

# What a Difference a Day Makes: The Case for a Strict Approach to Untimely Pleadings

*The California Code of Civil Procedure requires that civil defendants answer within thirty days of service of summons. Yet California courts routinely allow defendants to file more than thirty days after service, so long as entry of default has not been made. This comment argues that these untimely answers ought not be allowed, neither as a matter of right nor as a matter of course.*

## INTRODUCTION

Prudence Plaintiff files her complaint January 1, and completes personal service of the complaint and summons the same day. Dottie Defendant does not file her answer within the thirty days allowed by law.<sup>1</sup> On February 1, Prudence goes to court to seek default.<sup>2</sup> She finds herself standing in line behind Dottie at the clerk's window. The clerk

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<sup>1</sup> CAL. CODE CIV. PROC. § 412.20 (West Supp. 1982). This section was originally based on New York's "Field Code," 1849 N.Y. Laws 641, ch. 438, § 129, which allowed 20 days to answer a summons. The first California version provided 10 days for defendants served within the same county in which the suit was brought, and 30 days for defendants served outside that county. 1850 Cal. Stat. 430, ch. 142, § 24. The next year those periods were modified to 10 days where service was made within the judicial district in which the suit was brought, 20 days where service was outside the judicial district but within the county, and 40 days where service was in another county. 1851 Cal. Stat. 54, ch. 5, § 25. In 1880, the law reverted to the original limits. 1880 Cal. Code Amend., Amendments to the Code of Civil Procedure 13, ch. 32, § 1. Those limits survived until 1970, when a single 30 day period was adopted, regardless of where in the state the defendant was served. Additionally, separate provisions governing justice courts (and setting still other time requirements) were incorporated into § 412.20 at that time. 1969 Cal. Stat. 3363, ch. 1610, § 3.

Day one of the time period is the day after service. CAL. CODE CIV. PROC. § 12 (West 1973). Each calendar day counts as one day, except if the last day is a weekend or a holiday. Hence, Dottie's time to answer expired at midnight, January 31.

<sup>2</sup> CAL. CODE CIV. PROC. § 585 (West Supp. 1982). The substance of § 585 has existed in California law relatively unchanged since 1851. 1851 Cal. Stat. 73, ch. 5, § 150. This introduction elides the distinction developed in the text accompanying notes 8-11 *infra*, between "entry of default" and "default judgment."

accepts Dottie's untimely answer, and then refuses Prudence's request for default because Dottie's answer is now on file.

This result is standard in California courts,<sup>3</sup> despite statutes that extinguish the right to answer after thirty days and require entry of default upon plaintiff's request,<sup>4</sup> because judicial policy favors hearing cases on their merits. This comment contends that such a policy is misguided, for it ignores the jurisdictional consequences and jurisprudential dangers of failing to answer on time, and needlessly contributes to an ethical dilemma for plaintiffs' attorneys. In short, the clerk should turn Dottie away and comply with Prudence's request for default. If Dottie desires a day in court she should be required to seek statutory relief from her lapse, no matter how slight it was.

This comment outlines the statutory procedures governing answers and default judgments in California, and criticizes the various theories used to escape those procedures. It then discusses jurisdictional, ethical, and jurisprudential reasons why those theories ought to be discarded, and the policy behind them re-evaluated.

## I. THE PROCEDURE AND THE PROBLEM

### A. *The Procedure*

Section 412.20 of the California Code of Civil Procedure currently allows a defendant thirty days<sup>5</sup> to answer<sup>6</sup> after the service of the com-

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<sup>3</sup> *E.g.*, *Mustalo v. Mustalo*, 37 Cal. App. 3d 580, 585, 112 Cal. Rptr. 594, 597 (2d Dist. 1974). The result is the same regardless of "how far back in line" Prudence Plaintiff is: i.e., requesting entry of default five minutes after the untimely answer is filed is just as ineffectual as requesting it five days or five weeks later.

<sup>4</sup> CAL. CODE CIV. PROC. §§ 412.20, 585 (West Supp. 1982); see notes 51-58 and accompanying text *infra*.

<sup>5</sup> In the interest of uniformity, a standard 30 day period was instituted in 1970. 1969 Cal. Stat. 3363, ch. 1610, § 3; see note 1 *supra*.

<sup>6</sup> For the sake of simplicity, discussion is limited to answers. However, the argument developed in this comment applies as well to the broader category of "responsive papers." Filing any responsive paper constitutes a general appearance and prevents a default judgment. This category includes: an answer, a demurrer, a notice of motion to strike all or part of a pleading, a notice of motion to transfer the case to a proper court, a notice of motion to quash service of summons, a notice of motion to stay or dismiss the case on the ground of *forum non conveniens*, and a notice of filing of a petition for a writ of mandate. CAL. CODE CIV. PROC. § 585 (West Supp. 1982).

The time period for answering is unaffected by the court in which the action is filed (justice, municipal, or superior) or the proximity of that court to the place of service of the summons and complaint. See note 1 *supra*.

plaint. Within that thirty day period Section 1054 allows the defendant to obtain *ex parte* from the court a thirty day extension or, with the plaintiff's consent, an extension for a longer period of time.<sup>7</sup>

If the defendant does not answer within thirty days Section 585 provides (as Section 412.20 warns) that the plaintiff may seek a default judgment.<sup>8</sup> This is a two-step procedure: first the plaintiff must apply in writing for "entry of default;"<sup>9</sup> second, the default judgment itself is entered. When recovery is a fixed amount of money, the default judgment is automatically entered by the clerk immediately following entry of default ("Section 585(a) cases").<sup>10</sup> In all other cases, entry of judgment is made only after an uncontested hearing in which the plaintiff presents evidence and the court or a jury determines the recovery to which he is entitled ("Section 585(b) cases").<sup>11</sup>

### B. *The Problem and the Prior Law*

Case law is clear that once proper entry of default has been made, the defendant has lost the right to respond on the merits.<sup>12</sup> After entry

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<sup>7</sup> CAL. CODE CIV. PROC. § 1054 (West 1980).

<sup>8</sup> CAL. CODE CIV. PROC. § 585 (West Supp. 1982). Subsections (a) and (b) provide, essentially, that if the defendant has been served and no answer has been filed within the time specified in the summons or such further time as may be allowed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant.

<sup>9</sup> Cal. Code Civ. Proc. § 585 subdivisions (a) and (b) provide for entry of default only where the defendant has been served other than by publication. Section 585 (c) covers all cases where service was by publication, and does not provide for entry of default. Thus, where service is by publication the defendant is not at peril for failure to answer until entry of the default judgment. CAL. CODE CIV. PROC. § 585 (West Supp. 1982).

<sup>10</sup> CAL. CODE CIV. PROC. § 585 (a) (West Supp. 1982).

<sup>11</sup> CAL. CODE CIV. PROC. § 585 (b) (West Supp. 1982).

