

Memorandum No. 4

As I have indicated in another memorandum, it is now necessary to appoint research consultants for several of the Topics which have been approved for study by the commission. This raises several problems which are set forth in this memorandum and which I think the commission should discuss and decide at the June 25 meeting.

1. Who shall have responsibility for selecting research consultants?

One method would be to delegate this matter to the Chairman and/or the Executive Secretary by means of a resolution authorizing the Chairman and/or Executive Secretary to appoint qualified research consultants at honoraria not to exceed X amount whenever in his (their) judgment the services of such consultants are necessary. Another method would be to reserve this matter to the commission as a whole. In the latter event, I could furnish the commission with the names of several possible consultants for each Topic together with information as to their qualifications; after the matter were discussed a resolution could be adopted authorizing the Chairman and/or Executive Secretary to contract with A or B or C to do the particular job for an honorarium not to exceed X amount. A third possibility would be to have a committee appointed with authority to act or to make recommendations to the commission.

2. What matters should be covered in the contract with the research consultant?

I have drafted a hypothetical contract to serve as a form to be used, with appropriate modifications, in specific cases. A copy is attached hereto. I sent the contract to Ralph Kleps earlier under cover of a letter, a copy of which is also attached. The letter explains some elements in the contract and raises several questions about it.

3. How is the compensation to be paid to research consultants to be determined? This is the matter which I find most difficult in approaching the matter of hiring consultants. Some of the questions involved are these:

A. Should we take the attitude that the work is partly a public service and is, therefore, not to be paid for at a fair professional rate for an expert of the consultants' qualifications? Depending on our answer to this question, what rate of compensation on an hourly basis shall we set as an average figure -- e.g., \$5, \$10, \$20?

B. Should we contract to pay a lump sum or on an hourly basis? It seems to me that the former is the better method so far as our planning is concerned. I have had in mind as the procedure to be followed that we should try to estimate, in conjunction with the consultant, the probable number of hours which the work will take (including time spent in traveling and discussions), multiply this figure by some hourly rate, add an amount to cover typing expense, and thus determine a lump sum figure with both parties taking the risk of loss of the difference between this sum and whatever an hourly rate contract would work out to be. I think that the ~~commission~~ commission will win oftener than it will lose under such an arrangement because most people tend to underestimate how long a given job will take. Or we might do what we did in Professor Basye's case -- in effect, we contracted to pay him on an hourly rate basis (\$5), with a minimum of \$750 and a maximum of \$1000. I think that we would ordinarily end up paying the maximum under such an arrangement, as we did to Professor Basye.

4. What kind of study and report do we wish the research consultants to make? (This question is also relevant to the studies and reports which Mrs. Nordby and I will make).

No doubt the studies and reports will vary considerably from case to case.

Nonoverlapping
vs
compensation

Nevertheless, we should probably develop some fairly specific ideas concerning the general scope of, and elements to be included in, a typical study and report so that we can give our research consultants some guidance as to what is expected. Here are some ideas which may serve to start this discussion.

A. Preliminarily, I think we should consider whether we want to strive for as elaborate a job as has been done by the research consultants to the New York Commission. On the average their reports have been very detailed and fully documented -- on the order of a first rate law review article. Interestingly enough, the legislators do not see these studies -- they are published after the session (but any legislator is given a mimeographed copy on request). Our experience at the 1955 Session would suggest that even if the Members were given the report in advance they would not be likely to read it, although this might be less true if the reports were published well in advance of the Session. This may suggest some doubt that the elaborate New York studies serve any practical purpose other than as a contribution to legal literature. On the other hand, their justification may be that they are needed to inform the members of the commission adequately. In any case, Professor Basye's report on our summary probate assignment did not approach the New York reports in detail and we ought to decide whether we will be satisfied with about what he did or want something better. Presumably, we will have to pay proportionately more for more elaborate reports.

B. I assume that the study and report should in all cases cover all California authority thoroughly. In Professor Basye's study he stated the purport of the California law and cited cases which he found to support his statements. He did not state the facts of the cases, discuss them individually, or quote from them. Is this form of report satisfactory?

