

5/3/68

Memorandum 68-47

Subject: Future Activities of the Commission

The staff has the following suggestions concerning our activities during the next few months.

1969 Legislative Program

Any recommendation to the 1969 session must be approved not later than our September 1968 meeting if it is to be available in printed form in January 1969. In fact, the recommendations approved at the September 1967 meeting were not available in printed form until early in February 1968. The tentative recommendation on eminent domain was approved for printing at the September 1967 meeting and was not available in printed form until April 1968.

There is only one topic on which it appears possible to submit a recommendation to the 1969 Legislature. If we can approve a tentative recommendation on powers of appointment for distribution after the May meeting, there is a good chance that we can submit a recommendation on that topic to the 1969 Legislature. The recommendation could be submitted, however, only if the comments received on the tentative recommendation were generally favorable and no substantial changes were required. It is necessary to provide interested persons and organizations with at least three months to comment on a tentative recommendation. If the tentative recommendation could be distributed on June 1, we could possibly obtain comments by August 26 and consider them at our September meeting and approve the recommendation for printing at that meeting.

You will recall that we prepared two tentative recommendations last year which were approved for distribution for comment early this year. These recommendations relate to the marital privilege and a change in the Commercial Code. The comments we have received to date on these two tentative recommendations have all been opposed to any legislation at all on these subjects. Hence, it appears unlikely at this time that we can submit a recommendation on either subject to the 1969 Legislature.

Staff Vacancies

You will recall that our Senior Attorney resigned some time ago and that we are recruiting for this position at the Junior Counsel level. Mr. McClintock has also resigned to enter private practice. He agreed to stay one year when we hired him. However, he received an unsolicited offer of employment from an excellent Bay Area firm that needed an immediate replacement for an attorney who was drafted. Under the circumstances, a reasonable solution to the problem was worked out whereby Mr. McClintock will remain until June 15 to assist in revising the tentative recommendation on powers of appointment after the May meeting.

We have four applicants for the two positions. Two are excellent prospects, and we have offered the positions to them. One is interested in another position and has determined to take the other position if it is offered to her. It appears likely that the other applicant will accept the position we offered him. The third applicant appears to meet our minimum qualifications, and the fourth does not meet the standards we hope to maintain for staff personnel. We are doubtful that we could

obtain a qualified person from the civil service list since the qualified candidates are, almost without exception, recruited by and committed to employment by a particular agency before the list is published.

Staff turnover will continue to result in some reduction in the productivity of the staff, but we believe that by September the staff will be in a position to produce sufficient material to make the Commission fully productive.

Priorities to be Given Topics

Eminent domain. At a recent hearing by the Assembly Judiciary Committee, the Commission was criticized by several witnesses appearing before the hearing on particular bills relating to eminent domain because of its failure to make progress on this subject. The Committee considering the bills agreed that problems existed but that the bills did not solve those problems in an acceptable manner. There is no doubt that the Committee and a substantial number of attorneys interested in this field of law are looking to the Commission to produce something on eminent domain within a reasonable time. Accordingly, the staff believes that this topic should be given a high priority. We have for more than two years been devoting substantially all of the time of one of the experienced members of our staff to this subject. We recently published the first tentative recommendation and study on this topic. We anticipate that study on the right to take will be available for Commission consideration at the July meeting and that a study on procedural aspects of eminent domain will be available for Commission consideration at the December meeting. We hope to have the last major study, dealing with compensation, ready for consideration late in 1969. We believe that we can submit a recommendation for a

comprehensive statute to the 1972 session if this topic is given a high priority.

Inverse condemnation. We anticipate that the next installment of the research study will be available for consideration by the Commission at the June meeting. I have read the text of the study--dealing with landslides, flooding, etc.--and it is apparent that the next installment will present difficult problems that will require a substantial amount of time and considerable creative thinking by the Commission. We hope to have the final installment of the study available for consideration early in 1969. It has become apparent to the staff that it is unlikely that any comprehensive statute can be developed covering all aspects of inverse condemnation. Our aim, we believe, should be to draft statutes that cover particular aspects of the subject. These statutes could be submitted for legislative consideration as they are approved by the Commission. Because of the legislative interest in this subject, we believe that it should be given a high priority.

Leases. The staff believes that the Commission could accomplish substantial reform in this area of the law. We believe that this topic should be given a high priority with a view to submitting a recommendation to the 1970 Legislature. Because of the wide interest in the subject (we have approximately 300 on our list of interested persons), we believe that we should aim for distribution of a tentative recommendation on this subject not later than November 1968.