<sup>12</sup> *Christerson v. French*, 180 Cal. 523, 525, 182 P. 27, 28 (1919) (defendant's demurrer and motion to strike the complaint, filed one hour after entry of default, had no effect: "[a] defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action"); *Title Ins. & Trust Co. v. King Land & Development Co.*, 162 Cal. 44, 46, 120 P. 1066, 1067 (1912) ("[a] defendant against whom a default is entered 'is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.' (Citation) He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings."); *Irvine v. Davy*, 88 Cal. 495, 497, 26 P. 506, 506 (1891) (answer filed after entry of default did not affect the default); *Goddard v. Pollock*, 37 Cal. App. 3d 137, 142, 112 Cal. Rptr. 215, 218 (1st Dist. 1974) (recognizing authority); *A & B Metal Products v. MacArthur Properties, Inc.*, 11 Cal. App. 3d 642, 647, 89 Cal. Rptr. 873, 875 (1st Dist. 1970) (recognizing authority); *Jones v. Moers*, 91 Cal. App. 65, 69, 266 P. 821, 822 (1st Dist. 1928) (defendant's right to participate in litigation

of the default, absent jurisdictional or procedural defects,<sup>13</sup> the defen-

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terminates upon entry of default); *Green v. Rogers*, 18 Cal. App. 572, 575, 123 P. 974, 975 (3d Dist. 1912) (a demurrer, which was filed after entry of default, though on the same day, "conferred no right without first having the default vacated"); *see also* *Remainders, Inc. v. Superior Court*, 192 Cal. App. 2d 411, 412, 13 Cal. Rptr. 221, 222 (2d Dist. 1961) (answer filed after entry of default is a nullity).

Four other cases which are commonly cited for this proposition support it indirectly, stating that the purpose of entry of default is to limit the defendant's time to file. *Drake v. Duvenick*, 45 Cal. 455, 463 (1873); *Norman v. Berney*, 235 Cal. App. 2d 424, 429, 45 Cal. Rptr. 467, 471 (1st Dist. 1965); *Bank of Haywards v. Kenyon*, 32 Cal. App. 635, 636, 163 P. 869, 870 (1st Dist. 1917); *Lunnun v. Morris*, 7 Cal. App. 710, 715, 95 P. 907, 909 (2d Dist. 1908). (It is interesting to note that *Bank of Haywards* and *Lunnun* both allowed a late answer on this ground).

Some cases go even further, holding that where the plaintiff makes proper application but the court clerk improperly refuses to enter the default, the defendant is nonetheless "in default;" the clerk's failure to perform does not affect the plaintiff's right to entry of the default, and subsequent pleadings filed by the defendants are of no effect. *W. A. Rose Co. v. Municipal Court*, 176 Cal. App. 2d 67, 72, 1 Cal. Rptr. 49, 53 (1st Dist. 1959) (when defendant's time to answer had expired, and no answer or other pleading sufficient to constitute an appearance [*see* note 6 *supra*] had been filed, the clerk should have entered defendant's default upon plaintiff's request, and subsequent filings by the defendant did not affect the clerk's duty to do so); *Jones v. Moers*, 91 Cal. App. 65, 69-70, 266 P. 821, 822 (1st Dist. 1928) (failure of clerk to enter default does not prejudice plaintiff).

Nor does plaintiff's failure to request entry of default or the clerk's failure to enter default affect the validity of a default judgment once it has been properly entered. *E.g.*, *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 345-46, 146 P. 880, 882 (1915); *Drake v. Duvenick*, 45 Cal. 455, 462-63 (1873); *Miller v. Miller*, 33 Cal. 353, 355 (1867); *Norman v. Berney*, 235 Cal. App. 2d 424, 429, 45 Cal. Rptr. 467, 471 (1st Dist. 1965).

<sup>13</sup> For example, a serious defect in the summons precludes the court from acquiring jurisdiction over the defendant. Also, a default and a default judgment may be attacked if service failed to provide the defendant with actual notice of the complaint, for example in a case of substituted service or service by publication. CAL. CODE CIV. PROC. § 473.5 (West 1979). A default judgment may not be based on a complaint that fails to state a cause of action or the allegations of which do not support the demand for relief. *See generally* 4 B. WITKIN, CALIFORNIA PROCEDURE, PROCEEDINGS WITHOUT TRIAL § 155, at 2812 (2d ed. 1971).

A default judgment may not grant relief in excess of that which is requested in the complaint. CAL. CODE CIV. PROC. § 580 (West 1976); *Becker v. S.P.V. Construction Co.*, 27 Cal. 3d 489, 493-94, 612 P.2d 915, 917-18, 165 Cal. Rptr. 825, 827-28 (1980) (default award of compensatory damages in excess of figure stated in complaint was void to the extent of the excess even though the award was within the total amount of compensatory and punitive damages); *Lee v. Ski Run Apartments Associates*, 249 Cal. App. 2d 293, 298-99, 57 Cal. Rptr. 496, 500 (5th Dist. 1967) (the language "for such other and further relief" did not support a default judgment award of money when such an award was not specifically requested in the prayer for relief); 4 B. WITKIN, CALIFORNIA PROCEDURE, PROCEEDINGS WITHOUT TRIAL § 156, at 2812-13 (2d ed.

dant's only recourse is a motion for discretionary relief under Section 473.<sup>14</sup>

However, the law is not clear as to the effect on the default procedure of an "untimely answer" — that which is filed after thirty days, but prior to the plaintiff's request for entry of the default.

Before 1970, in Section 585(b) cases<sup>15</sup> it was theoretically impossible to file an untimely answer, because Section 585(b) directed the clerk to enter the default automatically upon expiration of the defendant's time to answer.<sup>16</sup> After thirty days, therefore, any answer proffered by the defendant was to be rejected by the clerk.<sup>17</sup> It then became the plaintiff's burden to request entry of judgment and to prove entitlement.<sup>18</sup> Indisputably, a defendant was "in default" from the first moment of the thirty-first day.<sup>19</sup>

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1971); Note, *Default Judgments in Excess of Prayer*, 4 STAN. L. REV. 278, 285 (1952).

<sup>14</sup> CAL. CODE CIV. PROC. § 473 (West Supp. 1982). Section 473 provides that:

The court may, in furtherance of justice, and on such terms as may be proper, . . . enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, . . . upon such terms as may be just . . . allow an answer to be made after the time limited by this code.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect.

<sup>15</sup> Prior to 1980, § 585 subdivisions (a) and (b) were designated subdivisions (1) and (2), respectively. See 1955 Cal. Stat. 2642, ch. 1452, § 36; 1980 Cal. Stat. 736, ch. 367, § 2.

<sup>16</sup> 1851 Cal. Stat. ch. 5, § 150 stated: "[I]f no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply . . . for the relief demanded in the complaint." This language was incorporated into § 585 of the California Code of Civil Procedure (enacted Mar. 11, 1872) and remained in effect (with minor variations) until 1970. 1969 Cal. Stat. 3386, ch. 1611, § 6.7.

<sup>17</sup> See text accompanying notes 12-14 *supra*.

<sup>18</sup> 1955 Cal. Stat. 2642, ch. 1452, § 6.

<sup>19</sup> Two courts ignored the clear language of prior § 585 to arrive at a contrary result. In *Acock v. Halsey*, 90 Cal. 215, 27 P. 193 (1891), plaintiff sued to replevy personal property. He posted an undertaking and obtained possession from the sheriff. Two days after the time for answering had expired, plaintiff requested and received an "entry of dismissal" — as distinct from an entry of default or an entry of *judgment* of dismissal. Subsequently the defendant filed an answer and a motion to set aside the "dismissal." The motion was granted. Plaintiff then managed to obtain entry of a judgment of dismissal from the court clerk. On defendant's motion this, too, was set aside. Plaintiff appealed. The California Supreme Court held that the judgment of dismissal

In Section 585(a) cases, however, ambiguity existed. Once the thirty days allowed by Section 412.20 expired, a plaintiff seeking default judgment was required to *apply* for entry of the default, and the clerk was to enter judgment automatically thereafter<sup>20</sup> (just the opposite of Section 585(b) cases). Hence, in Section 585(a) cases<sup>21</sup> unless the plaintiff requested entry of default at 8:00 a.m. on day thirty-one, it was theoretically possible for the defendant to file an answer late but prior to the plaintiff's request for entry of default.

