March 26, 1975

Time	Place
April 4 - 1:00 p.m. - 5:00 p.m. 7:00 p.m. - 10:00 p.m. Aptil 5 - 9:00 a.m. - 1:00 p.m.	Airport Marina Hotel 8601 Lincoln Boulevard Los Angeles 90045 (213)670-8111

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles April 4-5, 1975

April 4

1. Minutes of March 13-15, 1975, Meeting (to be sent)

2. Administrative Matters

3. Study 36.300 - Eminent Domain (AB 11 and related bills)

AB 11, AB 266, and AB 278

Memorandum 75-3 (sent 3/26/75)
Memorandum 75-23 (sent 3/20/75)

Special District Acts (AB 124-131)

Memorandum 75-24 (sent 3/20/75)

Possession Prior to Judgment

Memorandum 75-25 (sent 3/20/75)

Uniform Eminent Domain Code

(Commissioners have copy of this)

April 5

4. Study 63.60 - Evidence (Admissibility of Duplicates)

Memorandum 75-26 (to be sent)

5. Study 39.70 - Prejudgment Attachment

Memorandum 75-27 (to be sent)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 75-27 (to be sent)
Pamphlet--Selected Legislation Relating to Creditors' Remedies (you have this)

6. Study 39.32 - Wage Garnishment Procedure

Memorandum 75-28 (sent 3/25/75)
Statute and Comments (attached to Memorandum)
First Supplement to Memorandum 75-28 (enclosed)
Preliminary Portion of Recommendation (attached to First Supplement)

7. 1975 Legislative Program

Memorandum 75-29 (to be sent)

8. Research Contracts

Memorandum 75-30 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 4 AND 5, 1975

A meeting of the California Law Revision Commission was held in Los Angeles on April 4 and 5, 1975.

Present: Marc Sandstrom, Chairman, April 4
John N. McLaurin, Vice Chairman
John J. Balluff, April 4
John D. Miller
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMoully
Stan G. Ulrich
Nathaniel Sterling
Jo Anne Friedenthal

Commission Consultants Present:

Thomas M. Dankert (condemnation), April 4
Jerrold A. Fadem (condemnation), April 4
Professor Stefan A. Riesenfeld (creditors' remedies), April 5

Sitting in with the Commission in their deliberations on the Eminent Domain Law on April 4 were the following members of the State Bar Committee on Condemnation Law and Procedure:

Thomas M. Dankert, Ventura
Peter W. Davis, Oakland
Jerrold A. Fadem, Los Angeles
Richard L. Huxtable, Los Angeles
James E. Jefferis, Oakland
Roger M. Sullivan, Los Angeles

The following additional persons were present as observers on days indicated:

April 4

S. Robert Ambrose, County Counsel, Los Angeles
Norval Fairman, Dept. of Transportation, San Francisco
William C. George, County Counsel, San Diego
Milton B. Kane, Dept. of Transportation, Sacramento
John M. Morrison, Office of Attorney General, Sacramento
Anthony J. Ruffolo, Dept. of Transportation, Los Angeles
Roger D. Weisman, City Attorney, Los Angeles
James H. Wernecke, Office of Attorney General, Sacramento

April 5

Bruce R.Geernaert, Superior Court, Los Angeles
Edward P. Hill, Judicial Council, San Francisco
Clark MacGillivray, California State Sheriff's Ass'n, Los Angeles
John MacIntyre, Marshal's Ass'n of California, Ventura

ADMINISTRATIVE MATTERS

1975 Legislative program. The Executive Secretary made a report concerning the 1975 legislative program. This report is summarized below.

ENACTED

AB 74 (Ch. 7, Statutes 1975) - Modification of Contracts--Commercial Code Revision

ACR 17 (Res. Ch. 15, Statutes 1975) - Continues authority to study previously authorized topics, authorizes dropping one topic, and authorizes study of five new topics.

SENT TO GOVERNOR

AB 192 - Escheat--Travelers Checks and Money Orders

PASSED FIRST HOUSE

SB 294 - Out-of-Court Views by Judge or Jury

AB 73 - Good Cause Exception to Physician-Patient Privilege

March 18 - Failed to pass Committee; reconsideration granted

Set for hearing Senate Judiciary Committee on April 8

AB 90 - Wage Garnishment Exemptions

SET FOR HEARING IN FIRST HOUSE

Eminent Domain Bills

AB 11 - General Eminent Domain Statute
AB 266 - State Agency Condemnation
AB 278 - General Conforming Changes
AB 124-131 - Special District Acts