Additur and remittitur. We have found that considerable research will be needed before we can attempt to codify the rules relating to remittitur. Since the recommendation on this topic would not accomplish

any change in existing law, we do not believe that it should be given a high priority. Nevertheless, as soon as the staff has time, we plan to prepare a tentative recommendation for Commission consideration. We believe that a recommendation on this subject can be submitted to the 1970 Legislature. However, a preliminary discussion with a representative of the Judicial Council indicates that there may be substantial opposition to the effort to codify the law relating to remittitur.

Sovereign immunity. We believe that our decision to consider the recent developments in this field of law is sound. However, we also believe that any recommendation submitted to the Legislature should attempt to deal with all the problems in a particular area of governmental liability. It often requires approximately the same amount of time to obtain enactment of a one-section bill that makes no substantial change in the law as it does to obtain enactment of a fairly comprehensive bill that makes significant changes. We suggest that the first recommendation in this field cover problems arising out of liability for police and correctional activities and medical, hospital, and public health activities. Some of the problems in these two fields of activity overlap and should be dealt with in the same recommendation. We believe that a recommendation, if one can be developed that has a chance of legislative enactment, could be submitted to the 1970 Legislature.

Fictitious business names. A staff study on this topic has been prepared. The representatives of the newspaper industry are now preparing their recommendations on the subject. We believe that this topic might be ready for Commission consideration at the July or September meeting.

Evidence code. We believe that a recommendation covering the problems that we have identified and solved by July 1970 could be submitted to the 1971 Legislature. We would prefer to include all of the suggested revisions in one bill rather than submitting a series of bills to the Legislature within the next three years. We plan to consider conforming revisions to other codes when the necessary research studies are available.

Arbitration. It appears that our request to study this topic will be approved. We believe that we can prepare a study and submit a recommendation on this topic to the 1971 Legislature. We would give this topic some priority.

Other topics. There are several other topics of relatively minor importance on our agenda. When staff resources permit, we will prepare studies on these topics for Commission consideration.

Additional Topics for Study

You will recall that the Commission determined to contact all California law reviews and the faculties of all California law schools to obtain suggestions for topics for study. We have done this. We have obtained a fairly good response--perhaps 20 suggestions--and it appears that we may obtain one or two good topics as a result.

Before the Commission can determine whether a particular topic is one that should be studied, it is necessary for the staff to obtain a substantial amount of background information. The exact problem needs to be identified, the pertinent statutes located, and a determination made whether a problem that can be solved by legislation exists and whether the problem is suitable for Commission study. We are hopeful

that this staff work can be accomplished during the summer so that the Commission can determine the additional topics, if any, it wishes to request authority to study at its September meeting when the Annual Report is approved for printing.

The Chairmen of the Senate the Assembly Judiciary Committees are another possible source of suggestions for study. If the Commission desires, I could ask the chairmen if they are aware of any topics of relatively narrow scope that would be suitable for Commission study.

Several Commissioners have suggested to me that it might be desirable to request suggestions for topics for study from members of the Bar. This might be accomplished by including a notice soliciting such suggestions in one of the State Bar publications that goes to all members of the Bar. The Commission did solicit suggestions from members of the Bar when it was first established. A review of our files shows that a substantial number of suggestions were received, but only about one out of 25 proved, after considerable staff research, to be worthy of study by the Commission.

The Board of Governors of the State Bar, has, on occasion, referred matters to us with the suggestion that we undertake the study of a particular topic. Ordinarily, these topics are those upon which a resolution has been adopted by the Conference of State Bar delegates proposing a change in existing law that the Board considers either would require more research resources than are available to the State Bar committees or would not be appropriate for action by the State Bar.

The staff believes that we should not request authority to study more than a few new topics. It is apparent that the Legislature expects us to devote substantially all our time to inverse condemnation and eminent domain since these are the areas of law that the Legislature

believes are in need of revision and is unable to revise without our assistance. The legislative committees now have staff resources available that permit the committees themselves to study and resolve significant problems that do not require extended study.

Disposition of Topics Authorized for Study

We believe that there are several topics authorized for study that are either not appropriate for Commission study or are not of sufficient importance to justify utilization of our resources. At the September meeting, we plan to recommend those topics which we believe should be dropped from our agenda so that the Commission can include its determination in the Annual Report which will be approved for printing at that meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary