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MEMORANDUM

To: People Interested in Access to Court Issues

From: Dick Rothschild

Date: December 2001

Re: Update XIX

Fee Waiver Issues Involving Judge Klein

The following fee waiver issues have concerned a single judge: Los Angeles County Superior Court Judge Brett C. Klein.

1. A court may not deny a tenant's application for a fee waiver without first holding a hearing, the Appellate Division of the Los Angeles Superior Court has held. *Simpson v. Superior Court*, 92 Cal.App.4th Supp. 1 (2001).

The Appellate Division held that under California Rule of Court 985(f) if a court has any doubt about the validity of a fee waiver application, the court should promptly notice a hearing. The court implicitly rejected the argument of the trial judge—Judge Klein--that it's up to the tenant to request a hearing.

The Appellate Division also held that the trial court's rejection of the application was substantively invalid. The tenant had written "SSI" in response to a question on her occupation, and "unemployed" for her spouse's occupation. The trial court denied the application because "usual occupation not stated", but the appellate court held that the tenant's response was satisfactory.

The appellate court noted two "events", both of them trial judge actions. First, when the Appellate Division announced it was considering granting a writ to the tenant, the trial judge ordered payment of the answer fees refunded. The appellate court concluded, nonetheless, that the case was not moot because of the important questions raised. Second, Judge Klein wrote his own response to the writ application, which the Appellate Division ordered stricken. If a trial court response were in order, the appellate court concluded, it should have been written by Court Counsel, not the trial judge.

2. An unlawful detainer defendant who properly fills out the Judicial Council form fee waiver application may not be required to provide further documentation, the Appellate Division of the Los Angeles Superior Court has held. *Gutierrez v. Limited Civil Jurisdiction Court*, No. BS 070733 (L.A.

Super. Ct. App. Div. 2001). The unpublished opinion relied on Government Code §68511.3(b)(1), which exempts eviction defendants from documentation requirements.

The Appellate Division also criticized the trial judge – Judge Klein – for denying a fee waiver without holding a hearing in violation of Rule 985(f), and for discounting the documentation that the tenant in fact gave, including social security number and a bus pass for the disabled with photo ID.

Christian Abasto of the Legal Aid Foundation of Los Angeles (LAFLA) represented the tenants in *Simpson* and *Gutierrez*.

3. A trial court may not deny a low income parent’s fee waiver application based on the possible earning capacity of a 19-year-old child living in the household, the Appellate Division has held. *Juarez v. Limited Civil Jurisdiction Court*, No. BS071329 (L.A. Super. Ct. App. Div. 2001).

The trial court rejected without hearing an application from a litigant whose monthly income was \$1,995, below the \$2,078 threshold for a family of five. Judge Klein rejected the application for the reason that there was “no showing that applicant’s adult son cannot earn \$83 per month.”

The Appellate Division granted a writ, ordering the trial court to refund an \$89 filing fee. The appellate court stated that it was unaware of any law requiring an applicant to show lack of earning capacity of each member of a household to qualify for a fee waiver. The Appellate Division also faulted the trial court for denying the application without hearing.

The applicant was represented by Sonia Sanchez and Alejandra Cedillo of the Los Angeles Center for Law and Justice.

4. In another case, Judge Klein, denying without hearing a fee waiver application from a tenant with very limited income from part-time employment, stated: “No showing that applicant is incapable of earning \$89 on his six days per week off.” The tenant was represented by Rose Eustachio of the HIV & AIDS Legal Services Alliance.

5. In other cases, according to Rod Field of the Los Angeles Housing Law Project and Jennifer Braun at Bet Tzedek Legal Services, Judge Klein refused to waive jury fees for indigent eviction defendants on the ground that a jury was not “needed” in their cases. Though Rule 985(j)(1) states that jury fees and expenses “may” be waived, waiver has been mandatory under the case law since *Martin v. Superior Court*, 176 Cal. 289 (1917). *Accord, Maldonado v. Superior Court*, 143 Cal.App.3d 185 (1983); *Emerson v. Superior Court*, 29 Cal.App.2d 539 (1938).

