Meeting 9

First Supplement to Memorandum No. 53(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Counsel Fees)

The attached memorandum was prepared by Commissioner McDonough. He has requested that we distribute it to you.

Respectfully submitted,

John H. DeMoully
Executive Secretary

8/21/62

Memorandum to Law Revision Commission

From: John R. McDonough, Jr.

Subject: Limitation on Attorneys' Fees

I believe that the Commission would be making a serious mistake to include a recommendation with respect to attorneys' fees in those which it makes in 1963 in connection with its study of sovereign immunity. This for the following reasons:

1. If we were to make a recommendation on attorneys' fees we would be making a sharp departure from the Commission's past practice. Our standard procedure has been to obtain a detailed research study on a subject, consider and discuss it at length, and then to reach our conclusions and make our recommendations. Our decision-making process has been an essentially rational one based on our study of a thorough and objective compilation of the relevant evidence by a disinterested research consultant. Here if we act we do so upon the basis of the personal conviction of a number of our members based on their personal knowledge of facts dehors the record. I believe that this would be a highly dangerous precedent. Begun here, it might be followed again and we would indeed be guilty of usurping the legislative prerogative--i.e., voting for or against a matter on the basis of each member's personal conviction that it is "right" or "wrong." This is appropriate for a legislator or for his political advisors or a lobbyist. It is <u>not</u> appropriate for the Law Revision Commission.

2. It seems almost certain that there must be evidence relating to attorneys' fees of the kind we ordinarily take into account--i.e., studies published in the form of law review articles, bar association reports, royal commission reports, possibly even judicial opinions. If such material does exist it is almost certain that it is not unanimous in the conclusions it reaches. Do we not owe it to the legislature, the bar, and our own tradition to at least look at this material before we act?

3. I cannot believe that any other responsible body of men--a legislative committee, a state bar committee, even a group of law professors--would not undertake to ascertain the facts as to attorneys' fees in California before seriously making a proposal on the subject. Some of our members feel that they know the facts. But I cannot believe that if we did make a factual study we would find that all of the evidence supported the conclusion that attorneys' fees are too high. Even if the evidence preponderated in that direction, surely there would be some evidence--I dare say substantial evidence--looking the other way. Can we act responsibly without gathering that evidence and weighing it?

4. The Commission is not the appropriate body to make this study. First, we are not a fact-finding body and this is in large part a factual question. Second, however difficult we find it to determine what questions are too far in the area of "public policy" for us to take on, this surely must be one of them. The recommendation we propose to make can

only rationally be based on the premise that the legal profession in California is charging the public far too much for its services in tort cases--and that this fact is so notoriously well known that the conclusion can be reached without even a serious study of the matter--in fact, casually. This is not a question of "law," either substantive or procedural; it is a question of calling on the legislature to prevent a flagrant abuse of the privilege of practicing law by those who have been given a monopoly to do so. We have not been granted a charter to seek out those who prey on the public and denounce them; our charter is to study the decisional law and statutes of the State and to make recommendations to eliminate anachronisms and inequities in the law and to bring the law into harmony with modern conditions. I think we ought to stick to our assignment. If there is an Augean stable in this State in respect of attorneys' fees, the body to clean it up is the State Bar of California. I suggest we refer the matter, preferably unofficially, to the Board of Governors.

5. If despite all this, we do reach the merits, then I have three points to make:

a) I have no way of knowing that fees are out of line. The New York courts in undertaking to control them came out approximately, as I recall, where California practice fixes fees. I do not know what others have done or recommended.

b) If fees are out of line I have no way of knowing how far out of line they are: 50%? 25%? I certainly have no basis of knowing that the 20% of recovery limitation we suggest is any fairer than 15% or 25%--or any other figure. And I doubt that any other member of the Commission does. It is literally a figure pulled out of the air.

c) Insofar as I have thought about the matter casually over the years I have supposed that the fairest system of limiting fees would be on a sliding scale, depending on the amount of recovery. A $50,000 fee where there is a $150,000 judgment strikes me as high (if we leave out of account the fact that the lawyer gets nothing on the cases he loses) but a $500 fee on a $1500 judgment where the action was brought in good faith in the superior court for $5000 and was carefully tried does not. I would like to see us give careful consideration to a sliding scale system if we persist in making a recommendation on this subject.

6. One last word. Some have seemed to argue that this proposal is justified on the ground that the State is the source of the funds which will pay the fees involved. Two comments:

a) If this were a sound principle, the court should also fix the attorneys' fees in all cases brought against public entities, not just tort cases. It should also fix all other charges made to the plaintiff in tort cases because of the accident which will also be paid out of the recovery:

medical and hospital bills, expert witness fees and other costs of preparing for trial, the costs of rehabilitation and vocational retraining, ad infinitum.

b) The basic premise that fees can be regulated because the money comes from the State might have been sound in an era when sovereign immunity was the rule and every authorization to sue the State was a kind of legislative "gift." It has no place in the context of a series of recommendations proceeding on the general theory that the State ought to be treated like everybody else.