

Revised February 28, 1969

March 7

Time: 9:30 a.m. - 5:00 p.m.
Place: Rm. 1157, State Office Bldg.
Civic Center
San Francisco

March 8

Time: 9:00 a.m. - 4:00 p.m.
Place: State Bar Bldg.
601 McAllister St.
San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

March 7 and 8, 1969

MARCH 7

1. Approval of Minutes of February 7-8 meeting (sent 2/17/69)

2. Study 65 - Inverse Condemnation

Insurance Considerations

General Policy Considerations

Memorandum 69-34 (sent 2/27/69)

Research Study - Modernizing Inverse Condemnation:
A Legislative Prospectus (attached to Memorandum)

Stanton

General Approach to Statute

Memorandum 69-35 (sent 2/27/69)

Research Study (part IV) (you have this)

Yale

Water Damage

Memorandum 69-36 (sent 2/26/69)

Uhler

Concussion, Vibration, and Interference with Land
Stability

Memorandum 69-37 (sent 2/26/69)

Stanton

Liability for Ultrahazardous Activities

Memorandum 69-38 (enclosed) ✓ sent 3/1/69

Wolford

Escaping Fire and Chemicals

Memorandum 69-39 (sent 2/26/69)

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3. Study 52 - Sovereign Immunity

Miller

Immunity for Plan or Design

Memorandum 69-40 (sent 2/26/69)

Tentative Recommendation (attached to Memorandum)

4. Study 36 - Condemnation Law and Procedure

Arnebergh

Arbitration

Memorandum 69-41 (sent 2/27/69)

Tentative Recommendation (attached to Memorandum)

Arnebergh

Excess Condemnation

Memorandum 69-42 (enclosed) *sent 3/1/69*

Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 69-42 (sent 2/27/69)

Uhler

Moving Expenses

Memorandum 69-49 (sent 2/27/69)

Research Study (attached to Memorandum)

MARCH 8

5. Administrative Matters

Stanton

Materials for Policy and Program Hearing

Memorandum 69-43 (sent 2/22/69)

First Supplement to Memorandum 69-43 (sent 2/22/69)

Uhler

6. 1969 Legislative Program

Memorandum 69-44 (sent 2/27/69)

First Supplement to Memorandum 69-44 (sent 2/22/69)

Wolford

7. Study 44 - Fictitious Business Name Statute

Memorandum 69-45 (sent 2/26/69)

Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 69-45 (sent 2/27/69)

Stanton

8. Study 41 - Small Claims Court Law

Memorandum 69-46 (sent 2/22/69)

Statement to be included in Annual Report (attached to Memorandum)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
MARCH 7 AND 8, 1969
San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on March 7 and 8, 1969.

Present: Sho Sato, Chairman
Thomas E. Stanton, Jr., Vice Chairman
Carlos J. Moorhead, Member of the Assembly (March 7)
Roger Arnebergh (March 7)
John D. Miller
Lewis K. Uhler
Richard H. Wolford
William A. Yale

Absent: Alfred H. Song, Member of the Senate
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Clarence B. Taylor, Jack I. Horton, and John L. Cook, members of the Commission's staff, also were present.

Mr. Benton Sifford, who served as a consultant to the Senate Fact Finding Committee on Judiciary on the governmental liability study, was present at the request of the Commission to discuss the insurance aspects of inverse condemnation liability.

The following observers also were present:

R. C. Bergman, California Attorney General's Office
Donald L. Clark, San Diego County Counsel's Office
Norval Fairman, Department of Public Works
Gideon Kanner, Fadem and Kanner, Los Angeles
James T. Markle, Department of Water Resources
Ken Nellis, Department of Public Works
Willard A. Shank, California Attorney General's Office
Terry C. Smith, Los Angeles County Counsel's Office
Gerald J. Thompson, Assistant County Counsel, Santa Clara County
Reginald M. Watt, Attorney, Chico

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ADMINISTRATIVE MATTERS

Minutes of February Meeting. The Minutes of the meeting held February 7 and 8, 1969, were approved as submitted.

Materials for Policy and Program Hearings. The Commission considered Memorandum 69-43 and the attached materials. The materials prepared for the policy and program hearings were approved by the Commission. A brief evaluation of the value to the Commission of a computer search of California statutes is to be included. Commissioners Sato and Stanton turned in copies of the materials with suggested editorial changes which are to be considered by the staff when the material is revised after the meeting.

1969 Legislative Program. Memorandum 69-44 was considered. The Commission approved the staff's proposal to amend Section 102⁴ of the Evidence Code if Senate Bill No. 103 is otherwise amended.

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STUDY 12 - JURY INSTRUCTIONS

The Commission considered Memorandum 69-47, the attached exhibits, and the tentative recommendation. Section 612.5 of the Code of Civil Procedure was revised to read in substance as follows:

612.5. A copy of the court's instructions to the jury in a civil trial shall be made available to the jury during its deliberations at the discretion of the court or upon request of any party. The Judicial Council shall adopt rules to implement this section. This section becomes operative when the rules adopted by the Judicial Council pursuant to this section become effective.