Jennifer filed a writ in one of the cases, but it was mooted out when the landlord dismissed the unlawful detainer complaint. In another case, Judge Klein at a hearing reportedly explained that the case looked so strong for the tenant that a jury wasn’t needed. He also suggested that Bet Tzedek was using a jury demand to coerce landlords and to provide a volunteer lawyer with jury experience. Judge Klein granted the jury fee waiver in that case, however.

6. Bret Terrell of the Inner City Law Center reports that Judge Klein denied fee waivers for food stamp and SSI recipients who failed to fill out the second page of the fee waiver application. The

application instructs people who qualify because they are public benefit recipients to sign the application without filling out the back of the form.

Judge Klein reportedly no longer is handling fee waiver applications. He is still deciding unlawful detainer cases, however.

Other Fee Waiver Issues

1. The Los Angeles Superior Court has withdrawn an amendment to a local rule that would have required pro per fee waiver applicants – and fee waiver applicants alone – to provide proof of identity. Numerous letter writers, including David Ettinger of Horvitz & Levy on behalf of the Harriett Buhai Center for Family Law, Gary McGaha from the Public Law Center in Santa Ana, and Christian Abasto and Jane Preece (separate letters) for LAFLA, wrote to protest the proposed amendment. The writers pointed out the proposed amendment's inconsistencies with California Rule of Court 985's prohibition against blanket imposition of additional documentation requirements. Some of the letters also noted particular problems the identification might cause undocumented immigrants and disabled people who might ask a friend to file their papers for them. In addition, the letters writers argued that the *existing* local rule (Rule 925) should be substantially revised because it illegally requires pay stubs, tax returns and other additional documentation in violation of Rule 985.

The Court responded that it was withdrawing the amendment and that a subcommittee was studying Rule 925. Advocates are looking for a prompt response on their demand for withdrawal of the existing offending provisions of the local rule.

2. At the prompting of John Gianola at Legal Services of Northern California's Yolo County office – an annual event – the Judicial Council has revised the Application for Waiver of Court Fees and Costs and an accompanying information sheet to reflect the 2001 poverty guidelines.

3. In two cases, Yolo County applicants were granted waivers of fees for most costs, but not for the court reporter fees payable to the court. In each case, Steve Goldberg in LSNC's Yolo office successfully moved for reconsideration.

4. Steve and John also report that although the Yolo court has a website with downloadable forms, the clerks don't accept them. In one case, a downloaded form was rejected because the clerk insisted that the old triplicate forms had to be used and be typewritten only.

5. Last Yolo report: a pro per unlawful detainer defendant went to court to file her answer and fee waiver forms with the clerk. Both were accepted, but no copies were returned to her. The client next received a Notice to Vacate. She received all her forms back from the clerk with a cover note stating that her answer was rejected because (a) the original was not filed (although the original was among the papers returned to her); and (b) the fee waiver application was not completely filled out on the backside (the client did not need to fill out all of the back side because her income was below the guidelines). LSNC brought the case to the attention of Court Counsel, and the court on its own motion set aside the default and reset for trial.

Steve and John met with the court executive officer on this and other matters discussed above, informing the officer of Rule 985's requirement that pleadings be filed immediately if a fee waiver application is pending.

6. An indigent seeking to enforce a judgment in his favor in Los Angeles Superior Court was forced to pay filing and marshal fees, reports Sylvia Skillicorn, a paralegal at the Inner City Law Center. The court apparently took the position that the client was no longer indigent because of his uncollected judgment.

7. A Commissioner in Compton was denying without hearing fee waiver applications by unlawful detainer defendants who reported no income, according to Anthony Filer, Community Legal Services, Norwalk. Anthony persuaded the Commissioner to grant fee waivers in two cases where there were initial denials, and the Commissioner no longer is ruling on waiver applications.

8. A Monterey County judge denied without hearing a fee waiver application for a defendant whose income was below the threshold amount for a family of six, reports Phyl Diri of CRLA's Salinas office. Phyl successfully sought reconsideration, and the waiver was granted.

9. The family law department in Los Angeles agreed to stop asking for information and documentation not specified in Judicial Council forms, reports Betty Nordwind, director of the Harriett Buhai Center for Family Law. Betty had written to the Presiding Judge of that court, noting that one of the court clerks single-handedly was responsible for rejecting perhaps hundreds of fee waiver applications herself in violation of Government Code §68511.3 and Rule 985.

