

Date of Meeting: March 13-14, 1959
Date of Memo: February 25, 1959

Memorandum No. 1

SUBJECT: Reorganization of the Commission's Workload
and Procedures.

Perhaps because my successor has now been selected and I have begun to think tentatively of how I will turn the "shop" over to him, I have recently been giving considerable thought to the assignments which the Commission now has and to how it is and should be proceeding to perform them. As will appear from what follows, I have come to be concerned as to whether, as the Commission is and has been operating, its performance is commensurate with the assignments which it has been given. The purpose of this memorandum is to raise that question and to make several suggestions for the Commission's consideration.

In Appendix A are listed the 33 studies on which the Commission is not yet ready to report to the Legislature. Presumably, its intention is to report on these studies to the 1961 session of the Legislature. The fact is, however, that the Commission has never worked and is not now working at a rate of production which makes this goal realistic. This is demonstrated by the facts, among others (1) that the Commission reported on only 13 topics to the 1957 session of the Legislature and is reporting on only 14 topics to the 1959 session (of the latter, two reports are supplementary reports on matters originally presented in 1957 and the Commission's report on three others [narcotics, planning and appointment of

administrator in quiet title action] was that it had decided not to carry these studies forward) and (2) that for the past several months the Commission's meeting agenda have consistently contained several items that the Commission did not reach. At its current and past rate of production, there is ground for doubt that the Commission can complete and report on all of its currently assigned studies until 1965, even assuming that no additional assignments are given it in the interim. Even if this statement seems unduly pessimistic, it is quite realistic to predict that unless rather drastic changes are made, the Commission will not complete its present agenda until 1963, particularly when account is taken of the fact that our current assignments include such major assignments as the Uniform Rules of Evidence, sovereign immunity, arbitration, condemnation, the law of bail, etc.

As we have all recognized, I think, the "bottleneck" in the Commission's processes is the Commission itself -- what it can accomplish in the amount of time its members can give to meetings. This is obviously an inherent limitation and one about which no one can be critical. I for one, have little doubt that the members of this Commission give more time to nonpaid public service in a state agency than does any other comparable group in the state. Nevertheless, the "bottleneck" is there. This presents two questions: (1) can the "bottleneck" be made to accommodate a larger flow and (2) should the Commission's assignments be reduced to a number which the "bottleneck" can accommodate? I suggest that the Commission should come to grips with these questions rather than to continue to work along at a rate of production which is not realistic compared to its workload. I have some suggestions to offer on each question.

CAN THE COMMISSION'S RATE OF PRODUCTION BE INCREASED?

I think that the answer to this question is in the affirmative provided that certain changes are made. Let me suggest some possibilities:

1. Need for recognition of the problem. This is basic. If the Commission recognizes that the problem with which this memorandum is concerned exists and is serious, remedial steps will surely be taken. On the other hand, we are likely to go on doing as we have done if it is assumed that what has been done is about adequate.

2. Devote more time to Commission meetings. This is a difficult problem. Mr. Gustafson has suggested three-day meetings; others would find it more difficult than he to spare the time. Would a three-day meeting every other month be a reasonable compromise? Another possibility would be to decide to work Friday evenings at each meeting from 7 to 10. Still another would be to work regularly from 9 to 6 on both Friday and Saturday with an hour for lunch at 12 and a 15 minute break at 4:00.

3. Get better attendance at meetings. For one reason or another, the Commission has worked shorthandedly (often with a bare quorum) for much of the past year. This has resulted in many stalemates after long discussion, thus requiring the discussion to be repeated. Some members of the Commission obviously give its meetings the very highest priority. Should not every member do so?

4. Abandon the rule of five votes for a recommendation to the Legislature. This is an alternative to (3). The five-vote rule is a highly desirable one on the merits. But it seriously cripples the Commission's rate of production. A rule permitting action to be taken by

a majority of those present would have saved many hours of the Commission's time during the past year. Should every member be offered the alternative: attend or be bound by the action taken?

5. Delegate more responsibility to the staff. The Commission is a deliberative body, both as to matters of policy and as to the drafting of statutes. It is clearly to the credit of the members that they have been willing to assume responsibility for and take such interest in matters of detail. The fact is, however, that the Commission has spent many hours on the detail of statutory language which could have been spent considering questions of policy on studies on the agenda which were not reached. Let me make it clear that the statutes we have recommended have been better for the Commission's detailed consideration. Nevertheless, the question remains whether the State's best interest is better served by this use of the Commission's time than it would be if the Commission were to complete more studies less perfect in detail. Over the long haul this choice simply must be made.