On its face Section 585 seemed to make a procedural tradeoff. If the relief sought was a specific monetary recovery it was the plaintiff's burden to request entry of default once defendant's failure to answer conceded plaintiff's right to recovery. In all other cases — those in which the plaintiff was burdened with proving the amount and type of recovery to which he was entitled — automatic entry of default ensured that his burden was not increased by the defendant's failure to answer. Prior to 1970, entry of default appeared merely a procedural check on the drastic remedy of default judgment; it was hardly fraught with jurisdictional consequences.

Nonetheless, when faced with untimely answers under pre-1970 law most courts decided that a defendant could violate Section 412.20 without running afoul of Section 585.<sup>22</sup> To exacerbate this problem, the ambiguity in Section 585(a) cases was extended to Section 585(b) cases as well, when in 1970 the California Legislature revised the Code of

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was void, and that since no default had been entered, the answer, though untimely, "could not be disregarded, or treated as a nullity, so long as it remained on file. The plaintiff's remedy was a motion to strike . . ." *Id.* at 220, 27 P. at 194.

In *Lunnun v. Morris*, 7 Cal. App. 710, 95 P. 907 (2d Dist. 1908), plaintiff sued for possession of real property. Two days after the deadline for answering, plaintiff, without having obtained entry of default, was in court to present evidence in an uncontested hearing. Defendant arrived, filed an answer with the clerk, and then moved the court for leave to answer and defend. Plaintiff moved for entry of default, and then presented his testimony. The trial court denied defendant's motion and granted default judgment to the plaintiff. The court of appeal held that denial of defendant's motion for relief was quite proper, but that as long as the answer (untimely though it was) remained on file, no default could be entered and no default judgment could be granted. Relying on *Acock* and on *Bowers v. Dickerson*, 18 Cal. 420 (1861), the court held that proper practice required that the answer first be stricken.

<sup>20</sup> 1851 Cal. Stat. 73, ch. 5, § 150: "[T]he clerk, upon application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons." This language was incorporated into § 585 of the California Code of Civil Procedure (enacted Mar. 11 1982) in 1872 and remains substantially unchanged.

<sup>21</sup> See text accompanying note 10 *supra*.

<sup>22</sup> See text accompanying notes 24, 26, & 31 *infra*.

Civil Procedure to require that *all* plaintiffs apply for entry of default.<sup>23</sup> The only difference now remaining between the two subsections is the automatic entry of judgment in section 585(a).

## II. THE JUDICIAL "SOLUTION"

Courts have based their refusal to find default after an untimely answer on three distinguishable and equally unconvincing theories. These are the implied waiver theory, the implied grant theory, and the mere irregularity theory.

### A. Implied Waiver

The implied waiver theory asserts that by allowing the defendant to answer between the expiration of thirty days and the request for default, the plaintiff impliedly waives any default.<sup>24</sup> However, "[t]o make

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<sup>23</sup> 1969 Cal. Stat. 3386, ch. 1611, § 6.7.

<sup>24</sup> See *Mustalo v. Mustalo*, 37 Cal. App. 3d 580, 112 Cal. Rptr. 594 (2d Dist. 1974) (dismissal on trial court's own motion for failure to have judgment entered when no answer had been made within three years of service held improper, since defendant was free to answer at any time in the absence of entry of default and did so prior to the court's motion). This case relies on 4 B. WITKIN, CALIFORNIA PROCEDURE, PROCEEDINGS WITHOUT TRIAL § 146 (2d ed. 1971), which rationalizes on a waiver basis several cases that speak in terms of an implied grant. Witkin criticizes the implied grant theory. *Id.*; cf. notes 28-30 and accompanying text *infra*.

Not only may default inadvertently be waived by plaintiff's failure to obtain its entry, it may inadvertently be waived once it is entered as well. *Madison v. Octave Oil Co.*, 154 Cal. 768, 99 P. 176 (1908) (defendant obtained entry of default on a cross complaint, but then consented to, and without reference to the default went to trial on, an amended complaint that raised issues identical to those in the cross complaint; the court held that this behavior was inconsistent with an intent to assert the default, and constituted a waiver); *Hestres v. Clements*, 21 Cal. 425 (1863) (accepting service of a demurrer after default had been entered constituted waiver by plaintiff of defendant's default); *Brown v. Pacific Tel. & Tel. Co.*, 105 Cal. App. 3d 482, 164 Cal. Rptr. 445 (2d Dist. 1980) (plaintiff who elected to proceed on the merits instead of contesting the trial court's mistaken vacation of entry of default waived the default and could not raise it on appeal).

For a more extreme case, see *Batchelor v. Finn*, 169 Cal. App. 2d 410, 337 P.2d 545 (2d Dist. 1959). In *Batchelor*, plaintiff obtained entry of default and defendant answered later the same day. Plaintiff then moved for judgment on the pleadings. Ignoring abundant precedent to the contrary (see note 12 and accompanying text *supra*), the court stated that plaintiff "could not reasonably expect to obtain from any judge a default judgment so long as the answer was on file, nor could he properly suppress that fact." *Id.* at 419, 337 P.2d at 552. The court then held that the motion for judgment on the pleadings "constituted a waiver of the default just like any other step which recognizes the pleading as properly on file." *Id.* at 420, 337 P.2d at 552.

out a case of implied 'waiver' of a legal right, there must be a clear, unequivocal and decisive act"<sup>25</sup> indicating an intention to abandon the right. As a legal fiction, the implied waiver theory requires such an unwarranted assumption as to be untenable. Only the most altruistic plaintiff would willingly forego a quick, painless recovery in favor of the personal and financial strain of trial. It is unrealistic for a court to ascribe this altruism to a plaintiff.

### B. Implied Grant

The implied grant theory presumes that if the plaintiff does not request entry of default immediately upon expiration of thirty days he consents to additional time.<sup>26</sup> This consent continues until he does request entry of default.<sup>27</sup> "But this is inaccurate both in theory and result. The plaintiff cannot extend the defendant's time to plead except expressly in the manner provided by statute . . . ."<sup>28</sup> Power to grant presumes authority over the thing granted;<sup>29</sup> but plaintiffs have no authority over a court's jurisdiction. Thus, logic fails to support the implied grant theory. Existing judicial precedent for that approach is erroneous as well.<sup>30</sup>

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<sup>25</sup> BLACK'S LAW DICTIONARY 1417 (5th ed. 1979); see also *In Re Marriage of Moore*, 113 Cal. App. 3d 22, 27, 169 Cal. Rptr. 619, 621 (4th Dist. 1980):

Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. There must be actual or constructive knowledge of the existence of the right to which the person is entitled. The burden is on the party claiming a waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. (Citations omitted).

<sup>26</sup> *E.g.*, *Reher v. Reed*, 166 Cal. 525, 528, 137 P. 263, 264 (1913); *Goddard v. Pollock*, 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215, 218 (1st Dist. 1974); *Bank of Haywards v. Kenyon*, 32 Cal. App. 635, 636-37, 163 P. 869, 870 (1st Dist. 1917).

<sup>27</sup> See note 26 *supra*.

<sup>28</sup> 4 B. WITKIN, CALIFORNIA PROCEDURE, PROCEEDINGS WITHOUT TRIAL § 146 (2d ed. 1971). Witkin rationalizes on a waiver theory cases which speak in terms of an implied grant.

<sup>29</sup> A grant is a "gift or bestowal by one having control or authority over [the thing given or bestowed]." BLACK'S LAW DICTIONARY 629 (5th ed. 1979).