Undertakings

An indigent out-of-state tort plaintiff may not be required to post a \$22,000 undertaking as a condition of proceeding with his suit, the Court of Appeal has held. *Baltayan v. Getemyan*, 90 Cal. App. 4th 1427 (2001).

Code of Civil Procedure §1030 requires an out-of-state plaintiff to file an undertaking to secure recoverable costs and attorneys' fees if the defendant shows a reasonable possibility of prevailing. In this case, even though the Court of Appeal concluded that the defendant was likely to prevail and the plaintiffs' initial showing of indigency was deficient, once the plaintiff obtained an order permitting him to proceed *in forma pauperis*, the undertaking requirement should have been waived. The court stated that to require the plaintiff "to do the impossible, i.e., post a \$22,000 undertaking, would be an unconscionable burden on his attempt to seek redress for his injuries and property damage."

Though the majority opinion was short on authority, Justice Earl Johnson more than filled in the gaps in a scholarly concurring opinion. Citing *Martin v. Superior Court*, 176 Cal. 289 (1917), he argued that California common law adopts all the English common law protections of poor litigants as they existed in 1850. Among those protections was not only the right to waiver of any cost bonds, but the right to counsel free of charge as well, Justice Johnson noted. He also stated that imposing undertaking requirements on indigent litigants from other states would violate those litigants' equal protection rights.

Published Notice Costs

An Orange County Superior Court judge refused to permit a developmentally disabled woman to post notice of service of dissolution papers, according to David Ostby of the Public Law Center in Santa Ana. As a result, the client was unable to serve the dissolution papers at all, and the time for service lapsed. The client plans to refile, according to David.

When personal service is impossible, Code of Civil Procedure §415.50 permits publication of notice. When a litigant cannot afford such notice (\$550 for countywide publication in Orange County), case law permits her to mail notice to the last known address and post notice at the courthouse. *Cohen v. Board of Supervisors*, 20 Cal.App.3d 236, 239 (1971).

No-Handwriting Rules

1. The Santa Barbara Superior Court is modifying its prohibition against handwritten documents, reports Ron Perry, director of the Legal Aid Foundation of Santa Barbara County. The court will now allow legible printing by hand on domestic violence pleadings and documents from prisoners. In addition, the court has set up a six-month pilot project allowing hand printing on Judicial Council and local forms, and text up to five lines long.

Interpreters

1. Non-English-speaking, indigent family law litigants in Long Beach are beginning to win the battle to secure court-appointed interpreters, thanks to determined advocacy by Julia Galindo and others in LAFLA's Long Beach office. Julia's client, a victim of domestic violence seeking divorce and custody, initially was granted a fee waiver for ordinary court costs, but her request for a court-appointed interpreter free of charge was denied. Julia filed a motion for reconsideration, which was granted. Since that time, she reports, Long Beach judges have been granting waivers. In addition, Judge Aviva Bobb, who presides over the Family Law Department for Los Angeles Superior Court, has sent out a memo reminding judges that Evidence Code §755 requires waiver of interpreter fees for victims of domestic violence who have obtained protective orders.

Costly Mandatory Studies

1. When a petition for guardianship is filed, an investigator is appointed. The Norwalk courts require that the applicant pay fees up front, often more than \$400. Anthony Filer reports some success on a case-by-case basis in getting the fees waived. The clients file requests for waiver of additional fees. If the clerk says no, the client asks to see a judge, who often grants the waiver, according to Anthony.

2. The same issue arose in Monterey County, reports Jenny Kim of the Oakland office of California Indian Legal Services. In her case, the opposing party ended up paying the entire fees.

3. A Monterey County judge rejected an indigent mother's attempt to secure unsupervised visits with her child because she could not pay her \$350 share of an investigator's fee. Salinas attorney Michael Pekin, representing the woman, repeatedly explained to the judge that his client's income was only

\$1,000 per month, from which she paid \$200 in support for the child and also supported three other children. The judge refused even to hold a hearing until the woman paid the \$350.