C. In most instances it would add considerably to the quality of a study and report if the law of other jurisdictions on the same subject were researched and

analyzed. Should this be done as a matter of course or only in cases where such data would seem to be of unusual importance?

D. I suppose we will want the consultant to discuss and analyze the various policy considerations, pro and con, which are relevant to the Topic but not to indicate his own views on the matter since this is the function of the committee assigned to the study in the first instance and ultimately of the commission.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

June 10, 1955

Mr. Ralph N. Kleps
3021 State Capitol
Sacramento 14, California

Dear Ralph:

Now that the session is over and the commission has an agenda on which to work, I am turning my attention to the matter of lining up research consultants for several of the topics. I think it would be desirable to work out a form of contract with such consultants to be used with appropriate modifications to fit specific cases. I enclose a draft of a hypothetical form contract. I would appreciate it if you and Charlie Johnson would look it over with a view to giving me any suggestions which you may have. If you and Charlie think it advisable, I would appreciate it if you would show the contract to the people in the Department of Finance and the State Personnel Board to see whether it meets with their approval.

The following are comments on specific parts of the hypothetical contract:

1) The recitals are included pursuant to an idea which you and I discussed some time ago and are for the purpose of establishing the necessity for hiring an expert and the experts' qualifications. Do you think that this is a good idea and, if so, that the form in which it is done in the contract is satisfactory?

2) I have included in the subparagraph numbered 4 on page 2 of the contract a provision for reimbursing the travel expenses of the Contractor. The budget includes an item for this purpose. I am not clear whether a claim for reimbursement would be made on a regular State form since the Contractor is not a regular State employee. I would be happy to have any comments you might wish to make concerning this provision for travel expense reimbursement.

3) The provision for withholding 10% of the Contractor's compensation (subparagraph 7) is included because of my apprehension that the Department of Finance would not approve a provision for the payment of the entire compensation when the Contractor would still be under an obligation to attend meetings of the commission or its committees or a Legislative committee. Do you think that it is unnecessary to make this provision and that the department would approve payment of the entire sum when the commission has accepted the Contractor's written report?

Please feel free to make any comments and criticisms which may occur to you concerning matters which are either included in or omitted from the contract. I may say that it seems to me to be somewhat more legalistic

a document than might be deemed appropriate for this purpose. I have drafted it in this form in large part because it seemed to me that it might be necessary in order to secure the approval of the Department of Finance and the State Personnel Board. I would be interested in your comments on this.

I intend to put down on the agenda for the June 25 meeting a discussion of the form of the research consultants' contracts. Charlie can present at that time your ideas and his own on the subject. Of course, I would be happy to have an expression of your views before that time as well.

Sincerely,

John R. McDonough, Jr.

JRM:li
Enc.

cc: Thomas E. Stanton, Jr.

STATE OF NEW YORK
LAW REVISION COMMISSION
Ithaca, N. Y.
June 21, 1955

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Professor McDonough:

Mr. MacDonald will be abroad for several weeks. He will see your letter on his return, but perhaps in the meantime you would like to have from me answers to your questions before your June 25th meeting.

First, as to your numbered questions:

1. We do not attempt to work out a basis of compensation commensurate with what a research consultant would receive for like services in the practice of law - e.g., in working up materials for an opinion to counsel, or to a business organization that could or would require for a project the careful and detailed analysis we expect. Quite possibly the compensation we pay would conform with the return in royalties that might be expected from a published treatise -- or for the proportion of royalties on a book corresponding to the work on a segment of it roughly equal in quantity to the study the Consultant does. At any rate, that is a closer standard of comparison. Approaching it from the other end, the honorarium does constitute some monetary compensation for a kind of work more frequently done, without any monetary compensation, in the way of law review articles. Since most of our Consultants are law teachers, the inducement lies partly in the benefits from publication. Most of our Consultants have regarded their studies for the Commission as being in that category. Some, including a few who are not law teachers, have, I believe, thought of it in something of the same light as work for a bar association committee, or the American Law Institute. In addition to the public service aspect, there is also some element of prestige.

