Study J-1320 January 30, 2001

Memorandum 2001-4

Civil Procedure: Technical Corrections (Comments on Tentative Recommendation)

The tentative recommendation on *Civil Procedure: Technical Corrections* was circulated for comment. The Commission received the following input:

Before the tentative recommendation was circulated but after it was approved, the Commission also received a letter from Mark Lomax commenting on an earlier version of the proposal. (Exhibit pp. 5-6.) These materials and a few other points are discussed below.

The comments on the proposed reforms are generally favorable. The main issue for the Commission is **whether to finalize a recommendation now (consisting of some or all of the proposed reforms) and seek to introduce legislation this session,** as opposed to investigating additional issues and circulating another tentative recommendation before finalizing a proposal. If the Commission decides to finalize a recommendation now, it could still elect to study the new issues as a separate project (or several separate projects).

RECAP OF THE TENTATIVE RECOMMENDATION

The tentative recommendation proposes technical revisions to clarify the jurisdictional classification of:

(1) A proceeding to release a mechanic's lien.
(2) A proceeding to discharge the trustee and distribute the proceeds of a sale under a deed of trust.
(3) A petition for relief from claim-filing requirements of the Tort Claims Act.

The proposal would also revise a number of statutes to reflect that trial courts no longer maintain a record called a "docket" in civil cases.

Mr. Jones "especially appreciate[s]" the proposed revision of Code of Civil Procedure Section 86(a)(6) to clarify the jurisdictional classification of a proceeding to release a mechanic's lien where the amount of the lien is $25,000 or less. (Exhibit p. 1.) He explains that this "was an area of confusion for some individuals within the former municipal court." (*Id.*) This is consistent with what we heard previously from Mark Lomax, who originally suggested this reform. (Memorandum 2000-72, Exhibit pp. 1-2.)

Although Mr. Jones and Mr. Lomax report that the proposed clarification would be helpful, a further revision of Code of Civil Procedure Section 86 is in order. **Now that the trial courts in Kings County have decided to unify, the references to municipal court should be deleted from the statute:**

> 86. (a) The following civil cases and proceedings are limited civil cases:
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> ….
>
> (6) Actions to enforce and foreclose, or petitions to release, liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under the provisions of Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code, or to enforce and foreclose an assessment lien on a common interest development as defined in Section 1351 of the Civil Code, where the amount of the liens is twenty-five thousand dollars ($25,000) or less. However, where an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or where the total amount of the liens sought to be foreclosed against the same property aggregates an amount in excess of twenty-five thousand dollars ($25,000), the action is not a limited civil case~~, and if the action is pending in a municipal court, upon motion of any interested party, the municipal court shall order the action or actions pending therein transferred to the proper superior court. Upon making the order, the same proceedings shall be taken as are provided by Section 399 with respect to the change of place of trial~~.
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> ….
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> **Comment.** Subdivision (a)(6) of Section 86 is amended to clarify the jurisdictional classification of a petition to release a mechanic's lien. This is declaratory of existing law. See Code Civ. Proc. § 85 (limited civil cases) & Comment. See also Code Civ. Proc. §§ 85.1 (original jurisdiction), 88 (unlimited civil case).
>
> Subdivision (a)(6) is also amended to reflect elimination of the municipal courts as a result of unification with the superior courts

pursuant to Article VI, Section 5(e), of the California Constitution. For reclassification of an action in a unified superior court, see Sections 403.010-403.090.

In addition, **this proposed amendment of section 86 needs to be coordinated with the proposed amendment of the same statute in the Commission's recommendation on *Authority to Appoint Receivers*.** See Memorandum 2001-14. If the proposals were combined in a single bill, merging the two amendments would be straightforward, because they affect different parts of the statute. If the proposals were introduced separately, double-jointing the bills would also be a simple matter, for the same reason.

Finally, Mr. Jones comments that although Section 86 lists limited civil cases, "[n]owhere does it include appeals arising from parking tickets, toll road tickets, or municipal code violations." (Exhibit p. 3.) "However, in some courts in Orange County these matters are heard in the limited civil division of the court." *Id.* "Furthermore, some appellants do raise legality issues in the conduct of their appeals." *Id.* **The staff is not familiar with these situations, but believes that they warrant further investigation**. In light of the reported confusion regarding the jurisdictional classification of a petition to release a mechanic's lien, however, **we would proceed with the above amendment of Section 86 now,** rather than delaying that reform.

