

10/16/69

Memorandum 69-124

Subject: Function of Law Revision Commission

Several times within the past two years the staff has presented for Commission consideration the substance of Memorandum 69-65 (copy attached). The Commission has deferred consideration of this material because it felt that a discussion of the material would be more profitable after the members appointed two years ago had more experience. The staff suggests that it would be profitable to discuss Memorandum 69-65 at the December 1969 meeting.

In connection with the determination of what function the Law Revision Commission should serve, the staff believes that it might be desirable to schedule a meeting in Sacramento during the legislative session and invite the Chairmen of the Senate and Assembly Judiciary Committees to give the Commission their views on this matter. After all, the Commission owes its continued existence to the good will of the Legislature which, I believe, looks on the Commission as an agency created to assist the Legislature.

I believe that the legislative leaders look on the Commission for three types of recommendations. First, they expect recommendations that involve the study of areas of the law that are uncertain, inconsistent, and generally obsolete. In these areas, the recommendations are relatively noncontroversial and attract little interest except among knowledgeable persons. The powers of appointment recommendation is of this type. The need for this type of work is recognized but the legislator who carries the bill obtains little political benefit merely because he is the author of the bill. Second, they expect "clean up" legislation on such matters as evidence, sovereign immunity, and other topics on which the Legislature has enacted comprehensive legislation

upon Commission recommendation. They look to the Commission as the experts in the particular field. Third, and perhaps most important, they expect the Commission to prepare a comprehensive eminent domain statute that will satisfy the major objections made by property owners and at the same time not result in any great increase in the costs of property acquisition. I further believe that the Legislature also looks to the Commission to prepare inverse condemnation legislation (primarily in the area of water damage) that will provide certainty in the law and at the same time provide the maximum amount of immunity from liability that can constitutionally be provided. It would seem desirable to obtain an expression of the views of the Chairmen of the two key legislative committees as to what is expected of the Commission on these two major topics so that we have this in mind as we make the basic policy decisions on the topics.

With respect to each recommendation of the Commission, the Legislature expects--I believe--that the members of the Commission have become experts in the subject matter of the particular recommendation, that the recommended legislation contains no bugs or defects--both because the Commission members are experts and because the recommendation has been reviewed by other experts, and that the Commission has identified the significant policy questions for legislative consideration and decision.

The fear was expressed when the Commission was created that it might become a "super-legislature" and that the Legislature would merely rubber-stamp its recommendations. It was for this reason that a group of legislators--led by then Assemblyman Weinberger--amended the Commission's enabling statute to restrict the Commission's studies to those that were previously approved

for study by the Legislature by concurrent resolution and to eliminate any possibility that the Commission would exert any pressure on the Legislature or its members to obtain approval of its recommendations. Because of this background, the Commission has been careful in the past not to give the appearance of being anything more than a body that prepares recommendations for legislative consideration. We have not held "public hearings" and we have kept publicity of our activities to a minimum until the recommended legislation has been enacted by the Legislature. We have been careful not to give the appearance of lobbying for our bills. Perhaps because we have been so careful, we have substantially eliminated the fear that Mr. Weinberger and others expressed. The Legislature now looks to the Commission as a group of objective experts who prepare carefully drafted legislation after consideration of the views of all interested groups and takes the view that the Commission's recommendations are designed to assist the Legislature--the elected representatives of the people--in resolving legislative policy questions.

You are, of course, aware that the Commission makes every possible effort to obtain an expression of the views of all interested persons and organizations on its tentative proposals before a decision is made on what recommendation, if any, is to be submitted to the Legislature. The members of the Legislature are convinced that this is a desirable procedure because it makes it unnecessary for legislative committees to spend valuable hearing time in attempting to eliminate technical defects or ambiguities that can be eliminated before the bill is introduced if they are brought to the attention of the Commission. In addition, it is often possible for

the Commission to arrive at a reasonable rule that represents something less than the various conflicting interests desire but something they all can accept. In this connection, it should be noted that the New York Law Revision Commission takes a substantially different view as to the proper procedure. The New York Law Revision Commission makes no general distribution of its recommendations for comment. No distribution is made of recommendations until the recommendation has been submitted to the Legislature. I understand that the Commission seeks the views of the State Bar on a confidential basis prior to submitting recommendations but I do not know exactly how that procedure works. I have discussed this matter with the Chairman of the New York Commission on several occasions and the New York Legislature apparently takes the view that the Commission is designed to serve the Legislature and it would not be appropriate for it to disclose publically the substance of its recommendations prior to submission to the Legislature. At the same time, the New York Commission representatives spend considerable time discussing the Commission's legislative proposals with individual members of the Legislature.

Respectfully submitted,

John H. DeMouilly
Executive Secretary