The staff was directed to revise the Comment and tentative recommendation accordingly.

The recommendation was approved for distribution.

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STUDY 36 - CONDEMNATION LAW AND PROCEDURE (EXCESS CONDEMNATION)

The Commission considered Memorandum 69-42 and the First Supplement thereto, together with two background research studies.

The Commission made the following suggestions for the staff's guidance in drafting a statute for consideration at a future meeting:

(1) If possible, there should be a physical solution that avoids the need for excess condemnation. The owner must accept a physical solution if the court decides that this is a reasonable solution to the problem. It was recognized in some cases that the cost of a physical solution would be prohibitive.

(2) Excess condemnation should be authorized only where the value of the remainder after the taking is reduced by a specified percentage as determined by the jury verdict. The jury determines the value of the remainder in the before condition, its value in the after condition, and the severance damages. For example, if the severance damages are 50 (?) % or more of the value of the remainder in the before condition, the condemnor may elect to take the entire parcel by paying the value in the before condition. However, the owner may elect to waive the portion of the severance damages to the extent that exceeds the specified percentage and keep his property.

(3) If the property owner is willing to reduce his claim to severance damages to the percentage specified under (2), above, he should be permitted to keep his property.

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STUDY 36 - CONDEMNATION LAW AND PROCEDURE (MOVING EXPENSES)

Memorandum 69-49, Assembly Bill No. 375(1969), and the attached research study were considered. The Commission directed the staff to prepare a tentative recommendation providing moving expenses whenever property is acquired for public use without dollar limitations for consideration at a future meeting.

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STUDY 36 - CONDEMNATION LAW AND PROCEDURE (ARBITRATION)

Memorandum 69-41, the Eminent Domain Arbitration Rules of the American Arbitration Society, and the attached tentative recommendation were considered. The following actions were taken.

General. (1) "Person" should be defined to avoid repetition of the phrase "including any public entity, agency, or officer." (2) The Commission considered whether the statute should provide for public arbitration hearings. No such provision was inserted because of the varied nature of arbitration hearings and because the parties may provide for a public hearing in their agreement. (3) Waiver of all matters of controversy other than valuation should be required to preserve the finality of the arbitration award. (4) The staff was directed to study the problem of compulsory arbitration of small claims. (5) The staff was directed to make clear the extent of the right of appeal from the arbitration award and also the extent of the right to exchange valuation data.

Section 1273.01. This section was amended to read:

1273.01. Any person who has been authorized to do so may enter into an agreement to submit and submit to arbitration in accordance with the agreement any controversy as to the compensation to be made in connection with acquisition of the property.

The property acquisition law is to be amended to authorize acquisition of property by this procedure.

Section 1273.02. This section was amended to conform to the changes made in Section 1273.01.

Section 1273.03. This section was amended to provide that, unless the parties otherwise agree, the party acquiring the property must pay the

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legally recoverable costs and expenses of arbitration and that the party acquiring the property may agree to pay the reasonable witness fees, attorney fees, and other fees of the property owner.

Section 1273.04. It was suggested that the third sentence be amended to read, "If an eminent domain action has been commenced, or is commenced, any judicial question relating to the arbitration shall be submitted for ruling in such action" unless this would create unnecessary inconsistency with the general arbitration act. It was also suggested that the staff investigate the need for this sentence.

Section 1273.05. Abandonment of arbitration should give rise to the same rights and consequences as abandonment of a condemnation proceeding.

Section 1273.06. The staff was directed to examine the effect of this act upon the rights of lien holders and other third parties to participate in the arbitration.

As revised, the recommendation was approved for distribution.

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STUDY 41 - SMALL CLAIMS COURT LAW

Memorandum 69-46 was considered. The Commission decided to drop this topic from its agenda and approved the statement set out as Exhibit I for inclusion in the next Annual Report.

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STUDY 44 - FICTITIOUS BUSINESS NAMES

The Commission considered Memorandum 69-45, the First Supplement thereto, and the attached tentative recommendation. The following actions were taken.

General. The staff was directed to consider defining "fictitious business name statement" to avoid repetition.

Section 17902. The Comment was deleted.

Section 17903. The Comment was deleted.

Section 17904. This section was deleted.

Section 17910. Subdivision (b) was amended to read: "File a new statement in accordance with this chapter on or before the date of expiration of the statement on file."

Section 17912. The first sentence was deleted. The second sentence was amended to provide that, if the registrant is an individual, the fictitious business name statement shall be signed by the individual; if a partnership or other association of persons, by a general partner; if a corporation, by an officer.

Section 17913. This section was amended to read:

The fictitious business name statement shall be filed with the clerk of the county in which the registrant has his principal place of business in this state or, if he has no place of business in this state, with the clerk of Sacramento county.

The staff was directed to capitalize "county" if this is the present acceptable style.

Section 17915. Subdivision (d) was deleted.

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Section 17916. In subdivision (b) "in" was substituted for "that renders" and "except that" was substituted for "but"; "if the new residence address is within the county in which the statement is filed" was deleted.