PROCEEDING TO DISCHARGE TRUSTEE AND DISTRIBUTE PROCEEDS

As suggested by Mr. Lomax, the tentative recommendation would revise Civil Code Section 2924j to clarify the jurisdictional classification of a proceeding to discharge the trustee and distribute the proceeds of a sale under a deed of trust. Mr. Jones does not comment on the proposed clarification, but does make extensive, detailed suggestions for further reform of the statute. (Exhibit pp. 1-2.) **The staff is delighted to have this input, and inclined to give this area further study.**

Because Mr. Lomax reported that "there appears to be little confusion regarding the jurisdictional classification of a proceeding under section 2924j" (Memorandum 2000-72, Exhibit p. 2), the proposed clarification in the tentative recommendation does not appear urgent. Moreover, now that the trial courts in Kings County are scheduled to unify, the statute needs to be amended to delete the references to municipal courts. As noted in the tentative recommendation, the

provision also warrants other technical clean-up (e.g., insertion of subdivisions), which we previously delayed pending the disposition of the municipal courts. Thus, instead of proceeding with the proposed amendment now, **it seems preferable to study Section 2924j more thoroughly and develop a more complete proposal before introducing legislation.**

PETITION FOR RELIEF FROM CLAIM-FILING REQUIREMENTS

Where a person has a potential cause of action against a public entity, and the Tort Claims Act applies, the person must present the claim to the public entity before filing suit. Gov't Code § 954.4. This must be done within a specified time period. Gov't Code § 911.2. If the potential claimant misses the deadline, in some circumstances it is appropriate to apply to the public entity for leave to present a late claim. Gov't Code § 911.4.

If the public entity rejects this application, Government Code Section 946.6 permits the potential claimant to file a petition in court for relief from the requirement that the claim be presented to the public entity before filing suit. The statute provides that the proper court for filing the petition is "a court which would be a competent court for the trial of an action on the cause of action to which the claim relates and which is located in a county or judicial district which would be a proper place for the trial of the action." The statute does not state whether such a proceeding is a limited civil case, which may cause confusion.

The tentative recommendation proposed to address this by adding a sentence to Section 946.6 stating: "Where an action on the cause of action to which the claim relates would be a limited civil case, a proceeding pursuant to this section is a limited civil case." In preparing this proposed amendment in bill format, a representative of the Legislative Counsel's office commented that the meaning of the amendment is clear but the language is awkward. She did not suggest any alternative language.

The staff agrees that the proposed language is cumbersome, but such phraseology is already used in the statute. See Gov't Code § 946.6(a), (f). More importantly, clarity is of paramount importance in statutory drafting. The staff has not been able to think of a more elegant way to draft the sentence while still maintaining clarity. **Unless someone can suggest a better alternative, we would leave the proposed language on jurisdictional classification as is.**

Now that the trial courts in Kings County have agreed to unify, however, **a further revision is in order, to reflect the elimination of judicial districts:**

> 946.6. (a) Where an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. The proper court for filing the petition is ~~a court which would be a competent~~ the superior court that would be the proper court for the trial of an action on the cause of action to which the claim relates ~~and which is located in a county or judicial district which would be a proper place for the trial of the action, and if~~ . If the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court. Where an action on the cause of action to which the claim relates would be a limited civil case, a proceeding pursuant to this section is a limited civil case.
>
> ….
>
> **Comment.** Section 946.6 is amended to reflect elimination of the municipal courts as a result of unification with the superior courts pursuant to Article VI, Section 5(e), of the California Constitution, and the consequent elimination of associated judicial districts. See Section 38 (judicial districts).
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> Section 946.6 is also amended to clarify the jurisdictional classification of a proceeding for relief from the requirements of Section 945.4 following rejection of an application for leave to present a late claim. This is declaratory of existing law. See Code Civ. Proc. § 85 (limited civil cases) & Comment. See also Code Civ. Proc. §§ 85.1 (original jurisdiction), 88 (unlimited civil case).

OBSOLETE REFERENCES TO DOCKET

The term "docket" is obsolete where it refers to a record currently prepared by a trial court. A superior court prepares a "register of actions" (or authorized alternative form of record) in each case, not a "docket." Gov't Code §§ 69845, 69845.5. The tentative recommendation would revise a number of provisions to reflect this situation.

Mr. Jones "support[s] your cleaning up these passages to delete obsolete references to dockets." (Exhibit p. 1.) Nonetheless, a number of points require discussion.

