April 23, 1957

Memorandum No. 3

Subject: S.B. 36 (Effective date new trial order)

As you know, we have been in communication with the State Bar for some time on this matter. The general state of affairs between us as of a week ago is summarized in a memorandum which we prepared for the April meeting of the Board of Governors, a copy of which is attached.

On Saturday, April 20, I met with the Board of Governors in Los Angeles and, with Chairman Stanton's approval, proposed certain amendments to S.B. 36, responsive to suggestions made by the CAJ. The Board approved the bill as proposed to be amended.

S.B. 36 has been amended and is set for hearing by the Senate Judiciary Committee on April 29. The Commission will have the opportunity to review these amendments at the meeting this Friday. I attach a document showing these amendments in strike-out and underline.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

att.

AMENDMENT OF S.B. 36

A motion for a new trial is determined within the meaning of this section when, within the applicable 60-day period, (1) an order ruling on the motion is first entered in either the temporary or the permanent minutes, provided that if the order is first entered in the temporary minutes it is subsequently entered in the permanent minutes not later than five days after the expiration of such 60-day period or (2) a written order ruling on the motion is signed by the judge, provided that the order is filed not later than five days after the expiration of such 60-day period. Such determination shall be effective even though the order directs that a written order be prepared, signed and filed.

April 11, 1957

Memorandum to the Board of Governors

of the State Bar

Re: Senate Bill No. 36

We have received several communications from the State Bar relating to this matter. The first was a September 6, 1956 report of the CAJ relating to a prior draft of a revision of Section 660 which the Commission had proposed. In light of the comments of the CAJ the Commission revised the earlier draft to the form in which the bill now appears.

We have a letter of March 25 from Mr. Hayes indicating that at its March meeting the Board of Governors approved certain views expressed by the Southern Section of the CAJ. It is our belief that the Southern Section view adopted by the Board of Governors was the view taken by that Section of the first statute proposed by the Commission and that the Board will, therefore, wish to reconsider the matter.

We are also in receipt of a copy of a memorandum to the Southern Section of the CAJ dated March 13, 1957. This memorandum comments on the revision of Code of Civil Procedure Section 660 which would be made by Senate Bill No. 36. The memorandum states that the last sentence of our proposed revision of Section 660, which reads "Such determination shall be effective even though the order directs that a written order be prepared, signed and filed", is "apt to be somewhat of a trap for the unwary". We do not know what the writer of the memorandum has in mind in making this statement. The last sentence is added to make it clear that in this respect the definitive event for purposes

of Section 660 is to be different from the definitive event for purposes of starting the time for the appeal to run under Rule 2(b) of the Rules on Appeal which provides "the date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order". Since we are interested in having as early an event as possible be a "determination" of the motion under Section 660 (whether this be the first entry in the temporary minutes as proposed by the Commission or entry in the permanent minutes as proposed by our research consultant and the Northern Section of CAJ) differentiation of Section 660 from Rule 2(b) of the Rules on Appeal on this point is necessary.

We have reviewed the revision of the Commission's revision of Section 660 which is proposed in the CAJ memorandum of March 13. Our comments on it are as follows:

(1) We think the term "any official minutes" is unclear. We know of no statute or decision referring to "official" minutes and we do not know whether this means the temporary minutes kept by the courtroom clerk or the permanent minutes kept in the county clerk's office or both.

(2) We do not understand the reason for the language "provided the signing and filing of any written order directed in any such minute order is filed on or before five (5) days after the expiration of such sixty (60) day period". This is presumably related to the view stated earlier in the memorandum that there is some kind of "trap" involved in the revision as we have drafted it.

(3) We are unable to see why a written order which has been signed by the judge within the sixty-day period should have to be filed within five days after the period expires. A signed order, which is routinely dated when signed, should be a sufficiently definite and provable event to satisfy the need for certainty; the condition subsequent of filing within five days in order to avoid an automatic denial of the motion under Section 660 is, we think, considerably more of a "trap for the unwary" than anything which appears in the Commission's revision.

(4) We do not see how there could be any basis for supposing that the proposed revision of Section 660 could have any effect with respect to when the time for appeal begins to run. Our proposed revision begins with the language "a motion for a new trial is determined within the meaning of this section when, etc." Moreover, the Commission's recommendation makes it clear that no effect with respect to appeal is intended.

It is our belief that the various proposals which have been made on this matter by the Southern Section of CAJ have made a more complicated matter out of the problem to which S.B. 36 is directed than is either necessary or desirable. The problem is simple enough as we see it: to clearly identify as constituting a "determination" of a motion for a new trial for the purpose of Section 660 relatively early events in the process of decision of the motion which are capable of proof by resort to a written record. The Commission gave careful consideration to the recommendation of its research consultant and of the Northern Section of CAJ that these events be entry in the permanent minutes in the case of an oral order and filing in the case of a written order. Undoubtedly a revision drafted in such terms would provide the maximum of certainty in the matter. The Commission believed, however, that if the statute

were so drafted, there would arise from time to time the situation that a judge would have acted definitively to grant a motion for a new trial but that his act would be rendered nugatory by the failure of some officer of the court to perform a ministerial duty within the sixty-day period; i.e., entry of an oral order in the permanent minutes or filing of a written order. This the Commission thought should be avoided if it were possible to do so without too great a sacrifice of certainty. The Commission believes that this can be achieved by providing that the oral order is effective when first entered in the minutes and that the written order is effective when signed. If a question is going to arise about these matters, it will arise within a reasonably short time after the 60-day period expires and the Commission believes that the events which it has selected are sufficiently definite to be susceptible of proof by such written records at such time.

The Commission recognizes, of course, that reasonable minds can differ as to where the balance should be struck between the desire for certainty and the desire to avoid an unintended denial of a motion by someone's failure to take certain mechanical steps to process the order after it is made. The Commission recognizes also that the important consideration is to make the rule clear; both Bench and Bar can undoubtedly work satisfactorily under either the rule proposed by the Commission or under the rule proposed by its research consultant and the Northern Section, although there will be some difficulty under the latter rule in those cases where the motion is ruled upon by a judge who sat on assignment and has returned to his home county at the time that he decides the matter. The Commission respectfully suggests, therefore, that the Board of Governors take either of two positions on this matter: (1) that it endorse the Commission's proposed revision; (2) that it endorse the view taken

by the Northern Section of CAJ and the Commission's research consultant. If the latter position were taken, it could be given effect by recommending that the word "permanent" be inserted before the word "minutes" on page 2, line 5, of S.B. 36 and that the words "and filed" be inserted after the word "judge" on page 2, line 6 of the bill.

If the Board of Governors should, however, favor in principle the "condition subsequent" view which has been taken throughout by the Southern Section of CAJ, i.e., that one event such as the signing of a written order be a "determination" if followed by another event, the filing of the order, we suggest that the Board consider proposing amendments to the bill which would accomplish this result in what we think would be a more straightforward way than has yet been proposed by the Southern Section. We suggest that the principle could best be given effect by recommending the following amendments of S.B. 36:

1. On page 2, line 5, after "minutes", insert "provided that the order is entered in the permanent minutes within five days after the power of the court to pass on the motion expires".

2. On page 2, line 6, after "judge" insert "provided that the order is filed within five days after the power of the court to pass on the motion expires".