

12/10/75

Memorandum 76-4

Subject: Consultant on Class Actions Study

Summary

The Commission requested that the staff recommend a consultant to prepare a background study on class actions. The staff recommends that Professor Jack Friedenthal be selected as the consultant. We do not have funds to finance the study available during the current fiscal year. However, we will propose that funds from the 1976-77 fiscal year in the amount of \$5,000 (or more if possible) be allocated to pay Professor Friedenthal. Professor Friedenthal would start to work on the study when the contract is made. During 1978, he would devote a substantial amount of time to the study with a view to completing the study by approximately January 1, 1979.

Background

At the October meeting, the Commission decided tentatively that it would retain a law professor consultant to prepare a background study on class actions. In addition, the Commission plans to retain one consultant who represents plaintiffs in class actions and one who represents defendants in class actions. These latter two consultants would not prepare any significant amount of written material, but they would attend Commission meetings to provide expert assistance to the Commission when the background study is being considered and the recommended legislation is being drafted. They would probably be compensated at \$20 per day for attending meetings plus travel expenses. In addition, at the November meeting, it was suggested that Judge Campbell M. Lucas, Los Angeles Superior Court, would be someone who could give the Commission the insight of the judge in class actions.

This topic is now at the planning stage. At the October meeting, it was recognized that it may be three years or more before the Commission will be

in a position to actively consider this major study. Nevertheless, it was decided that plans should be made now to obtain a consultant to prepare the background study so the background study will be available when the time to commence active work on the topic arrives.

The staff believes that the consultant to prepare the background study should be selected now. The person selected will need to plan his schedule for future years to work in sufficient time to prepare this study. We do not recommend that we select the other expert consultants now. We believe it would be better to select them a few months before we commence active work on the topic.

#### Scope of Background Study

There is much material available on class actions. The study, in the view of the staff, should present an overview of the entire field of class actions and identify all the areas that will need consideration in a comprehensive statute. The study should indicate and discuss each significant problem and present the consultant's suggested solution to the problem. Alternative solutions might be presented where the consultant believes they would be possible solutions the Commission might want to adopt. The study should distill the extensive writing in the field and identify all the practical procedural and policy considerations. Reference can be made to published materials for extended discussions of particular points rather than unduly extending the length of the background study. The consultant will have to use his judgment to prepare a comprehensive study and, at the same time, avoid producing a 1,000-page book on the subject of class actions.

#### Selection of Consultant

The subject of class actions is primarily a civil procedure problem. In view of the federal experience in this area, experience in federal as well as

California civil procedure is desirable in the consultant. We have reviewed the law review articles published in the last five years on class actions, and no California professor stands out as the obvious consultant. See Exhibit I attached.

Our past experience with consultants indicates two basic problems. First, the consultant promises to produce the study on a schedule and fails substantially to meet the schedule. At least one-fourth and perhaps more of the consultants fail to produce any study at all. Second, the study produced is of little use to the Commission because it is so general in its nature that it does not provide any real assistance in the drafting of legislation for California. In other words, the study provides no practical legislative solution to the problems considered. In addition, it is desirable that the consultant have a continuing interest in the matter after he has produced his study so that his assistance is available during the period the proposed legislation is being drafted.

The staff strongly recommends Professor Jack Friedenthal as the consultant to prepare the background study on class actions. He has prepared previous studies for the Commission--on imputed negligence and on pleading reform--which resulted in the enactment of significant legislation. The studies were produced substantially on schedule in a form that was very usable by the Commission (something consultants very seldom accomplish). He showed a continuing interest by assisting the Commission in developing the necessary legislation after the study was delivered. He also is our consultant on the study to compare the California Evidence Code to the Federal Rules of Evidence and has produced that study on schedule (it is now being typed in final form). He is an outstanding civil procedure expert and the staff would look forward to working with him on the difficult topic of class actions.

Professor Friedenthal has reviewed his schedule for the next few years and could finish the study in three years--by approximately January 1, 1979. He might be able to produce the study somewhat sooner if it was absolutely necessary. Taking into account the funds available to the Commission, Professor Friedenthal and I have been discussing a compensation for the study and attending meetings of approximately \$5,000. Considering the complexity of the topic, this compensation assumes a substantial public service contribution on the part of Professor Friedenthal in preparing the background study. After July 1, 1976, the staff will present its proposal for financing the study (including the amount of compensation). At this time, we suggest that the Commission tentatively select Professor Friedenthal as the consultant to prepare the background study. We hope that we can provide a compensation greater than \$5,000, but that decision will have to await our proposal to be made after July 1, 1976.

The selection of a consultant on this topic is of great importance, and the staff has given the matter considerable thought. We believe we are fortunate that Professor Friedenthal is willing to be considered as a consultant.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

EXHIBIT I

The following are the names, biographic data, and articles published by all those who have published in California legal periodicals on the subject of class actions in the last five years, exclusive of student-written material:

1. Authors who are identified as California law professors at the time of publication:

(a) David W. Louisell, Professor of Law, Boalt Hall, University of California, Berkeley: Comments on Vasquez v. Superior Court, 18 U.C.L.A. L. Rev. 1041 (1971). (Professor Louisell, in collaboration with two law students, contributed a nine-page commentary to this symposium.)

(b) James R. McCall, Associate Professor of Law, Hastings College of the Law, University of California (B.A., Pomona College, 1958; J.D., Harvard Law School, 1962): Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance--Class Action Issues, 25 Hastings L.J. 1351 (1974).

(c) William D. Warren, (then) Professor of Law, University of California at Los Angeles: Comments on Vasquez v. Superior Court, 18 U.C.L.A. L. Rev. 1041 (1971). (Professor Warren contributed a 26-page commentary to this symposium.)

2. All other authors (less law students):

(a) William Baronoff, member of New York Bar and General Counsel's office of a national corporation (B.A., Brooklyn College, 1951; L.L.B., Yale University, 1954): Comments on Vasquez v. Superior Court, 18 U.C.L.A. L. Rev. 1041 (1971). (Mr. Baronoff contributed an eight-page commentary to this symposium.)

(b) L. Richard Fischer (A.B., University of San Francisco, 1965; J.D., Hastings College of the Law, 1970): From Ratner to Qui Tam: Truth-in-Lending Class Action Developments, 24 Hastings L.J. 813 (1973).

(c) Marshall Grossman, partner, Schwartz & Alschuler, Los Angeles, specializing in commercial and securities litigation (law degree from U.S.C. Law School, Production Editor, U.S.C. Law Review; Order of the Coif): Class Actions: Manageability and the Fluid Recovery Doctrine, 47 L.A. B. Bull. 415 (1972).

(d) Sidney B. Jacoby, Professor of Law, Case Western Reserve University: The Effects of Eisen IV And Proposed Amendments of Federal Rule 23, 12 San Diego L. Rev. 1 (1974).

(e) Jonathan M. Landers, Professor of Law, University of Kansas Law School (A.B., Colgate University, 1962; J.D., Harvard Law School, 1965): Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 So. Cal. L. Rev. 842 (1974).

(f) Carl D. Lobell, member, New York Bar and Antitrust Section of American Bar Association (B.A., Rutgers University, 1959; L.L.B., New York University, 1962): Comments on Vasquez v. Superior Court, 18 U.C.L.A. L. Rev. 1041 (1971)(Mr. Lobell contributed a 14-page commentary to this symposium.)

(g) William Masterson, partner, Sheppard, Mullin, Richter, Hampton & Masterson, Los Angeles; lecturer for California Continuing Education of the Bar (B.A., U.C.L.A., 1953; J.D., U.C.L.A., 1958; Law Review, Order of the Coif): Class Actions--The Defense Viewpoint, 47 L.A. B. Bull. 425 (1972).

(h) Stephen Zachary Meyers, partner, Meyers & Jacoby, Los Angeles (J.D., U.C.L.A. 1967; formerly with California Rural Legal Assistance): Multiple Class Actions: A Problem Which Needs a Solution, 47 L.A. B. Bull. 436 (1972).

(i) J. David Rosenfeld, partner, Lipsig, Rosenfeld, Temkin & Leff, Beverly Hills and Encino (U.C.L.A. graduate; attended Loyola of Los Angeles and U.S.C. law schools; led seminar for attorneys on "Class Action Litigation";

law instructor at L.A. City College for course, "Law for Consumers"): Class Actions: Engrafting Federal "Complex and Multi-District Litigation" Procedures in Appropriate California Cases, 47 L.A. B. Bull. 445 (1972).

(j) William Simon, partner, Howrey, Simon, Baker & Murchison; member of District of Columbia Bar: Class Actions--Useful Tool or Engine of Destruction, 7 Lincoln L. Rev. 20 (1971).

(k) Gabriel N. Steinberg, associate, Overton, Schwartz & Yacker, Ltd., Chicago, Illinois (B.A., University of Michigan, 1968; J.D., University of Chicago, 1971; former attorney in Enforcement Division, Environmental Protection Agency, Region V, Chicago, Illinois): Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision, 12 San Diego L. Rev. 107 (1974).

(l) Walter S. Weiss, partner, Long & Levit, Los Angeles, specializing in tax and securities litigation (A.B. & J.D., Rutgers University; former trial attorney, Office of Regional Counsel, Internal Revenue Service; former Chief, Tax Division, U.S. Attorney's Office, Los Angeles): Tax Refunds Through Class Actions? 46 L.A. B. Bull. 30 (1970) (Mr. Weiss collaborated with Mr. Wolf, infra, on this article).

(m) Malcolm Wheeler, (then) Associate Professor of Law, University of Kansas; member, California Bar (B.S., Massachusetts Institute of Technology, 1966; J.D., Stanford Law School, 1969): Predissmissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah, 48 So. Cal. L. Rev. 771 (1975).

(n) Paul C. Wohlmuth, Associate Professor of Law, University of Toledo (B.S., University of Pennsylvania, 1960; J.D., Yale University, 1963): The Class Action and Bankruptcy: Tracking the Evolution of a Legal Principle, 21 U.C.L.A. L. Rev. 577 (1973)

(o) Richard B. Wolf, associate, Long & Levit, Los Angeles (A.B., U.C. Berkeley; J.D., U.C.L.A.; former law clerk to Justice Otto Kaus, California Court of Appeal, Second District): Tax Refunds Through Class Actions? 46 L.A. B. Bull. 30 (1970)(Mr. Wolf collaborated with Mr. Weiss, supra, on this article).

(p) Bruce Zagaris, member, Idaho and Oregon Bar (B.A., George Washington University, 1969; J.D., George Washington University, 1972; L.L.M., George Washington University, 1973); Recent Developments in Prison Litigation: Procedural Issues and Remedies, 14 Santa Clara Lawyer 810 (1974)(portion of article dealing with class actions is on pages 831-833).