In some cases -- I am thinking particularly of one very good consultant -- the consultant will be willing to work for an honorarium within our range because she is interested only in occasional and part-time work. We could not pay her the equivalent of the salary she could command in a big office, but the honorarium we pay does represent for her an inducement to do a study for us rather than some other piece job that might be available.

2. In fixing compensation we do not attempt any specific estimate of the number of hours the study will take. I think in some cases some of our Consultants who were especially familiar with the problem they were undertaking have made a fairly close estimate, in deciding whether they would accept. From our point of view, the approach is rather one of allocating our available budget. The factors that enter into the fixing of the honorarium are,

- (1) What are the topics we want to study in a particular year?
- (2) How they range in
 - (a) importance, i.e., as a significant law reform if they do work out to a proposal;
 - (b) size in terms of the quantity of data we think will have to be covered;
 - (c) the degree of expertise and judgment we think will be needed in collecting and presenting all pertinent data, and the extent to which the views of the Consultant as an expert will be needed;
 - (d) tie-in with other things we have done or may do;
 - (e) availability of someone who qualifies as an expert with specific reference to the particular problem;
- (3) What proportions of our budget for consultant service will be absorbed by important topics (not necessarily the largest) that are clearly indicated for study in that year;
- (4) What we have paid the particular consultant for other studies;
- (5) What we have paid or plan to pay other consultants for studies that look, from the preliminary analysis, comparable to the one in question;
- (6) To what extent, so far as we can anticipate, the particular consultant is himself sufficiently interested in the particular question that he will want to undertake it for his own satisfaction;
- (7) How high up in the scale of eminent experts the consultant is.

3. The compensation has not actually been a matter of bargaining in more than a half-dozen instances that I can think of, off-hand. The procedure is first to arrive at an estimate of what we think we can pay for the job, and will be acceptable to the Consultant. This is done substantially at one time for everything on the list of topics we plan to study that year. Then letters are written to each of the prospective consultants, describing the project and asking them whether they would be willing to undertake the job for that honorarium, and saying that if the prospective consultant agrees, he will be recommended to the Commission at that honorarium. The letter is accompanied by a copy of the original project suggestion and the excerpt from the project report. The letter also summarizes any discussion of the Projects Meeting that may have defined the project further, and if it is related to any other study we have made, or anything else on our calendar, the letter refers to them and attempts to indicate what then seems to be the relation of the new study. In some cases where a topic has been on our calendar, there is some accumulation of data on it, and the letter attempts also to present that. In some cases the letter has attempted

to identify specific elements of the problem. In no case, however, is this letter a limitation on the treatment to be given when the study is made. If the Consultant accepts, the nomination is presented to the Commission. In a few cases the prospective Consultant has replied that he would need to have a somewhat larger honorarium. I do not now recall whether there was ever a case where it was decided that we could not manage the further amount. I do recall that in several cases, the honorarium has been authorized for the larger amount.

In addition to these instances, there has been what might be called "negotiation" in some cases on the matter of research assistance and of stenographic services. In several cases, we have offered, along with the honorarium, a small flat sum in addition for research services for the Consultant, or the services of a member of our staff, or we have undertaken to pay directly as a temporary staff member, on an hourly rate, a student assistant selected and supervised by the Consultant. This is a useful method of making the remuneration more flexible, especially in cases when it is difficult to predict just how much library research will be needed on a particular job.

Typing is strictly a matter of negotiation. We would very much like to have in every case a typewritten manuscript such as your contract calls for. In some cases, however, we have offered to pay disbursements for typing, or have accepted longhand manuscripts. It is, surprisingly, a determining factor in some cases.

I think some Consultants like to have their research assistance and typing service furnished from staff, as it saves them clerical work on tax withholding, social security reports, etc. On the other hand, some Consultants are accustomed to hiring student help and typing service for other work, and take it for granted they will do the same in our studies.