<sup>30</sup> The latest direct authority for the implied grant is *Goddard v. Pollock*, 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215, 218 (1st Dist. 1974), which boldly asserted that the implied grant "is now well established by the case law." *Goddard* cites *Reher v. Reed*, 166 Cal. 525, 528, 137 P. 263, 264 (1913), and *Bank of Haywards v. Kenyon*, 32 Cal. App. 635, 636-37, 163 P. 869, 870 (1st Dist. 1917), which itself relied on *Reher*. *Reher*, ostensibly the seminal case, in turn cites *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501 (1881), but *Tregambo* stands for no such proposition. In that

### C. Mere Irregularity

The mere irregularity theory cavils that while the statute limits the time for answering to thirty days, it does not actually prohibit an answer from being filed after that time. Filing late is simply a minor procedural irregularity; while an untimely answer is not proper, neither is it a nullity, and therefore it should be allowed.<sup>31</sup> Proper pro-

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case, the plaintiff filed suit in Mono County, and subsequently served the defendants in San Francisco on March 22, 1879. The applicable period in which to answer was 40 days, the last day of which was May 1. On April 20, the defendant's attorneys sent a demurrer to the court for filing, which the clerk received on April 29. The requisite filing fee was not tendered at that time, nor did the clerk request it at that time. At 6:00 p.m. on May 1, the defendant's attorneys received a letter from the clerk requesting the fees. The attorneys, who lived some 20 miles from the court (in a day when most local travel was by horse), arrived there at noon the next day, May 2, to pay the fees. They were turned away by the clerk because he was at that moment entering the defendant's default. On appeal, the California Supreme Court held that the defendant's demurrer was properly filed, irrespective of payment of filing fees. *Id.* at 505-06. No issue of a grant of additional time to answer was presented, and the court expressly held that the trial court's refusal to set aside the entry of default was unappealable. *Id.* at 503. The resulting default *judgment* was set aside on the sole basis that the demurrer was filed on time and was not disposed of by the trial court. *Id.* at 506-07.

<sup>31</sup> *Acock v. Halsey*, 90 Cal. 215, 220, 27 P. 193, 194 (1891) (plaintiff did not have the power to dismiss the case once defendant had filed an answer seeking affirmative relief, for though the answer was untimely "it could not be disregarded, or treated as a nullity, so long as it remained on file"); *Bowers v. Dickerson*, 18 Cal. 420 (1861) (plaintiff's motion to strike an untimely answer and for default judgment denied: "[i]t was, perhaps, not strictly regular to file the answer after the time for answering had expired without leave of the Court; but as the default of the defendant had not been entered, we think the filing was not a nullity. It was at most a mere irregularity"); *Goddard v. Pollock*, 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215, 218 (1st Dist. 1974) (entry of default improper following an untimely motion to quash service of summons because an untimely pleading is not a nullity); *A & B Metal Products v. MacArthur Properties, Inc.*, 11 Cal. App. 3d 642, 647, 89 Cal. Rptr. 873, 875 (1st Dist. 1970) ("an untimely pleading is not a nullity, and . . . will serve to preclude the taking of default proceedings"); *Cuddahy v. Gragg*, 46 Cal. App. 578, 580, 189 P. 721, 721 (2d Dist. 1920) (late pleading is not a nullity, and entry of default is improper until it has been disposed of); *Bank of Haywards v. Kenyon*, 32 Cal. App. 635, 636, 163 P. 869, 870 (1st Dist. 1917) (trial court abused its discretion in striking answer simply because it was filed one day late and without permission of the court: "[a]n answer filed late is an irregularity and not an absolute nullity"); *Lunnun v. Morris*, 7 Cal. App. 710, 715-16, 95 P. 907, 909 (2d Dist. 1908) (answer which was filed while plaintiff was presenting evidence to the court in support of a request for default judgment was not a nullity, and since it was not stricken it prevented a default judgment).

The "mere irregularity" theory might be justified on the ground that it simply recognizes the maxim *de minimus non curat lex*, except that in applying this theory courts have made no mention of the relative untimeliness that they will excuse on that basis.

cedure, adherents say, is for the plaintiff to invoke the court's discretion to strike an untimely answer.<sup>32</sup>

Ironically, this approach frames the essence of the law's dilemma: the desire to hear cases on the merits versus the necessity to establish "traffic ordinances" so that delay will not impede either the general course of justice or its specific application. The failure of the courts to clearly fix responsibility where the legislature has placed it perpetuates confusion in what ought to be one of the simplest areas of California procedure.

Indisputably it is a defendant's responsibility to answer within thirty days. A defendant's failure to meet that responsibility is merely a plaintiff's *opportunity* to seek entry of default and default payment — plaintiff's remedy is not automatic. Yet failure to answer on time should not be cost-free for the defendant. The remainder of this comment argues that courts should not permit defendants to escape all responsibility for their tardiness by allowing defendants to file untimely answers without leave.

### III. WHAT A DIFFERENCE A DAY MAKES: THE JURISDICTIONAL EFFECT OF SECTION 412.20

#### A. *The Purpose of Default*

Several courts have ignored the thirty day limit of Section 412.20, holding instead that an answer may be filed until entry of default is made.<sup>33</sup> These cases reason that the purpose of entry of default is to limit the defendant's time to answer.<sup>34</sup> However, this theory of the purpose of entry of default is not supported by the California Code of Civil Procedure. First, it strips any meaning from the flat thirty day limitation of Section 412.20.<sup>35</sup> Second, Section 585, which provides for entry

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See note 3 *supra*.

<sup>32</sup> *Acock v. Halsey*, 90 Cal. 215, 220, 27 P. 193, 194 (1891); *Bowers v. Dickerson*, 18 Cal. 420, 421 (1861); *Buck v. Morrossis*, 114 Cal. App. 2d 461, 464-65, 250 P.2d 270, 273 (1st Dist. 1952); *Cuddahy v. Gragg*, 46 Cal. App. 578, 581, 189 P. 721, 722 (2d Dist. 1920); *Lunnun v. Morris*, 7 Cal. App. 710, 715, 95 P. 907, 909 (2d Dist. 1908).

<sup>33</sup> *E.g.*, *Drake v. Duvenick*, 45 Cal. 455, 463 (1873); *Norman v. Berney*, 235 Cal. App. 2d 424, 429, 45 Cal. Rptr. 467, 471 (1st Dist. 1965); *Bank of Haywards v. Kenyon*, 32 Cal. App. 635, 636, 163 P. 869, 870 (1st Dist. 1917); *Lunnun v. Morris*, 7 Cal. App. 710, 715, 95 P. 907, 909 (2d Dist. 1908).

<sup>34</sup> See note 33 *supra*.

<sup>35</sup> CAL. CODE CIV. PROC. § 412.20 (West Supp. 1982) states: "(a) Except as otherwise required by statute, a summons . . . shall contain: . . . (3) a direction that the

of default, makes no mention of such a purpose,<sup>36</sup> nor does any other section in the Code.

The purpose of entry of default is found in those sections relating to notice. Section 1010, which establishes a defendant's right to notice, states that notice need not be given to any party whose default has been entered.<sup>37</sup> Section 2004 provides that entry of default constitutes a waiver by the defendant of the right to notice of depositions.<sup>38</sup> Section 664.5 specifies that notice of entry of judgment need not be given to parties who have not appeared.<sup>39</sup> Entry of default is the formal recognition that a party has not appeared, and that his time for doing so has expired. The purpose, and the effect, of entry of default, therefore, is to cut off notice rights.<sup>40</sup> It deprives a delinquent defendant of what would otherwise be a procedural right, and relieves a persistent plaintiff of a procedural burden. Entry of default is unrelated to the defendant's time to answer,<sup>41</sup> and the plaintiff's failure to request entry of default does

defendant file with the court a written pleading in response to the complaint within 30 days after the summons is served on him."