Insertion of References to Register of Actions

In the initial draft of this proposal, we inserted a reference to the "register of actions" in ten of the provisions that now refer to a "docket." On reviewing this draft, Mr. Lomax pointed out that this is unnecessary and inappropriate in five of those provisions (Code Civ. Proc. §§ 396a, 398, 472b, 631, 638). (Exhibit p. 5.) He explained that these statutes pertain to events that necessarily occur in open court, so the events are properly memorialized in the minutes, not the register of actions. (*Id.*) Because the provisions already refer to the minutes, it is only necessary to delete the obsolete references to the docket, without substituting a reference to the register of actions. (*Id.*)

Mr. Lomax's comments arrived after the Commission approved the tentative recommendation, but before it was prepared for circulation. Because his point seemed well-taken, the staff revised the proposal as suggested before circulating the tentative recommendation. As to each of the five provisions, however, the tentative recommendation solicited input on whether to insert a reference to the register of actions.

The Commission has received no comments suggesting that a reference to the register of actions is needed in any of the provisions. **Thus, we would not make any revisions along these lines.**

Statement of Jurisdictional Facts

Code of Civil Procedure Section 396a sets forth a special pleading rule, applicable only to certain types of limited civil cases. In a limited civil case covered by the rule, the plaintiff must state in the complaint (or in an affidavit filed with the complaint) verified facts showing that the action has been commenced in the proper court. This requirement is intended to discourage intentional filing of these types of lawsuits in inappropriate venues.

The tentative recommendation would revise Section 396a to delete an obsolete reference to the docket and insert subdivisions. Mr. Jones points out that it would also be appropriate to study the manner in which this provision applies now that judicial districts have been eliminated due to the elimination of the municipal courts. (Exhibit pp. 2-3.) The Commission and the Judicial Council have already begun studying this matter. (Memorandum 2000-55, Attachment pp. 22-30; Memorandum 2000-72, pp. 4.) We are not ready to introduce legislation on this point, however, and may not be ready to do so for some time.

(Minutes (Oct. 5-6, 2000), p. 8.) Thus, the Commission needs to decide whether to go forward with the minor reforms proposed in the tentative recommendation, or delay them until the more substantive analysis is completed. **The staff leans towards the latter approach.** The proposed reforms are not urgent, and if we proceed with them now we may encounter opposition based on our failure to address the more substantive issues relating to the provision.

Use of Parentheses

In several provisions, the tentative recommendation proposes to replace a reference to "docket entries" with a reference to the "register of actions (or a comparable court record of another jurisdiction)." See the proposed amendments of Vehicle Code Sections 16370, 16373, and 16379. A representative of the Legislative Counsel's office has suggested that we use commas in these amendments, rather than parentheses, because that is standard drafting style.

The staff would prefer to leave the amendments as is, but we do not feel strongly about this. Parentheses are sometimes used in statutes. See, e.g., Code Civ. Proc. § 697.730, 700.140(a), 700.179. We believe that they would enhance clarity in these proposed amendments.

References to the "Proper Court in the County"

One of the provisions with an obsolete docket reference is Code of Civil Procedure Section 398. That provision refers repeatedly to the "proper court in the county." Due to trial court unification, these references are obsolete, because the superior court is now the only trial court in each county. Section 398 also refers to "a court having jurisdiction of the subject matter of the action which the parties may agree upon." Again, this reference appears to be obsolete due to trial court unification.

We could attempt to revise the proposed amendment to address these points. But this would be one of the more complicated amendments stemming from the elimination of the municipal courts. Instead of undertaking such work in the context of this study, **it seems preferable to omit Section 398 from the current proposal and prepare a more comprehensive amendment in the context of the Commission's study of general municipal court statutes** (See Memorandum 2001-11).

References to Municipal Court Provisions in the Comments

The Comments to the proposed docket-related amendments require revision to reflect the elimination of the municipal courts. For example, the Comment to Section 472 should be revised as follows:

> **Comment.** Section 472b is amended to delete the reference to a "docket," because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal. Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a "docket"), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the "docket" and other records of the court). Now actions taken in open court are recorded in the minutes of a ~~municipal or~~ superior court. Gov't Code ~~§§~~ § 69844 (minutes of superior court)~~, 71280.2 (minutes of municipal court)~~; see also Copley Press v. Superior Court, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See ~~Code Civ. Proc. §§ 1052 (clerk of municipal court may keep a register of civil actions), 1052.1 (alternative methods of keeping register of actions in municipal court)~~; Gov't Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Because the minutes are the proper record for reflecting a waiver in open court, and Section 472b already refers to the minutes, the reference to the "docket" may be deleted without substituting a reference to the register of actions. ~~For preparation of a "docket" in criminal actions and proceedings in municipal court, see Penal Code § 1428~~.

