

Study B-700

January 11, 1996

First Supplement to Memorandum 96-3**Unfair Competition: Status of Study
(Additional Comments from Prof. Fellmeth)**

We have received a supplementary letter from Prof. Robert C. Fellmeth, the Commission's consultant on unfair competition litigation, which is attached to this supplement. He raises some issues with regard to the staff draft statute that has been under consideration at two prior meetings. The staff recognizes that further work needs to be done on the draft, but has not presented a revised draft for consideration at the January meeting because of the overriding issue of whether to proceed with the study at all. If the Commission decides to continue with the study, we will prepare a revised draft that implements the Commission's tentative, working decisions to date and deals with other issues that have been raised by Prof. Fellmeth and others. Specifically, we agree with Prof. Fellmeth that the draft can be shaped so that it does not unnecessarily raise objections from public prosecutors. The staff also agrees with Prof. Fellmeth that thoughtful criticism of a draft and continuous redrafting should result in a better proposal.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



University of San Diego

Center for Public Interest Law

Children's Advocacy Institute

January 10, 1995

Nathaniel Sterling, Executive Director
Attn. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Contract LRC 92-005 Study of Business and Professions Code
Section 17200

Dear Nathaniel and Stan,

As I mentioned to you over the phone, I have a regrettable conflict on January 19, 1996. There is a meeting of the Athletic Commission of California in Los Angeles about 10 blocks from the Law Revision Commission meeting at the same time. At that meeting there will be a final vote on a rule necessary to prevent the regrettable termination of California's boxer pension plan which I proposed in 1981 while Chair of that Commission. I shall try to make it to the meeting as soon as the Athletic Commission votes on the continuation of the pension plan.

My recent memorandum attempts to isolate the major components upon which consensus should be reached. The most recent Commission draft from staff made several alterations from my recommendations. Some of these changes, as well as some of my original suggestions, have produced thoughtful objections. Any legislative draft needs strong criticism in order to test its problems.

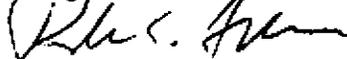
I strongly disagree that there is no problem with a representative status where it has either no *res judicata*, or where it has an effective *res judicata* lacking the checks on abuse which gave rise to Rule 23 safeguards, or where the only checks are by *post facto* challenge which must unwind an accomplished judgment.

The previous statutory draft may have addressed problems beyond those we face. Confining ourselves to the most clearly warranted checks, which do not unduly impede any *bona fide* private action for the general public, should strike a balance. This means requiring a clear pleading of a representative action, prohibiting conflicts, and requiring minimal notice (not *Eisen* individual notice) and hearing prior to final judgment.

I believe it is best not to change the current differentiation in the law between public and private suits, particularly since the staff draft here combining the two is offensive to public prosecutors, and they have some strong policy arguments and historical references supporting their position. And the other provisions in the previous drafts which spawned heated opposition are arguably not central to the problems which need to be addressed.

I would appreciate it if you could transmit this letter and my previous short memorandum to the Commission members for their consideration prior to the meeting, particularly in case the conflict noted above precludes me from making it to your meeting in time for the Unfair Competition agenda item.

Very sincerely,



Robert C. Fellmeth