<sup>36</sup> CAL. CODE CIV. PROC. § 585 subdivisions (a) and (b) (West Supp. 1982) state simply that if the defendant has

been served, other than by publication, and no answer [or pleading of one of the types specified] has been filed . . . within the time specified in the summons, or such further time as may be allowed, the clerk, . . . upon written application of the plaintiff, . . . shall enter the default of the defendant.

<sup>37</sup> "No bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings, or an amended pleading, need be served upon any party whose default has been duly entered or who has not appeared in the action or proceeding." CAL. CODE CIV. PROC. § 1010 (West 1980).

<sup>38</sup> CAL. CODE CIV. PROC. § 2004 (West 1955).

<sup>39</sup> "Promptly upon entry of judgment in a contested action or special proceeding . . . the clerk of the court shall mail notice of entry of judgment to all parties who have appeared in the action . . ." CAL. CODE CIV. PROC. § 664.5 (West Supp. 1982).

<sup>40</sup> This was the approach taken by two early cases. *Title Insurance & Trust Co. v. King Land Improvement Co.*, 162 Cal. 44, 46, 120 P. 1066, 1067 (1912) (once entry of default is made defendant cannot demand notice of subsequent proceedings); *Green v. Rogers*, 18 Cal. App. 572, 575, 123 P. 974, 975 (3d Dist. 1912) (after default was entered defendant was not entitled to notice of trial).

<sup>41</sup> This approach is consistent with § 585(c), which establishes the procedure for default judgments in cases where service is by publication. Significantly, in such cases entry of default is not allowed. Since there is no guarantee that service by publication will ever effect actual notice, a plaintiff seeking default judgment under these circumstances must at every step attempt to apprise the defendant of the proceedings against him.

Additionally, this approach is consistent with § 473.5, which establishes less restrictive requirements than § 473 for overturning defaults or default judgments when ser-

not permit untimely answers.

### B. *The Jurisdictional Effect of Section 412.20*

The theory that only entry of default cuts off the right to answer also robs the Code of Civil Procedure of its clear, simple approach to jurisdiction. It transforms Section 412.20's thirty day span into merely a minimum breathing period during which the defendant need not fear harm. Under this theory, from the thirty-first day forward what jurisdiction exists is not statutorily defined, and substantive rights hinge not on the merits of a motion for relief from default, but on the outcome of a procedural footrace.<sup>42</sup> It is ironic that this situation should be the product of a policy favoring disposal of cases on their merits.

To adjudicate claims a court must acquire jurisdiction over the parties. A court gains plenary jurisdiction if a defendant voluntarily makes a general appearance upon learning that a complaint has been filed. Absent a voluntary appearance, the Code of Civil Procedure attempts to coerce a defendant into appearing.<sup>43</sup>

Once service is made,<sup>44</sup> the Code grants the court a qualified jurisdiction.<sup>45</sup> Just as a statute of limitations recognizes a potential defendant's

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vice of summons does not result in actual notice to the defendant.

<sup>42</sup> Present practice starts a race to the courthouse when 30 days expire. If the defendant wins, his answer is accepted. If he loses, even by minutes, he is out of court and may only address the court's discretion for vacation of the default and for leave to answer. See text accompanying notes 12-13 and 22 *supra*. For an example of a literal race to court, see discussion of *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501 (1881), in note 30 *supra*.

<sup>43</sup> *Keybers v. McComber*, 67 Cal. 395, 397, 7 P. 838, 840 (1885) (except in cases of voluntary appearance, personal jurisdiction is gained through the instrumentality of a summons); *Lyman v. Milton*, 44 Cal. 630, 634 (1872) ("[t]he summons is the process by which parties defendant are brought into Court, so as to give the Court jurisdiction over their persons"), *rev'd on other grounds*, *In re Clarke*, 125 Cal. 388, 58 P. 22 (1899); *Community Redevelopment Agency v. Superior Court*, 248 Cal. App. 2d 164, 177-78, 56 Cal. Rptr. 201, 210 (2d Dist. 1967) (citing *Lyman*, this note *supra*). Once personal jurisdiction has been acquired, the sanction of default judgment becomes a possibility.

<sup>44</sup> For the court to gain jurisdiction, so that a default judgment will be valid, the summons and its service must meet statutory requirements. *Greene v. Municipal Court*, 51 Cal. App. 3d 446, 451, 124 Cal. Rptr. 139, 142 (2d Dist. 1975) (service of a substantially defective summons does not confer jurisdiction over a party); *Community Redevelopment Agency v. Superior Court*, 248 Cal. App. 2d 164, 177-78, 56 Cal. Rptr. 201, 210 (2d Dist. 1967) (for jurisdiction to be obtained by service of summons, plaintiff must comply with the prescribed form of the summons and the prescribed conditions for service).

<sup>45</sup> Until a defendant appears, clearly a court can not grant him affirmative relief.

interest in repose, Section 412.20 recognizes a plaintiff's interest in recovery.<sup>46</sup> Thus, to prevent the defendant from frustrating the plaintiff's desire for a day in court by refusing to answer, the initial grant of jurisdiction is limited to thirty days,<sup>47</sup> with plenary jurisdiction conditioned upon the defendant's general appearance.<sup>48</sup> And, just as jurisdiction to accept a defendant's answer is created by statute, it is limited to that authorized by statute. A court may not extend the initial period except as provided by statute;<sup>49</sup> any attempt to do so is "an excess of jurisdiction."<sup>50</sup> Absent an answer, on day thirty-one Section 412.20's grant of jurisdiction expires.<sup>51</sup> As of day thirty-one the defendant is "in

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Nor can the court grant a plaintiff relief other than or beyond that requested in the complaint.

<sup>46</sup> CAL. CODE CIV. PROC. § 412.20(a)(4) (West Supp. 1982) requires that the summons contain a "notice that unless the defendant . . . responds, his default will be entered upon application by the plaintiff, and the plaintiff may apply to the court for the relief demanded in the complaint . . . ."

<sup>47</sup> CAL. CODE CIV. PROC. § 412.20(a)(3) (West Supp. 1982) requires that the summons contain a "direction that the defendant [answer] within 30 days after summons is served on him."

<sup>48</sup> Under § 585 a court has no jurisdiction to hear any evidence from the defendant once entry of default has been made. Subdivision (a) requires that the court enter judgment immediately upon entry of default; subdivision (b), read in conjunction with those cases holding that entry of default cuts off the defendant's right to further affect the plaintiff's cause of action (see note 12 *supra*), allows only for evidence by the plaintiff in a hearing for relief by default judgment. CAL. CODE CIV. PROC. § 585 (West Supp. 1982).

<sup>49</sup> CAL. CODE CIV. PROC. § 1054 (West 1980) authorizes such an extension. See text accompanying note 7 *supra*.