Similar revisions should also be made in the other docket-related Comments.

Waiver of Jury Trial

One of the provisions with an obsolete docket reference is Code of Civil Procedure Section 631. Several reforms of this provision have been proposed in the Commission's joint study with the Judicial Council, and a Judicial Council group has suggested that a joint working group be assembled to study the provision further. See Memorandum 2001-3, pp. 3-5. As with the proposed amendment of Code of Civil Procedure Section 396a, if we proceed with the amendment proposed in the tentative recommendation, we may encounter opposition based on our failure to address more substantive issues relating to the

provision. **We therefore suggest that this proposed revision not be incorporated into legislation until we are ready to proceed with a more substantive reform of the statute.**

OTHER ISSUES

Mr. Jones has suggested technical amendments of four provisions that are not included in the tentative recommendation. (Exhibit p. 4.) The tentative recommendation also mentions the possibility of amending twenty-one provisions to delete language authorizing the judge to substitute for the clerk if there is no clerk. **The staff is inclined to study these points, but proceed with the reforms in the tentative recommendation as outlined above.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

COMMENTS OF JOHN JONES

Date: Thursday, January 11, 2001

To the California Law Revision Commission:
Regarding #J-1320, Tentative Recommendation re: "Civil Procedure: Technical Corrections"

Dear Sirs and Madams,

I support your cleaning up these passages to delete obsolete references to dockets. I especially appreciate your clarification of CCP 86(a)(6) to clarify the placing of petitions to release mechanics liens clearly within the jurisdiction of the limited courts when the amount is $25,000 or less. (This was an area of confusion for some individuals within the former municipal court.)

While looking through the recommendation I came upon Civil Code 2924j. This is a section I've had some experience with, and I've come to the conclusion that this statute has some unique problems. If it is within the scope of your work to consider the following comments, I submit them for your review:

Civil Code §2924j creates the potential for confusion in the notice requirements outlined in sub-section(d), which states that before a trustee can deposit surplus funds with the clerk of the court they must notify anyone with a recorded interest in the property of their intent to do so. It also says that the notice must provide the address of the court as well as "a phone number for obtaining further information." The statute fails to indicate exactly whose number this should be, but since it is placed alongside the requirement for providing the court's address, it can be interpreted to mean the number of the courthouse. Since the notice is required to be mailed prior to the deposit of funds, it is very likely that it will not contain a case number.

Thus you have a statute that allows a notice to be sent to interested parties which contains no case number, but refers people to the clerk's office. If someone were to call the courthouse under these circumstances, they would find the clerk's office unable to help them, for (a) there would be no case number to refer to and (b) the clerks are prohibited from giving legal advice. To make matters worse, a notice generated under these circumstances starts a 30 day clock

running, even though the recipient may be unaware of what case number their claim should be filed in, making compliance with the statutory deadline difficult. (The language of 2924j(d) gives contradictory impressions as to the deadline: in the first paragraph, it is 30 days from the notice; in the second paragraph it is 15 days before the hearing date.)

The Judicial Council has been directed by the legislature to "adopt a form to accomplish the filing authorized by this section." They have proposed a form for the trustee but none for the claimants. This seems like an oversight; it would be beneficial to have a simple form available for those who want to make a claim on the surplus funds.

It would be desirable to see the following changes made in this law:

* Have the Judicial Council form that the trustees complete contain a space for a hearing.

* Have the Judicial Council prepare a form for claimants, to be served along with the form that is filled out by the trustee or their attorney.

* Have the notice required by 2924j(d) go out after a case has been filed and the funds have been tendered to the court. Change the language of the statue so that instead of a notice of intent to deposit, it becomes a notice that (a) a case has been filed (b) funds have been deposited and (c) a hearing has been set.

* Have the 30 day response time run from service of the notice of hearing, with the time extensions of CCP 1013 applying.

* Amend the statute to provide minimum and maximum setting times. (For example, no less than 40 days and no more than 90 days away from the filing date.)

