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11/27/68

Memorandum 69-16

Subject: Study 52 - Sovereign Immunity (The Collateral Source Rule)

At the November meeting, the Commission determined to retain a consultant to prepare a study on the collateral source rule as applied to actions against public entities and public employees and related problems.

The staff believes that this will be a difficult study to prepare. The study should be comprehensive. It should consider the compensation system used in those jurisdictions where the collateral source rule does not apply. This is not because the Commission would necessarily recommend such a system, but because this background information will be helpful to the Commission and others in understanding the significance of the collateral source rule and in formulating legislation. The study should also consider what items received from collateral sources should be offset if no substantial changes in the California law were to be made. In other words, the study should provide the Commission with background information and analysis that would permit the Commission to determine whether a particular type of item received from a collateral source should be offset against the plaintiff's losses if the Commission determined merely to recommend legislation to make the existing law certain. The study should also discuss whether the judge or jury should make the offset of receipts from collateral sources, problems arising out of contribution where a public entity and private person are defendants, and other related problems. Is this an accurate statement of the study the Commission wants?

We estimate that the study outlined above might be prepared by a member of the staff working full time for not less than four months. A

consultant who is an expert in this field probably could produce the study in much less time. Recognizing that we do not purport to provide full compensation to our consultants, the staff recommends (if the study is to be substantially as outlined above) that the consultant be paid \$1,500 and that he be permitted to publish his study in a law review article after it has been examined by the Commission and found to cover the problem adequately.¹ The staff further recommends that the contract provide \$250 for the 1969-70 fiscal year for the consultant's travel expenses in attending Commission meetings when this matter is discussed. We have more than enough funds available for research to cover this contract.

The staff recommends that we retain Professor John G. Fleming of Boalt Hall (who appeared at the November meeting) as our consultant. He is one of the outstanding experts on the collateral source rule in the United States. The law review articles he has written include: Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478 (1966); More Thoughts on Loss Distribution, 4 Osgoode Hall L. J. 161 (1966); Proof of Negligence in Modern Tort Law, 19 Okla. L. Rev. 307 (1966);

1. We have never required that the study conform to our recommendation. In fact, it is unusual to find that the recommendation is substantially the same as the consultant's recommendations. Most often, the recommendation of the Commission is substantially different than the recommendations made in the study, whether the study is prepared by an outside consultant or by the staff. Consider, for example, the fictitious business name study prepared by the staff or the inverse condemnation study prepared by Professor Van Alstyne. The Commission has taken the position that the study need not conform to our recommendation because it has been of the view that the Legislature and other interested persons should have an opportunity to consider the views of the Commission's consultant when they consider the Commission's recommendation. The right of the consultant to publish his study is a significant factor in obtaining a competent consultant.

53 Va. L. Rev. 815 (1967); Lost Years: A Problem in the Computation and Distribution of Damages, 50 Cal. L. Rev. 598 (1962). These are some of his recent articles; he has written others on tort law and other fields of law. Mr. Shank of the Attorney General's office told me at the November meeting that he has read all of the articles on the collateral source rule and that Professor Fleming's article was the only one that made sense.

We do not know whether Professor Fleming would be willing to prepare the study or whether he would consider the compensation suggested by the staff to be adequate. If the Commission determines to retain Professor Fleming as our consultant, we will report back to the Commission if we run into difficulty in obtaining Professor Fleming on the terms determined by the Commission.

We are not aware of any other law professors who would be willing to write the needed study. We have not made an extensive search, however, since Professor Fleming appeared to be the outstanding man in this field. Ordinarily, we can obtain as a consultant only a person who is interested in writing in the particular field of law.

Respectfully submitted,

John H. DeMouly
Executive Secretary