Section 17918. The acknowledgement requirement was deleted to conform with Section 17912.

Section 17920. Subdivision (b)(3) was amended to read: "The truth of the information required by Sections 17911 or 17918 that is contained in the statement." The comment should make clear the effect of an expiration of a statement.

Section 17922. The Comment should make clear that this does not alter the right to inspect the public records of the county clerk.

Section 17923. The staff was directed to confer with the Legislative Counsel to ascertain whether a section governing the fees charged by the county clerk should be in the Government Code.

Section 17924. Subdivision (a) was amended to read:

Any person who regularly transacts business in this state under a fictitious business name and knowingly and willfully fails to comply with the requirements of this chapter is liable civilly in a sum to be determined by the court not to exceed three hundred dollars (\$300).

Subdivision (b) was deleted.

The first line of subdivision (c) was amended to read: "(b) The sums referred to in subdivision (a) may"

Subdivision (d) was deleted.

In subdivision (e) "impaired" was substituted for "void or unenforceable."

Subdivision (f) was amended to read:

(d) Nothing in this chapter prevents a person from filing or publishing a fictitious business name statement at any time after the time prescribed in this chapter.

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A provision was added making it a misdemeanor to make a false statement in any statement or certificate required by this chapter. A fine not to exceed \$1,000 may be levied by the court.

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STUDY 52 - SOVEREIGN IMMUNITY (IMMUNITY FOR PLAN OR
DESIGN OF A PUBLIC IMPROVEMENT)

Memoranda 69-40, 68-18, and the attached tentative recommendation were considered. The Commission determined to make the section inapplicable where the dangerous character of the plan or design of a public improvement was or should have been known.

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STUDY 59 - SERVICE OF PROCESS

The Commission considered Memorandum 69-48 and determined to drop this topic from its agenda. The Commission approved the statement set out in Exhibit I for inclusion in the next Annual Report.

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STUDY 65 - INVERSE CONDEMNATION

The Commission considered Memoranda 69-34, 69-35, 69-36, 69-37, 69-38, 69-39, and two background research studies. Mr. Benton A. Sifford discussed the problems of writing insurance for inverse condemnation liability.

General Approach

The Commission tentatively determined that the statute should be the exclusive basis for inverse condemnation liability in those areas of liability covered by the statute. The Commission reviewed the staff's rough draft of general principles or goals relating to inverse liability. These principles are to be given further examination and study.

(1) Mitigation. It was suggested that perhaps this concept divides into two separate problems which should be treated differently--long term prevention of potential damage and prevention of imminent damage. Another question raised was whether the property owner should have any duty to advise the public entity of potential danger caused by a public improvement.

(2) Recovery of mitigation expenses. One problem identified is whether the property owner should be able to recover for expenditures made to avert threatened damage before any damage has occurred. It was also suggested that perhaps there should be a method for the owner to determine in advance whether certain expenditures are reasonable.

(3) Offsetting general and special benefits. This problem should be resolved in a consistent manner with the solution adopted when compensation for condemnation is considered.

(4) Trivial harm. This principle was generally unfavorably received.

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(5) Prejudgment interest. It was suggested that perhaps a different rule should apply for out-of-pocket losses. It was also suggested that the reasons for not granting interest in tort actions should be examined.

(6) Proportioning damages.

(7) Consequential damages excluded.

(8) Purchase of easement. It was suggested that both parties should have the option. It was also suggested that perhaps the power to take an easement should be limited to public entities who could have condemned an easement.

(9) Causation. It was suggested that there should be no liability for damage caused by an inadequate facility if the damage would have occurred without the facility.

(10) Speedy trial. It was suggested that methods of getting inverse condemnation cases to trial earlier should be examined.

(11) Other problems. The following potential problems were identified: accrual of the cause of action, date of valuation, and the applicability of the collateral source rule.

Water Damage

It was suggested that the staff draft statute deal separately with each general category of water law (e.g., surface water, flood water). It was also suggested that public entities should be encouraged to acquire easements where future water damage is foreseeable and that unless an easement is acquired the owner may develop his property even in the face of potential overflow. The converse was also suggested.

Concussion, Vibration, and Interference with Land Stability

The applicability of Section 832 of the Civil Code to inverse condemnation was considered but, no valid reason was posed in support of different bases of public entity liability for similar activities (excavation, imposition of fill, and the like). Drafting difficulties were pointed out in the phrases "except as provided by statute," and "as deliberately designed and constructed by the public entity."

Ultrahazardous Activity

The Commission determined that governmental liability for ultrahazardous activity should be based on a section which refers to the common law. The Commission was informed that liability for the acts of an independent contractor is the major basis for ultrahazardous liability under existing law. However, it was also pointed out that the state almost always includes an indemnity clause in its contracts with independent contractors. It was suggested that the staff should make a study of nuisance law to determine whether there is any continued need for this doctrine with respect to governmental liability.

Escaping Fire and Chemicals

The staff was directed to prepare amendments to make clear that the statutes imposing liability for escaping fire and chemicals apply to public entities.