<sup>50</sup> *Baker v. Superior Court*, 71 Cal. 583, 584, 12 P. 685, 686 (1887) (trial court's order extending the defendant's time to plead until ten days after remittitur to that court of another case then on appeal held invalid insofar as it extended the time to answer beyond 30 days). See also *Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 P. 291, 291 (1902). This decision denied the defendant his day in court despite strong suggestions of the plaintiff's own dilatory tactics. The complaint was filed May 5, 1896, but it was not served until March 24, 1898. On April 23, 1898, the last day to answer, the defendant moved that service be set aside and that the suit be dismissed for lack of prosecution. Four months later the motion was denied, and the trial court issued an order allowing the defendant one day to answer. Apparently no answer was filed, for default and default judgment were entered. On the defendant's appeal, the California Supreme Court held the order to be beyond the jurisdiction of the trial court, and therefore void, because it was an attempt to grant the defendant more than thirty days additional time to answer without the plaintiff's consent. See also *Start v. Heinzerling*, 27 Cal. App. 145, 148, 149 P. 50, 51 (1st Dist. 1915) (extension of time granted after statutory time to answer had expired was void).

<sup>51</sup> See note 47 *supra*; see also *W. A. Rose Co. v. Municipal Court*, 176 Cal. App. 2d 67, 72, 1 Cal. Rptr. 49, 53 (1st Dist. 1959).

default," and no longer may answer as of right. This jurisdictional event occurs whether or not the default is a matter of formal record — that is, whether or not entry of default has been made.<sup>52</sup> Hence, on day thirty-one the court loses jurisdiction to accept an answer, and the defendant loses his right to file one.<sup>53</sup>

At this procedural stage the court's jurisdiction is circumscribed by Sections 473 and 585.<sup>54</sup> Section 473 allows the court in its discretion to accept an answer even though the time for answering has expired.<sup>55</sup> However, this requires notice to the plaintiff,<sup>56</sup> hence it is improper to allow a defendant to file an untimely answer without a hearing.<sup>57</sup> On the other hand, Section 585 grants the court jurisdiction to enter the defendant's default, indeed it commands the court to do so upon plaintiff's request. Authority to enter a default judgment is also granted.<sup>58</sup> As of the thirty-first day the court may act only pursuant to Sections 473 and 585.

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<sup>52</sup> This was explicitly recognized in *Batchelor v. Finn*, 169 Cal. App. 2d 410, 419, 337 P.2d 545, 552 (2d Dist. 1959). In *Batchelor* the plaintiff filed a quiet title action, and stipulated to November 20, 1956 as the date by which defendants were to answer. No answer having been filed, on November 21 the plaintiff obtained entry of default. In sorting out the confused trial court procedure which followed, the court of appeal noted that "[t]he defendants Finn were in default and that fact was made a matter of record early on the morning of November 21, 1956, when plaintiff's counsel caused the clerk to enter said default." Earlier authority is contra. See notes 24-28 and accompanying text *supra*.

<sup>53</sup> "The rule in California and the majority of United States jurisdictions is that when a consequence is enunciated for failing to comply with an act on a given date, that date is deemed to be jurisdictionally mandatory, not directory . . ." *Ward v. Fremont Unified School Dist.*, 276 Cal. App. 2d 313, 322, 80 Cal. Rptr. 815, 821 (1st Dist. 1969). Section 585 enunciates the plaintiff's right to seek default and default judgment as a consequence of defendant's failure to answer in the time granted. Hence, §§ 412.20 and 1054 are jurisdictional.

<sup>54</sup> *W.A. Rose v. Municipal Court*, 176 Cal. App. 2d 67, 72, 1 Cal. Rptr. 49, 53 (1st Dist. 1959).

<sup>55</sup> See note 14 *supra*.

<sup>56</sup> See note 14 *supra*.

<sup>57</sup> Decisions seem to apply the language of the third paragraph of § 473, regarding relief from a judgment, order, or other proceeding, to the first paragraph of that section, which establishes the court's power to enlarge the time to answer. Thus, a defendant's motion for relief from default must be based on a mistake, inadvertence, or excusable neglect, and must be accompanied by the pleading sought to be filed.

Additionally, § 473.5 allows relief from a default or default judgment when service of summons does not result in actual notice. However, the defendant must not have avoided service or have been guilty of inexcusable neglect.

<sup>58</sup> CAL. CODE CIV. PROC. § 585 (West Supp. 1982); see note 9 *supra*.

IV. THE ETHICAL DILEMMA<sup>59</sup>

Not only does the prevalent judicial treatment of untimely answers entail jurisdictional problems, it creates an ethical dilemma for plaintiffs' attorneys as well. For, while an attorney is ethically bound to represent his client to the limit of the law,<sup>60</sup> he is also obliged to observe local custom in doing so.<sup>61</sup> Where local custom concerning untimely answers requires a friendly telephone call and liberal assent to extensions of time, these two duties conflict. Resolution of this conflict is customarily at the plaintiff's expense.<sup>62</sup>

The fraternal approach to practice is firmly rooted in the American legal tradition.<sup>63</sup> That tradition embraces the notion that a professional should be courteous to and should cooperate with his peers.<sup>64</sup> A century ago Judge Sharswood admonished that a lawyer should

shun most carefully the reputation of a sharp practitioner. Let him be liberal to the slips and oversights of his opponent whenever he can do so

. . . .  
Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public.<sup>65</sup>

Liberality, however, gives way to laxity, and judicial tolerance of that

<sup>59</sup> CALIFORNIA RULES OF PROFESSIONAL CONDUCT, *reprinted in* CAL. BUS. & PROF. CODE foll. § 6076 (West Supp. 1981), do not cover the issues discussed in this section. Rule 1-100, however, states that "[t]he prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned." Rule 1 of the former California Rules of Professional Conduct went further, saying that "the Code of Professional Responsibility of the American Bar Association should be noted by the members of the State Bar." CALIFORNIA RULES OF PROFESSIONAL CONDUCT (as amended 1972). While not technically binding, the ABA Code is of great persuasive authority in California. For cases in which California courts have looked to the ABA Code for guidance see, e.g., *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 795 & n.13, 647 P.2d 86, 92 & n.13, 183 Cal. Rptr. 810, 816 & n.13 (1982); *Maxwell v. Superior Ct.*, 30 Cal. 3d 606, 616 & n.5, 639 P.2d 248, 253-54 & n.5, 180 Cal. Rptr. 177, 182-83 & n.5 (1982); *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978), *cert. denied*, 439 U.S. 981 (1978).

<sup>60</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 and DR 7-101(A)(1) (1981) [hereafter MODEL CODE].

<sup>61</sup> *Id.* EC 7-38 and DR 7-106(C)(5).

<sup>62</sup> Local custom generally requires that plaintiff's attorney consent to additional time to answer even though thirty days have passed. Such consent estopps the plaintiff, at least for the period consented to, from pursuing entry of default or default judgment.

<sup>63</sup> See H. DRINKER, *LEGAL ETHICS* 192, 194-96 (1953); G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 73-76 (5th ed. 1896).

<sup>64</sup> G. SHARSWOOD, note 63 *supra*, at 73-76.

<sup>65</sup> *Id.* at 74-75.

laxity serves to sanction it as custom.

Once custom is established, ethical canons and codes of professional conduct enshrine it. The American Bar Association Model Code of Professional Responsibility<sup>66</sup> states in its Ethical Canons that a lawyer "should follow local customs of courtesy and practice, unless he gives timely notice to opposing counsel of his intention not to do so."<sup>67</sup> This is echoed in the old ABA Canons of Professional Ethics,<sup>68</sup> which required compliance with local custom, unless notice was given, even when the law permitted otherwise.<sup>69</sup>

While the Ethical Canons are merely suggestive guidelines,<sup>70</sup> they are given teeth by the Model Code's Disciplinary Rules. One rule subjects an attorney to disciplinary action for failure to comply with known local customs of courtesy or practice without giving timely notice to opposing counsel.<sup>71</sup> Arguably this rule does not apply to out of court conduct,<sup>72</sup> but even if it does not compel an attorney to follow local customs out of court, other rules<sup>73</sup> seem to do so. One such rule states that a lawyer does not violate the duty to represent a client zealously "by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client."<sup>74</sup> Another provides that a lawyer may, "where permissible," exercise professional discretion in waiving a client's rights.<sup>75</sup> In short, the Disciplinary Rules do not bind a lawyer

<sup>66</sup> MODEL CODE, note 60 *supra*.