If these changes were implemented, it would be beneficial to the trustees, the claimants, and the courts. A trustee who files their papers with the courts could know their case number and hearing date. Claimants would know their case number and hearing date, as well as have a simple form on which to present a claim. Court employees would be able to deal with the needs of claimants and trustees more effectively.

I also notice that you are proposing changes to CCP 396a, which deals with defining the proper court for filing a case. I would like to raise an issue here as well: Since most counties are now unified into Superior Courts there is, to the best of my knowledge, no statutory provision for venue. In Orange County, historical venue requirements are currently [as of December 29, 2000] sustained by administrative order.

The former municipal venue requirements served a useful purpose by preventing the plaintiff from fatiguing the defendant into default. The failure to develop a statutory program for preserving venue requirements, especially for unlawful detainer cases could have negative public policy consequences. A defendant of limited means, without Internet access, relying on public transportation may find the process of defending themselves overwhelming if their case is heard at the opposite end of a large county. Therefore, if it is within your purview to consider how the public benefit of former venue requirements might be maintained in the new unified courts, I urge you to do so.

I'd also like to make an observation for your consideration: CCP 86(a), which is part of your recommendation package defines the jurisdiction of the limited courts. Nowhere does it include appeals arising from parking tickets, toll road tickets, or municipal code violations. However, in some courts in Orange County these matters are heard in the limited civil division of the court. Furthermore, some appellants do raise legality issues in the conduct of their appeals.

"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."

John Jones
c/o Orange County Superior Court
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949 476 4762

ADDITIONAL COMMENTS OF JOHN JONES

Date: Friday, January 12, 2001
To: California Law Revision Commission
From: John Jones

Here are a few technical comments in the area of potential law revision:

1. See Code of Civil Procedure 12a. The second paragraph says "this section applies … to Sections … 946, and 974 though 982 …" These sections have been repealed.

2. CCP 472 says "any pleading may be amended … without costs" but the limited courts charge $45 for amended pleadings, pursuant to GC 72056.01(b).

3. CCP 904 says an appeal may be taken … as provided in sections 904.3, 904.4 …" but those sections have been repealed.

4. CCP 200 says that the L.A. municipal court should use the same juror pool as the superior court. This is obsolete now that L.A. is unified.

"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."

MARK LOMAX
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September 29, 2000

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94309-4739

Dear Mr. Sterling:

STAFF DRAFT TENTATIVE RECOMMENDATION
CIVIL PROCEDURE: TECHNICAL CORRECTIONS

I am writing to comment on the staff draft tentative recommendation to delete several obsolete references to a court record called a docket. Specifically, my comments are directed to the proposed amendments to Code of Civil Procedure sections 396a, 398, 472b, 631, and 638.

The draft tentative recommendation would amend these five sections by substituting "register of actions" for "docket," an obsolete reference to a record formerly maintained by justice courts. I think these five sections should be amended by deleting the word "docket" without substituting "register of actions" (or any other word or phrase) in its place. My reasoning is based on the fact that the relevant parts of the five sections are concerned with recording the acts of a party in open court—a consent (§§396a and 631), a designation (§398), a waiver (§472b), and an agreement (§638)—and courtroom proceedings are recorded in the minutes, not in the register of actions.*

Further, the proposed amendments to the five sections do not make sense if one considers the nature of a justice court docket. Before 1977, justice court clerks did not keep minutes or a register of actions in civil cases. Instead, they kept a docket, a record that was a composite, or hybrid, of minutes and a register of actions. That is why, for example, before 1977, a waiver of notice of ruling on a demurrer was required by section 472b to be en-

*While Government Code sections 69844 and 71280.1, which require superior and municipal court clerks to keep minutes, do not prescribe their contents, case law generally recognizes that they are a record of courtroom proceedings. (See, e.g., *Copley Press, Inc.* v. *Superior Court* (1992) 6 Cal.App.4th 106, 110.)

tered in the clerk's minutes, in a superior or municipal court, or in the justice court equivalent of minutes—the docket. After 1977, Government Code sections 71614 and 71614.5, requiring justice court clerks to keep a docket, were repealed, and Government Code section 71280.1, requiring municipal court clerks to keep minutes, was made applicable to justice court clerks. At that time—as, indeed, now—all trial court clerks were required to keep minutes, and a waiver of notice of ruling was (and is now) required to be entered in the minutes, not in the register of actions.

Very truly yours,

MARK LOMAX