April 23, 1957

Memorandum No. 4

Subject: S.B. 34 (Bringing in new parties).

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. 34, responsive to suggestions made by the CAJ. The Board approved the bill as proposed to be amended.

S.B. 34 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. 34

389. A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

A person who is not an indispensable party but whose joinder would enable the court to determine additional ~~claims~~ causes of action arising out of the transaction or occurence involved in the action is a conditionally necessary party.

When it appears that an indispensable party has not been joined, the court shall order a the party ~~to the action~~ asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all ~~claims~~ causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any ~~claim made~~ cause of action asserted ~~in the action~~ by a party whose failure to comply with the court's order is willful or negligent.

When it appears that a conditionally necessary party has not been joined, the court shall order a the party ~~to the action~~ asserting the cause of action to which he is conditionally necessary to bring him in, if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without prejudice any ~~claim made~~ cause of action asserted ~~in the action~~ by a party whose failure to comply with the court's order is willful or negligent.

Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed

and summons thereon issued and served.

~~When additional parties are brought into an action the court may order a severance of any claim made therein in accordance with Section 1048 of this code.~~

If, after additional parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials or make such other order as may be just.

April 11, 1957

Memorandum to the Board of Governors

of the State Bar

Re: Senate Bill No. 34

The Board of Governors has suggested that other language, such as "cause of action", be substituted for the word "claim" in the proposed revision of Section 389 of the Code of Civil Procedure which is set forth at lines 5 through 35 of page 2 of S.B. 34. We consider that the term "claim" is more appropriate than "cause of action" in the context of the proposed amendment of Section 389 and that the courts will not give the term any special or technical significance. We have no objection, however, to the substitution of another term for "claim", provided that the meaning of the section is not changed, but we suggest that the substitution of "cause of action" for "claim" would create an awkwardness of expression which should be avoided.

We have also received a copy of a memorandum to the Southern Section of CAJ, dated March 11, 1957, relating to S.B. 34. We understand that the recommendations in this memorandum were approved by the Southern Section. Our comment on the matters discussed in the memorandum is as follows:

1. It is true that in the Bank of California case the court said that both "necessary" and "indispensable" parties may be brought in under present Section 389. We believe, however, that the proposed revision of Section 389 is desirable for two reasons: (1) there are other cases in books which indicate that merely necessary parties cannot be brought in under Section 389 (See, e.g., Goldsworthy v. Dobbins, 110 Cal. App.2d 802, 243 P.2d 883 and other cases discussed at pp. M-11 - M-13 of Commission's report on this subject) and it is

not entirely clear whether all of these cases are overruled by the Bank of California case; (2) Section 389 ought to clearly state what the law is rather than be in apparent conflict, as it now is, with the recent decisions, such as the Bank of California case, interpreting it. In short, the Commission believes that it is desirable to codify what the Supreme Court said in the Bank of California case. This, indeed, is substantially what our proposed revision of Section 389 does.

2. We agree with the suggestion that the definition of "indispensable party" should include the case where the rights of one of the parties before the court may be seriously prejudiced if an absent party is not joined. We propose, therefore, to add the words "or would seriously prejudice any party before the court" after the word "parties" on page 2, line 7 of S.B. 34.

3. The Commission deliberately used the term "conditionally necessary" rather than "necessary" because we believe that it expresses more accurately than does "necessary" the difference between this type of party and the "indispensable" party. In ordinary speech the terms "indispensable" and "necessary" are very nearly synonymous and we believe that their use to describe the quite different categories of parties involved has been unfortunate and has been partly responsible for the considerable confusion in the decisions dealing with this general subject matter. The term "conditionally necessary" is taken from the New York Practice Act, as set forth at page M-14 of the Commission's recommendation and study on this matter.

4. It is true that the courts will have to determine whether the terms "indispensable" and "conditionally necessary" as used in revised Section 389 are different from the words "indispensable" and "necessary" as used in the Bank

of California case and other decisions. We believe, however, that the problem will not be a difficult one, the short answer being that "indispensable" in the statute means substantially what "indispensable" in the present decisions means and that "conditionally necessary" in the statute means substantially what "necessary" in the decisions means. In any event, the terms as used in the cases hardly have so precise and accurate a meaning that any departure therefrom would be a serious matter.

5. It is true that the statute authorizes the court to impose sanctions on a party who wilfully or negligently fails to comply with the court's order to bring in an indispensable or conditionally necessary party. The statute does not, however, state what party may be ordered to bring in another party, leaving this matter up to the court. It seems clear to us that the party so ordered would normally be the party who has asked the court to determine the controversy. Thus, we see no difficulty with this aspect of the proposed revision.

6. We believe that our proposed amendment of Section 442 is not ambiguous as to the persons who may be brought in as cross-defendants. Under the revised section a party may be brought in if the cross-complainant seeks affirmative relief against him "relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates". This is the sole criterion to be applied in determining whether a party was properly joined. It will not be necessary to determine whether the party joined as a cross-defendant is either "indispensable" or "conditionally necessary". We believe, therefore, that the revision of our proposed revision of Section 442 recommended on page 2 of the CAJ memorandum is unnecessary.

7. The Commission believes that the recommendation of its research consultant, Professor Howell, that a third party practice statute be enacted is sound. We also believe, however, that this goes beyond the authority given to the Commission by the Legislature in this matter and that the Commission should not recommend the enactment of a third party practice statute at this time.