

12/22/81

Memorandum 82-6

Subject: Consultant for Study of Statutes of Limitations on Felonies

Background

At the last meeting, the Commission approved the Minutes of the previous meeting that included a portion indicating that the Commission had approved a contract with Professor John B. Mitchell to prepare a background study on the statutes of limitations on felonies in California. At the time the Minutes were approved, the Commission directed the Executive Secretary to advise the consultant that the contract was approved subject to the condition that the consultant meet with the Commission after he had completed the research and before he started to write the report. This meeting would give the Commission an opportunity to provide input that would help the consultant to produce a report that would be useful to the Commission. A copy of the letter the Executive Secretary wrote to Professor Mitchell is attached as Exhibit 1.

Professor Mitchell's Decision

Professor Mitchell has decided that he does not want to prepare the study under the condition adopted at the last meeting. A copy of his letter is attached as Exhibit 2. He sees two problems with the condition. First, he must substantially complete his research before he receives assurance that he can go ahead and complete the study. More important, he believes that the condition violates the fundamental condition that he be completely free to reach his own conclusions in preparing the study.

It is unfortunate that Professor Mitchell is no longer willing to prepare the study. Not only has he demonstrated his ability to write high quality and very readable law review articles, but he also has practical experience since he has been involved in more than 600 criminal cases. He is highly regarded both by defense and prosecution lawyers.

Recommended Procedure for Obtaining Another Consultant

Past experience indicates that careful selection of the consultant who is to prepare the background study is critical to obtaining a study

that will be useful to the Commission. In recognition of this fact, the staff has always given considerable thought to the persons it recommended as consultants to prepare various studies. We have recommended persons we thought would prepare a useful study and would deliver the study on schedule.

The Commission has been fortunate in the past in obtaining nationally recognized experts who have considerable experience in the particular fields to prepare background studies. Because of their interest in law reform in the particular area, these consultants have been willing to prepare studies for a modest compensation. The studies in the great majority of cases have identified the problems considered to be significant by practitioners and other law professors in the field and have suggested various alternative solutions to the problems based on the consultant's considerable experience in the field. Although the Commission frequently does not accept the consultant's recommendations and makes significant modifications of the consultant's recommendations or devises new alternatives to recommend, the 90 percent acceptance of Commission recommendations by the Legislature is in part a result of the high quality of the background studies we have received.

The study of the statutes of limitations on felonies is one that requires a consultant that has unique qualifications. Not only must the consultant have outstanding analytical and writing ability, but some practical experience in the actual trial of criminal matters would appear essential to an understanding of the statutes of limitations problems in felony cases. This is because the practical trial problems presented by delay in prosecution of a criminal case can best be understood by one who has actual trial experience.

We believe that we should select a law professor to prepare the study. As a practical matter, it is next to impossible to obtain approval of a contract with a person who is not a law professor. This is because we have obtained exemptions from complex state regulations governing contracts with consultants, but the exemptions apply only if the consultant is a law professor. These regulations require approval of the contract by the lawyers in the Department of General Services. They require exemption from civil service requirements by the State Personnel Board, which can be given only after a determination that the study

could not be prepared by a person in the state civil service (not an easy matter to establish based on our past experience). They require that the proposed contract be noticed in the State Contract Register so that all persons interested may submit proposals on the contract. They require that justification be given for not accepting the low bid on the proposed contract. The State Contract Register is a new development. These requirements result in a delay of months and much paper work. All of these requirements make it not practical to seek a consultant other than a law professor.

The staff is not aware of any other persons who might be qualified and willing to prepare a background study on this subject. (Professor Kaplan at Stanford Law School who recommended Professor Mitchell was of the opinion that Mitchell was unique in that he possessed both practical experience in criminal practice and an outstanding analytical ability and a demonstrated ability to write a high quality study.)

The Chairperson of the Commission is more familiar than the staff with members of the faculties of the California law schools, and we are hopeful that she will be able to recommend one or more qualified law professors who would be willing to prepare a study under the condition fixed by the Commission. The office of the Attorney General indicated that that office could suggest one or more assistant district attorneys who might be interested in preparing the study. We do not believe that it would be desirable to have the study prepared by a member of the staff of a district attorney. Not only is it unlikely that such a staff member could prepare an objective study, but we are concerned that the study will not be expeditiously prepared because the day-to-day work of the staff member will be likely to have priority over the study.

#### Conditions Under Which Consultants Prepare Studies

It might be desirable for the Commission to adopt a formal statement of the conditions under which a consultant prepares a background study. In the past, the consultant has been free to recommend whatever he or she believed was correct. The consultant was not required to conform the study to the views of the Commission. The staff believes that a requirement that the study conforms to the views of the Commission would be undesirable and would greatly limit the persons who would be willing to prepare studies. In addition, we have been able to relieve

research consultants from filing Conflict of Interest Statements on grounds that they are not under the direction of the Commission and are "independent" consultants. At the same time, perhaps it should be made clear that the consultant should not present his or her recommendations to others until after they have been presented to the Commission. This would avoid a situation where other persons or organizations are taking positions on a report that has not yet been delivered to the Commission.