I believe my reply to question 3 carries the suggestion that assumption of the cost of research assistance, in one way or another, may be a useful way of getting the services of the particular Consultant you want at a fairly modest honorarium for himself. Perhaps my answer to question 3 suggests that if you go outside the teaching field for a Consultant, you will perhaps need to find someone who has a special reason for contributing high value legal talent at a low remuneration. We have had good experience in four categories:

- (1) a practicing lawyer really expert in the field who will do a single job because he thinks it is important and he can afford to make the contribution to public service;
- (2) a practicing lawyer of moderate expertise in the general field, who will take on a single job because he is interested in making himself the expert in that particular problem, and in the prestige he hopes will accrue;
- (3) a young, but not too recently graduated lawyer, who is just beginning to establish his own practice in a small town, after some big office experience. You will not be able to get them more than once or twice, if they are as good as they should be for the kind of work you want.

- (4) women lawyers, who, being wives and mothers, are not in active practice or available for salaried jobs commensurate with their abilities, but will undertake a research job.

Your Civil Service rules may limit you to the first category.

One thing I should mention is the question of reviewing adequacy of the honorarium if the study as it develops proves to be more than was anticipated. This can also work the other way. On one occasion, the Consultant demonstrated in a very brief memorandum that the project would not work out as contemplated, and, when we arranged for him to study another topic instead, the original honorarium on the first one was, I believe, reduced.

There is a lower limit to the amount that can be offered, even on quite small problems. However, we have sometimes offered a combined honorarium for two small and unrelated topics.

I have some hesitancy in answering your question following the numbered questions. However, I should say that it would be incorrect to say that Commission approval is a formality in any sense. The initiative Mr. MacDonald takes is predicated on a long experience. The situation is not that the Commission delegates to him the substantial matter of selecting Consultants and allocating our consultant budget; it is rather that Mr. MacDonald is able in general to anticipate what the judgment of the Commission will be in the particular cases. A great many of the Consultants we have had have made several studies for the Commission, and the Commissioners are acquainted with their abilities. In every case when a Consultant is nominated for the first time, the nominating letter contains a fairly detailed statement of the prospective Consultant's background. Where the reason is not obvious to the Commissioners because of their acquaintance with the Consultant, the letter does explain why Mr. MacDonald proposes him for the particular study. I believe that Mr. MacDonald also discusses the possible nominees for Consultants informally with the Commissioners before he writes asking whether they are interested in taking the assignment. In a number of cases, the availability of a Consultant for a particular study is discussed when the topic is placed on the Immediate Study List at the Projects Meeting. I know that individual members of the Commission have at times brought up the name of a possible Consultant. It is also my understanding that specific allocations of the Consultant budget to particular topics enters into the discussions of budget matters generally.

The recitals in your proposed contract suggest to me two limitations that do not apply in our employment of Consultants. I gather that they are unavoidable for you, but I should point out how they would preclude use of our procedures. First, the first "whereas" and the "Now therefore" clause both contain a fairly concrete description of the specific legislation that might result from the study. Under these terms, the conclusion to be drawn from the study would be "yes" or "no" for a specific proposal. If Assembly

Concurrent Resolution No. 82 was framed in those terms, I assume the Commission itself is limited to a recommendation in those terms. However, does A.C.R. No. 82 mean that you can not, in order to prepare yourselves for a recommendation in those terms, expend funds for a broader and less explicitly stated study?

There have been many occasions when our studies could have been formulated in similar terms. However, they almost never are. As you know, the caption we give the projects in the Calendar is usually a mere reference to the subject matter. Within the limits that may be laid down by the Commission itself in discussion at the Projects Meeting, or subsequently by the Committee and the Commission as the study progresses, we expect the Consultant himself to find out and report just what is involved in the study, using the project suggestion and report, and the letter of invitation and accompanying data as a starting point and general frame of reference. He may arrive at a more specific delineation by a "preliminary" Committee Meeting, or short of that, he may check with Mr. MacDonald or me by correspondence or conference to see whether we concur with his view as to scope and points of coverage. We ask him to formulate his concrete recommendations, as a part of the study, but the nature of what his recommendation might be is never circumscribed in any sense that his contract defines it. Requests for his specific recommendation on any single point are an element of supervision of the study by the Committee, and in some cases by Mr. MacDonald or by me in anticipation of what we believe the Committee will want.