<sup>67</sup> *Id.* EC 7-38.

<sup>68</sup> The ABA CANONS OF PROFESSIONAL ETHICS were adopted in 1908 and remained in effect until they were replaced by the Model Code in 1970. They are reprinted in T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY, 1981 Selected Standards Supplement 461-71 (2d ed. 1981) [hereafter MORGAN & ROTUNDA].

<sup>69</sup> ABA CANONS OF PROFESSIONAL ETHICS, note 68 *supra*, Canon 25.

<sup>70</sup> This is especially true in California, which has not adopted the MODEL CODE. *But see* note 59 *supra*.

<sup>71</sup> MODEL CODE, note 60 *supra*, DR 7-106(C)(5).

<sup>72</sup> That rule's heading, "Trial Conduct," suggests that it governs only in-court proceedings. While it seems unlikely that a court would construe it so narrowly, such an interpretation is consistent with the purpose of entry of default. *See* notes 33-41 and accompanying text *supra*. It is also supported by the commentary to DR 7-106(C)(5) found in AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 354-55 (1979). Two cases are cited in that commentary, both dealing with notice to opposing counsel of an in-court proceeding. Also cited is an ABA informal ethics opinion regarding notice of intent to cite an unreported opinion to a court.

<sup>73</sup> MODEL CODE, note 60 *supra*, DR 7-101(A)(1) and (B)(1).

<sup>74</sup> *Id.* DR 7-101(A)(1).

<sup>75</sup> *Id.* DR 7-101(B)(1). And, given the current judicial attitude toward defaults, DR 7-102(A)(1) may apply as well. That rule requires that a lawyer not "assert a position, . . . or take other action on behalf of his client when he knows or when it is obvious

"to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued."<sup>76</sup>

There are two difficulties with citing these ethical norms and disciplinary rules as support for liberal local customs regarding untimely answers. First, their language is qualified. Ethical Consideration 7-38 of the ABA's Model Code, for example, states that a lawyer should punctually fulfill all professional commitments.<sup>77</sup> It holds no comfort for an untimely defendant. Disciplinary Rule 7-101(A)(1) requires that a lawyer not prejudice the rights of his client.<sup>78</sup> Thus, it would be a violation of this rule not to pursue a default to which a plaintiff is entitled, because to agree to trial once the defendant was in default would prejudice the plaintiff's rights. By this reasoning, except in cases where extreme unfairness would result, it should be impermissible to waive or fail to assert the right to default when it arises.<sup>79</sup>

Second, the various norms and rules juxtapose the duty to advance the interests of a client against the admonition to behave courteously toward fellow members of the bar. The conflict is hidden in Disciplinary Rule 7-101(A)(1), quoted above as authority for liberality.<sup>80</sup> That rule begins with the statement that a lawyer must "seek the lawful objectives of his client through reasonably available means permitted by law,"<sup>81</sup> but quickly limits the means to those allowed by the disciplinary rules, and further qualifies them with the "professional judgment" exception.<sup>82</sup> The conflict is clear, however, in the code of conduct proposed by The American Trial Lawyer's Foundation.<sup>83</sup> That code sug-

that such action would serve merely to harass . . . another." *Contra* EC 7-4:

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

<sup>76</sup> MODEL RULES OF PROFESSIONAL CONDUCT comment to Rule 1.3 (Proposed Final Draft 1981), reprinted in MORGAN & ROTUNDA, note 68 *supra*, at 67-303.

<sup>77</sup> MODEL CODE, note 60 *supra*, EC 7-38.

<sup>78</sup> *Id.* DR 7-101(A)(1).

<sup>79</sup> *Contra* MODEL CODE, note 60 *supra*, DR 7-101(B)(1).

<sup>80</sup> See notes 74-75 and accompanying text *supra*.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> THE AMERICAN LAWYER'S CODE OF CONDUCT (American Trial Lawyers Foundation Discussion Draft 1980). Reprinted in MORGAN & ROTUNDA, NOTE 68, *supra*,

gests that a lawyer should give "undivided fidelity to the client's interest as perceived by the client, unaffected by any interest of the lawyer . . . or by the lawyer's perception of the public interest."<sup>84</sup> Further, it states that "[a] lawyer shall use all legal means that are consistent with the retainer agreement, and reasonably available, to advance the client's interests as the client perceives them."<sup>85</sup> By these standards, the lawyer's concern for his reputation among his colleagues should not enter into the decision to pursue a default. If the client's interests *as the client perceives them* require that the attorney be a "sharp practitioner," that is where the attorney's duty lies.

This position has been even more clearly stated. A lawyer has "the choice of representing his client fully within the bounds set by the law or of telling his client that he cannot do so, so that the client may obtain another attorney if he wishes."<sup>86</sup> Or, to paraphrase Henry Drinker, such procedures as the default and default judgment are deliberately offered by the law, and it is the client's privilege to avail himself of them:<sup>87</sup>

In a case in which their assertion would produce flagrant injustice, the lawyer may, of course, . . . withdraw from [the case] if this is possible without impairing the client's right, but while in the case he must advise the client of the availability of such [procedures] and if, despite his admonition, the client insists, assert and make them effective.<sup>88</sup>

Local customs of liberality in response to untimely pleadings may be faulted on other grounds as well. Most obviously they violate Section 412.20's clear thirty day limit, not to mention ethical canons and rules requiring punctuality.<sup>89</sup> Also, they strain tort principles regarding reasonableness of custom. Prosser defines custom as an "indication of what the community regards as proper."<sup>90</sup> As already noted,<sup>91</sup> the relevant community here is not the legal community, but the community of plaintiffs. Even if the relevant community did comprise lawyers, its custom should not be honored where it

arise[s] from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence.

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at 304-39.

<sup>84</sup> *Id.* Rule 2.1.

<sup>85</sup> *Id.* Rule 3.1.

<sup>86</sup> Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 582 (1961).

<sup>87</sup> See H. DRINKER, note 63 *supra*, at 149.

<sup>88</sup> *Id.*

<sup>89</sup> See note 77 and accompanying text *supra*.

<sup>90</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 166 (4th ed. 1971).

<sup>91</sup> See text accompanying notes 84-85 *supra*, and text following note 85 *supra*.

There can certainly be such a thing as customary negligence . . . .

Even an entire [profession], by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard.<sup>92</sup>

Judicial refusal to sanction a custom developed largely for the convenience and congeniality of the bar would eliminate the conflict within the ethical standards and disciplinary rules. Attorneys then would be constrained only by their own consciences in pursuing defaults whenever circumstances and their duty to their clients require it. An attorney's options would be clear: either he should state his position to a potential client at the outset or, should his conscience conflict with his duty to his client, his conscience should give way if he cannot withdraw without prejudicing his client's right to seek default and default judgment.<sup>93</sup>

## V. THE JURISPRUDENTIAL PERSPECTIVE

Present default practice is also flawed from a jurisprudential standpoint. The flaws, however, are only partly intrinsic to the nature of that practice: they arise also from what has been widely recognized as a "legal explosion" affecting courts nationwide.<sup>94</sup>

Courts ultimately rely on public respect in order to maintain their power and efficacy.<sup>95</sup> Maintaining public respect requires that courts continue to perform their dispute resolving function not only wisely but

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<sup>92</sup> W. PROSSER, note 90 *supra*, at 167; see also CICERO, *LAWS*, Book I, reprinted in *THE GREAT LEGAL PHILOSOPHERS* 47 (C. Morris ed. 1959) ("the most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations").