In 1960 and 1961, the Commission considered this problem in a situation where the consultant took the position in the study that the solution recommended by the Commission was unconstitutional. In that case, the consultant was persuaded to revise a portion of the study that stated in effect that the Commission's solution was "clearly unconstitutional" to read in effect that the solution "presented serious questions as to its constitutionality." This change was made in preparing the study for printing. To deal with this problem, the Commission added the following provision to its Manual of Practices and Procedures:

If views expressed in a consultant's study are not in agreement with the final recommendation of the Commission on the subject, the consultant may be asked to review pertinent parts of the study. The consultant is not required, however, to conform the study to the views of the Commission, nor are any portions of the study eliminated when the study is published merely because they are inconsistent with the final action of the Commission. Whenever possible, the consultant's study is published in a California law review and may be republished in the Commission's recommendation. In some cases, a study may be published only in the Commission's recommendation. Studies are printed with a note explaining that the views expressed are not necessarily the views of the Commission.

Based on the above policy statement, the staff has always advised persons we sought to retain as consultants that they were free to recommend whatever they believed was proper. The fact that the consultant's conclusion's in a published article differed from the Commission's conclusions has not presented a problem in obtaining enactment of Commission recommended legislation.

For many years, the Commission's standard contract for a background study has included the following provisions:

8. Contractor's study is to be made and Contractor's report prepared in accordance with general standards fixed by the Law Revision Commission through its Executive Secretary, but neither

the Law Revision Commission nor its Executive Secretary shall have the right to control the manner or means by which Contractor conducts the study and prepares the report. Contractor shall exercise independent judgment in all matters pertaining to the methods by which Contractor undertakes to fulfill Contractor's obligations under this agreement.

10. Contractor agrees that the study and report shall become the sole property of the State except that Contractor may publish the report in the form of a law review article, providing that the article to be so published has first been examined by the Executive Secretary of the Commission and determined to be generally satisfactory for Commission purposes and that the law review has consented to the republication of the article in the Commission's report to the Legislature, and subject to the requirement that a note in substantially the following form be included in the article to be so published:

This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

12. Contractor may employ research assistants in making the study and report but shall assume personal responsibility therefor. Contractor shall bear all expense incurred by Contractor for research assistants.

Paragraphs 8 and 12 are required by the Department of General Services to assure that the contractor is an independent contractor rather than an employee. Paragraph 10 was prepared by the Commission, primarily to assure that recommendations in a published law review article are clearly understood not to be recommendations of the Commission.

The staff suggests that the following additional provision be added to the standard contract:

11. Prior to the time the study and report has been considered by the Law Revision Commission, Contractor agrees not to disclose Contractor's recommendations contained in or to be contained in the study and report unless the prior written consent of the Executive Secretary of the Commission or the Commission itself has first been obtained. If such consent is given, it shall be given only under such conditions as will assure that it will be clearly understood by those to whom the recommendations are disclosed that the recommendations are not recommendations of the Commission. Nothing in this paragraph precludes the Contractor from discussing the problems with which the study is concerned on an individual basis with

experts in the field concerned, or on an individual basis with lawyers or judges or others who have experience in the field, in an effort to obtain information of a practical nature or to determine the workability and acceptability of various alternative solutions to problems. Nothing in this paragraph precludes the Contractor from having a few colleagues review and comment on a preliminary draft of the study and report for the purpose of improving the quality of the study and report to be submitted to the Commission.

The adoption of a provision such as that set out above should assure that the Commission will be protected against premature disclosure of recommendations and at the same time would assure the consultant that the Commission is not seeking to impose its views on the consultant as to the recommendations to be made by the consultant.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

December 7, 1981

Prof. John B. Mitchell  
School of Law  
University of Puget Sound  
950 Broadway Plaza  
Tacoma, WA 98403

Dear Mr. Mitchell:

The Commission has approved the contract pursuant to which you would prepare a background study in the form of a law review article on the statutes of limitations on felonies in California. The contract was approved subject to the condition that you meet with the Commission after you have completed your research and before you start to write your report. The purpose of this meeting would be to make an oral presentation to the Commission of your recommendations. It was the Commission's belief that this meeting would provide you with Commission input that will assist you in preparing a report that will be useful to the Commission.

Please advise me that this condition is agreeable to you. As soon as I receive your written agreement to the condition, I will forward the contract to Sacramento for approval by various state agencies. Please do not commence work on this project until you receive your copy of the approved contract.

The Commission's staff looks forward to working with you on this challenging project.

Sincerely,

John H. DeMouilly  
Executive Secretary

JHD/vvm

cc: Jean C. Love, Chairperson

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December 18, 1981

Mr. John H. DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

Dear Mr. DeMouilly:

While I am not without sensitivity to the concerns which implicitly underlie the Commission's amendment to my contract, the proposed change is totally unacceptable. The Commission's amendment, in effect, requires that I invest (what I estimate will be between) 400-600 hours of research and analysis before I am given any assurance that the Commission will approve the next phase of the project. More significantly, it violates the fundamental condition that I be completely free to reach the conclusions which I feel properly follow from my analysis. Accordingly, I must withdraw my original offer to undertake the project.

Nonetheless, I want to thank you for your efforts upon my behalf, and express my hopes that we may some day work together under mutually satisfactory conditions.

Sincerely,

John B. Mitchell

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