6. Return to the use of committees of the Commission. This system, used by the New York Law Revision Commission, was abandoned by us for three reasons: (1) it proved more difficult to get some members to attend committee meetings than to attend Commission meetings; from the staff side it was, in calling members, more like asking a favor than determining the time for fulfilling of a predetermined obligation; (2) some members did not seem to perform with as much sense of responsibility and seriousness of purpose when the question was what recommendation to make to the Commission as they did when, sitting with the Commission, they were deciding what recommendation to make to the Legislature; thus, they

"ducked" difficult questions by referring them to the Commission and they cast votes which they reversed when the same matters were before the Commission; (3) the committee meetings imposed a heavy burden on the staff. The last of these should be a good deal less of a problem with the new Assistant Executive Secretary. The other two could be overcome if the Commission were to decide that service on the Commission imposes the same obligation to attend committee meetings as Commission meetings and were to delegate (and the committees were to accept) substantially final responsibility for action on the studies assigned. A committee system is a waste of time, of course, unless the decisions of committees are very nearly automatically endorsed by the full Commission (as the Legislature, by and large, endorses the work of its committees). This implies an important departure in substance from the "Rule of Five Votes." Perhaps the committee system would work with smaller studies even if it would not with the larger ones.

SHOULD THE COMMISSION'S ASSIGNMENTS BE REDUCED?

Unless the Commission's rate of production is increased by some or all of the expedients suggested above (or others), its workload should be reduced. Possible courses of action for consideration here are:

1. Request no new assignments in 1960 and attempt to avoid assignments sponsored by others. This needs no stronger argument, I think, than consideration of the studies listed in Appendix A and what is said above.
2. Request relief from existing assignments. The Commission could quite reasonably (though not perhaps realistically) go to the Legislature with a request that it be relieved of the obligation to complete some of

its assignments in view of the major tasks it has in the studies of the Uniform Rules of Evidence, arbitration, condemnation, sovereign immunity, etc. If this were to be done I would suggest the following as candidates simply because we have not been or are not any longer involved with an outside consultant.

- Study #12 Taking Instructions to the Jury Room.
- #21 Confirmation of Partition Sales.
- #23 Rescission of Contracts.
- #26 What Law Governs Escheat.
- #30 Custody Jurisdiction.
- #40 Notice of Alibi.
- #41 Small Claims Court Law.
- #44 Suit In Common Name.
- #47 Civil Code § 1698 (modification written contracts)
- #59 Notice by Publication.
- #60 Representation re Credit of Third Person.
- #61 Election of Remedies.

3. Set up priorities among presently assigned studies as to which shall be completed by 1961. At the February meeting we decided to press forward with the Uniform Rules of Evidence. By that decision, I believe, we probably committed one-half and certainly not less than one-third of the Commission's time between now and the 1961 session of the Legislature. In January, the Commission decided to press forward vigorously with arbitration and condemnation (the latter if funds are made available). Thereby, another major part of the Commission's time between now and 1961 was committed. If to these were added, for 1961, sovereign immunity, the

law relating to bail, and attachment, garnishment and property exempt from execution, the Commission would have completed six major assignments and would have a very substantial legislative program -- and at least all it could hope to do in the interim (unless its rate of production is considerably increased). Should all other studies be put off until 1961, unless during some meeting we happen to have time to take one up? Or should the Commission decide now to defer two or three of the major studies until 1963 and devote a substantial part of its energies between now and 1961 to completing most or all of the smaller assignments? Some choice must be made, if not now then later and perhaps by happenstance. It would be helpful to the staff to have the decision made sooner rather than later.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

APPENDIX A

12. Taking Instructions Into Jury Room
21. Confirmation Partition Sale
23. Rescission-Contracts
26. Escheat
27. Putative Spouse
29. Post-Conviction Sanity Hearings (may be consolidated with 43)
30. Custody Jurisdiction
32. Arbitration
- 34(L) Uniform Rules of Evidence
- 35(L) Habeas Corpus
- 36(L) Condemnation
- 37(L) Claims Statute - (Continuation - Claims Against State)
 38. Inter Vivos Rights 201.5 Property
 39. Attachment, Garnishment, Execution
 40. Notice of Alibi
 41. Small Claims Court
 42. Rights Good Faith Improver Property
 43. Separate Trial Issue Insanity
 44. Suit in Common Name - Fictitious Name
 45. Mutuality re Specific Performance
 46. Arson
 47. Civil Code § 1698 (Contract in writing)
 48. Juvenile Court Proceedings (consolidated with 54(L) - Term "Ward of Juvenile Court")