

Memorandum No. 7

Subject: Study No. 7 - Retention  
of Venue.

We have redone the report on the Venue study to "de-slant" it, in accordance with the request of the Commission. A copy of the revised report will be sent to you shortly. We will also send at the same time, as a separate item, a statement entitled "Author's Analysis of Policy Questions Presented" which is believed to contain all of the opinion which was scattered through the original report. This statement can either remain separate or it could be incorporated in the revised report just before the section thereof entitled "Methods of Changing the Law to Avoid the Transfer-Retransfer Procedure". The latter would be preferable if the statement is not too slanted to permit it because it provides background analysis for some of the discussion in the "Methods of Changing, etc." part of the report.

Prior to the last meeting we sent you a memorandum on the Venue study which included a proposed draft of the Commission's Report and Recommendations to the Legislature relating to this study. This memorandum was not reached at the November meeting. A copy of it is, accordingly, attached hereto.

If time permits, it would be desirable for the Commission to consider at the January meeting the second draft of the report, the attached memorandum, and the proposed draft of its Report and Recommendation to the Legislature.

Respectfully submitted,

John R. McDonough, Jr.  
Executive Secretary

DEC 30 1935

Memorandum

Subject: Venue Study

As I have reported to you, the Southern Committee considered the staff report on the Venue study at its meeting on October 22 and recommended its acceptance by the Commission. The Committee also recommended that the Commission recommend the fourth proposed revision of Code of Civil Procedure Section 396b (pp. 34-35 of the staff report) to the Legislature and that it recommend a parallel revision of Code of Civil Procedure Section 397(3) which governs change of venue for convenience of witnesses.

We have prepared a draft of a Report and Recommendation by the Commission to the Legislature, a copy of which is attached. Several questions are presented:

1. We have bracketed some material because we are in doubt as to whether it should be included. Some of these doubts we referred to below; others will be explained at the meeting.

2. Is the general form of the report - Findings, Recommendations, Proposed Revisions - acceptable? In lieu of the first of these we could use a different title, omit the numbers, and cast some of the paragraphs in the form "The Commission believes ..." (see, e.g., paragraphs 4, 5 and 6).

3. You will note that the proposed revision covers both Section 396b and Section 397(3) of the code and that it combines the revisions of Section 396b proposed in both the third and fourth revisions suggested in the staff report. Bringing in the third proposed revision departs from the Committee's recommendation. Our thought is that a method should be devised to enable the court to put pressure on the defendant to make a disclosure of the issues he intends to raise before his answer is filed. The "unless

clause" in brackets is included to make it clear that the plaintiff's affidavits shall not control the pleadings and other documents in the case as to what the issues are; it is bracketed because (a) it may not be necessary because no court would think that the affidavit would control and (b) it may be desirable to permit the affidavit to control, (this assumes, contrary to (a) that it would) so that for the purpose of the motion, the issues shall be determined by the parties' affidavits only rather than by the pleadings and other documents which may formally frame issues that the parties do not seriously intend to contest.

A couple of other matters:

First, the Chairman wishes the Commission to consider whether the staff study and the Commission's Recommendation and Report should, if adopted by the Commission at the November meeting, be immediately sent to the State Bar and other interested groups for their comment and criticism.

Second, at the Committee meeting Mr. Babbage called attention to the fact that witnesses are sometimes called on matters arising at the outset of the trial, such as restraining orders, injunctions, and writs and suggested that this might be adverted to in the study as an additional justification for abolishing the requirement that the answer be filed before a counter motion to retain venue for the convenience of witnesses can be heard because the convenience of such witnesses ought to be considered but this aspect of the case will be moot by the time the answer is filed. The Committee suggested that consideration be given to including this thought in the staff report.

There are no California cases which suggest that a court should consider the convenience of any witnesses other than those at the trial. This is probably due to the fact that because of the strict rule that a motion based on convenience of witnesses cannot be considered before answer, the question of convenience of witnesses at preliminary proceedings is usually moot by the time the motion comes on for hearing. However, even in the Federal cases which we have read, where the motion was decided prior to preliminary proceedings, there is no indication that the convenience of witnesses at those proceedings was considered. Moreover, in all of the considerable amount of material which was studied in preparing the staff report discussion was tacitly on the footing that the controlling factor is the convenience of the witnesses at the trial. If the convenience of witnesses at preliminary proceedings were to be considered, difficult questions would arise, such as whether the action should be held in or transferred to one court for pretrial matters and then transferred to another for trial if the respective witnesses and their residences are different. We think that getting into this matter would considerably complicate the study and suggest that it may be better to leave it alone. Thus, the proposed revision of sections 396b and 397(3) refer to witnesses "at the trial" but this language is bracketed to indicate that it should be omitted if the Commission decides that the convenience of other witnesses should also be considered.

Respectfully submitted,

John R. McDonough, Jr.  
Executive Secretary