We also have had a number of broadly exploratory studies, designed to find out what, if anything, should be studied specifically.

My concrete suggestion as to this first point is that it would be advantageous in the long run if you could make the "Now therefore" clause tie up with the second "Whereas", rather than the first.

I assume you do not want to put into the formal contract any specification of the specific points you want covered, and this aspect comes under points 1 and 5 of the Contract. However, you may want to have an understanding at the outset that the Consultant is going to report broadly on third-party procedure, including but not limited to the operation in the decisions of the present rules, the definition of "indispensable" parties, the related operation of other procedural devices, the constitutional and existing statutory limits in getting personal jurisdiction, etc. -- whatever you think is especially significant for the problem as you have it in California.

It occurs to me also that if you define the study your Consultant is to make in the concrete terms of the contemplated Report of the Commission itself you add one more factor to the difficult problem of maintaining a distinction between the research study made for the Commission and the Commission's report based on its consideration of that study.

Second, the second and third recitals set up a criterion of "expertness". As you know, many of our studies have been done by Consultants who were "recognized experts" before they undertook the work, and there is no doubt that expertness is necessary for some topics and a status of general recognition of the Consultants as experts is a good thing until the Commission's own work acquires such recognition that reliability of the studies will be generally assumed. On the other hand, some of our very good studies have

been done by people who did not qualify as recognized experts before the study, although they may have become experts in the course of the study and acquired general recognition through publication of the study. We have been able to use Consultants on this basis as well as staff members, the Consultant status importing an independent contractor basis of employment. Of course, our staff employments are not on Civil Service either. Not knowing exactly what your civil service regulations require, I cannot offer any suggestions on this, but I should point out that you may not be able to draw Consultant service from as wide a field as we do.

I mentioned the question of submission of reports in typewritten form, and the expense of clerical and stenographic services above. I also mentioned the possibility of treating expense of research assistants as a compensable disbursement, or furnishing it from staff.

As to point (4) of the Contract, we have never asked our Consultants to attend any legislative hearings. As a matter of fact I do not believe that such attendance has ever been suggested. My personal feeling is that to bring the Consultant before the Legislature to explain a statute or even to answer questions would subvert the Commission's position that it makes the Recommendation, having considered the Consultant's report. I have a recollection of hearing that the practice of the Massachusetts Judicial Council is different on this, although I may be wrong. A lot may depend on the practices of legislative committees in a particular legislature; if they ask to hear the Consultant, it cannot very well be refused.

In New York, vouchers for travel expenses for Consultants go in and are paid under the Rules of the Comptroller, in the same manner as for employees. I am not clear as to whether your language "on a scale commensurate" implies something different.

(5) The clause requiring Consultant to revise and supplement his study seems like a good idea; do you think you would also like to have a clause under which you reserve the right to do some editing yourselves? That editing could, of course, be worked out under Clause (5) as you have it. As a matter of fact, some of the editing I do is a short-cut to asking the Consultant to revise according to particular instructions and then considering whether the revision is adequate.

(6) The express provision for modification of the contract is a good thing. I think the possibility of such a modification is understood in our employments, and there have been modifications in several instances. Would any modification have to be set up as a formal contract as well? The provision that nothing is payable until acceptance of the Report may be a desirable safeguard until you get to know just what your Consultants will do. However, it may be a difficulty when you have a long study. Also some Consultants may not be happy about being out of pocket for research assistance and typing costs for that long.

I hope these comments will be useful.

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I know that Mr. MacDonald will be interested to know of your experience in your first legislative year, as I was. If you have your agenda set up in mimeograph or other distributable form, we would be glad to see it. As you know, we are still working on the Uniform Commercial Code this year, but we are looking forward to a return to our regular work next year.

Sincerely yours,

s/ Laura T. Mulvaney

Laura T. Mulvaney
Assistant to the
Director of Research

LTM:to