arising from the interference.

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