<sup>93</sup> See text accompanying note 78 *supra*.

<sup>94</sup> J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 5 (1981). This explosion is correlated with the demise of the requirement of "strong proof that the defendant directly injured the plaintiff in a palpably physical or financial way." *Id.* at 3. Lieberman attributes the rise in civil filings to a greater number of actions in federal courts which "has been out of all proportion to any growth in population and reflects the outpouring of congressional enactments from the mid-1960s . . . ." *Id.* at 6.

The situation in California courts has worsened as well, where a record 740,500 superior court cases were filed in 1978-79. *JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS* 65 (1980). In selected California superior courts accounting for 90 percent of all civil filings in the state, calendars increased for the fifth consecutive year in 1978-79. *Id.* at 78-82. In only 20 percent of the courts studied did the average jury case reach trial within one year of the filing of the at-issue memorandum. *Id.* at 85.

<sup>95</sup> R. POUND, *SOCIAL CONTROL THROUGH LAW* 20 (1942).

efficiently.<sup>96</sup> Continued efficiency, in turn, requires increased attention to case management.<sup>97</sup> The Federal Justice Center, in its studies of delay in the federal courts, has concluded that “[t]imely filing of the answer is a precondition to subsequent judicial case management.”<sup>98</sup> The Center suggests that to encourage timely filings, cases need close monitoring for non-compliance.<sup>99</sup> However, a simpler solution exists. It is entirely consistent with the nature of the adversary system to encourage, as a matter of policy, monitoring of untimely answers by plaintiff’s attorneys. Not only would self-interest motivate a closer watch than courts would keep, it would relieve courts of some additional burden at a time when their resources are already strained.

A corollary, if not a cause, of late answers contributing to delay and congestion is what has been termed the “local legal culture.”<sup>100</sup> “[B]oth speed [of disposition] and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys.”<sup>101</sup> Just as effective case management begins with encouragement of timely answers, so does changing local attitudes properly begin with a reversal of the notion that “moving for default is

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<sup>96</sup> *Id.* Pound states:

[T]he legal order goes on, whatever may be the basis of whatever rightful authority it has, and I submit it has kept and holds an actual authority because it performs, and performs well, its task of reconciling and harmonizing the conflicting and overlapping human demands and so maintains a social order in which we may maintain and further civilization. So long as it does this well there will be the habit of obedience that makes practicable the employment of force upon those who require it.

*Id.* at 53-54. And, it has been noted that willingness to utilize the judicial process is “a clarion of social health. For the willingness to go to court is a sign that we are not going to the streets — the court of last resort.” J. LIEBERMAN, note 94 *supra*, at 5; see also T. CHURCH, JR., A. CARLSON, J. LEE, T. TAN, JUSTICE DELAYED 1-2 (1978) (hereafter JUSTICE DELAYED) (the public has great concern about court delay, and places great value on speedy disposition of cases).

<sup>97</sup> See generally L. SIPES, MANAGING TO REDUCE DELAY (1980); JUSTICE DELAYED, note 96 *supra*, at 1-2.

<sup>98</sup> S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 21 (1971).

<sup>99</sup> *Id.*

<sup>100</sup> JUSTICE DELAYED, note 96 *supra*, at 54-55.

<sup>101</sup> *Id.* at 54; see also U.S. DEPT. OF JUSTICE, PROCEEDINGS OF THE ATTORNEY GENERAL’S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 3 (May 21-22, 1956) (remarks of the Honorable Herbert L. Brownell, Jr., Attorney General of the United States: “We have come to expect delays, to take them for granted, and to resign ourselves to them. . . . Some lawyers and judges have become accustomed to a *modus operandi* which takes delay into account”).

considered ungentlemanly."<sup>102</sup>

Clear precedent for strict adherence to the thirty day filing limit exists in the strict approach taken to statutes of limitation and the time limit for filing notice of appeal.<sup>103</sup> Whether a potential plaintiff locks himself out of court by failing to file his complaint in time, or a defendant, having had a day in court, exhausts the patience of the appellate tribunal by delaying his appeal, courts rarely grant relief.<sup>104</sup> Cutoff of a right to appeal may be distinguished on the ground that the litigant is never deprived of a day in court. However, as with the statute of limitations, the issue is not properly whether the litigant had a day in court, but whether the *opportunity* existed for a day in court. The law is not solicitous of a person who squanders the right to sue or to appeal; neither should it be solicitous of a defendant who squanders the opportunity provided to answer a complaint. Furthermore, the right of a particular defendant to a day in court increasingly must be weighed against the right of every other litigant to obtain judicial relief. Section 412.20 of the Code of Civil Procedure strikes what the California Legislature considers to be an appropriate balance by establishing certain requirements which litigants must meet if they wish to avail themselves of the judicial process. Judicial policy ought to honor, rather than frustrate, the legislative purpose in this respect.

#### CONCLUSION

While California courts have glossed over the problem of untimely filings for more than 120 years, their approach is supported neither by

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<sup>102</sup> S. FLANDERS, note 98 *supra*, at 71.

<sup>103</sup> See, e.g., *McGuinness v. Motor Trend Magazine*, 129 Cal. App. 3d 59, 180 Cal. Rptr. 784 (2d Dist. 1982) (complaint for libel barred by statute of limitations because it was filed one year and four days after the cause of action arose, irrespective of when plaintiff discovered the libel); *Rolen v. Rhine*, 117 Cal. App. 3d 23, 172 Cal. Rptr. 456 (3d Dist. 1981) (appeal dismissed because notice was filed eleven days late); *People v. Pacini*, 120 Cal. App. 3d 877, 174 Cal. Rptr. 820 (3d Dist. 1981) (it was beyond the trial court's jurisdiction to entertain an untimely petition to extend the term of the defendant's commitment to an asylum, since the purpose of the statute limiting the time was to benefit the defendant); *Edginton v. County of San Diego*, 118 Cal. App. 3d 39, 173 Cal. Rptr. 225 (4th Dist. 1981) (complaint filed one day after expiration of statutory period for appeal from denial of administrative remedy barred because it was untimely).

<sup>104</sup> See note 103 *supra*. Pound justifies such results on the ground that "[a] legal system attains the end of the legal order, or at any rate strives to do so, by recognizing certain . . . interests, by defining the limits within which those interests shall be recognized and given effect . . . and by endeavoring to secure the interests so recognized within defined limits." R. POUND, note 95 *supra*, at 65.

sound reasoning nor by statute. Nor has their approach, in its tolerance of sloppy legal practice, been consistent with the ethical norms and rules by which lawyers have chosen to govern themselves. Finally, in a day when courts are increasingly crowded, it is administrative foolishness to accept routine delay at the outset of the judicial process.

The solution is simple and clear: the courts should strictly adhere to the legislatively mandated procedures regarding filing answers and obtaining default. Prudence Plaintiff's request for entry of default should be honored from the first moment that Dottie Defendant's time to answer has expired.<sup>105</sup> Dottie's untimely filings should not be recognized except in the context of a motion for relief from the consequences of her own delay. In this way the courts can give effect to the spirit, as well as the letter of the law.

*Ryan L. Werner*

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<sup>105</sup> See text accompanying notes 1-2 *supra*.