Set for hearing on April 17, 1975

AB 919 - Prejudgment Attachment--Court Commissioners

Set for hearing on April 24, 1975

INTRODUCED BUT NOT YET SET FOR HEARING

AB 974 - Admissibility of Copies of Business Records in Evidence

SB 607 - Payment of Tort and Inverse Condemnation Judgments

NOT YET INTRODUCED

Partition of Real and Personal Property

Liquidated Damages

ADDITIONAL BILLS BEING DRAFTED BY COMMISSION

Prejudgment Attachment (to be considered at April meeting)

Admissibility of Duplicates in Evidence (to be considered at April meeting)

Wage Garnishment Procedure (to be considered at April meeting)

Inverse Condemnation--Claims Presentation Requirement (Kanner is working on this)

DEAD BILLS

AB 75 - Oral Modification of Contracts--General Provisions

ADDITIONAL BILL OF INTEREST TO COMMISSION

ACR 39 (McAlister)(Introduced on February 27, 1975) - Authorizes study of Marketability of Title Act--"whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and absolute covenants, conditions, and restrictions on land use, should be revised."

Research consultants. The Commission considered Memorandum 75-30 and directed the Executive Secretary to execute on behalf of the Commission an addendum to the contract with Thomas E. Dankert, consultant on condemnation law and procedure, to provide an additional amount not exceeding $400 for his travel expenses in connection with attending Commission meetings and legislative hearings on the Commission's eminent domain proposals when requested to do so by the Law Revision Commission through its Executive Secretary. The period covered by the addendum should commence on April 1, 1975, and end on June 30, 1977.

The Commission noted that Mr. Dankert has served as an expert consultant to the Commission on eminent domain and that it is essential that he be available during the course of the legislative consideration of the Commission's proposals.

STUDY 36.35 - EMINENT DOMAIN (POSSESSION PRIOR TO JUDGMENT)

The Commission considered Memorandum 75-25 relating to the possible need for an urgency statute should the enactment of Section 19 of Article I of the California Constitution be held to have repealed the right of immediate possession. The Commission determined that no action on this matter was necessary.

Minutes
April 4 and 5, 1975

STUDY 36.300 - EMINENT DOMAIN (AB 11 AND RELATED BILLS)

The Commission considered Memorandum 75-3 and the First Supplement thereto, and Memorandum 75-23, relating to AB 11 and related bills concerning eminent domain. The Commission took action with respect to the following matters raised in the memoranda:

§ 1230.065. Operative date

The Commission determined to amend Section 1230.065 to provide that actions pending on the operative date of July 1, 1977, which were filed prior to January 1, 1977, are not governed by the Eminent Domain Law. These dates would be made one year earlier should the Eminent Domain Law be enacted at the 1975 legislative session.

§ 1235.140. Litigation expenses

The Commission directed the staff to investigate whether the term "litigation expenses" in eminent domain has been construed to include lobbying expenses to obtain abandonment of the action. The staff should particularly examine the case of Excelsior Union High School Dist. v. Lautrup, 269 Cal. App.2d 434, 74 Cal. Rptr. 835 (1969) and other recent cases.

§ 1240.030. Public necessity required

The Commission requested that the City of Los Angeles supply it with a draft of a section that provides an early hearing and determination of public necessity issues in the initiation of public projects.

§ 1240.050. Extraterritorial condemnation

The Commission requested that the City of Los Angeles supply it with a draft of a section that specifies those uses for which it believes that extraterritorial condemnation should be expressly authorized by statute.

§ 1240.250. Acquisition for future use under Federal Aid Highway Act of 1973

The Commission determined to include in AB 11 Section 1240.250, extending the future use period to 10 years in cases of takings under the Federal Aid Highway Act of 1973 as set out in Exhibit II to Memorandum 75-3.

§ 1245.270. Bribery

The Commission approved for inclusion in AB 11 the text of the following section removing the effect of a resolution of necessity procured by bribery:

§ 1245.270. Adoption of resolution affected by bribery

1245.270. (a) A resolution of necessity does not meet the requirements of this article if the defendant establishes by a preponderance of the evidence both of the following:

(1) A member of the governing body who voted in favor of the resolution received or agreed to receive a bribe (as that term is defined in subdivision 6 of Section 7 of the Penal Code) involving adoption of the resolution.

(2) But for the conduct described in paragraph (1), the resolution would not otherwise have been adopted.

(b) Where there has been a prior criminal prosecution for conduct of a type described in paragraph (1) of subdivision (a), proof of conviction shall be conclusive evidence that the conditions of paragraph (1) of subdivision (a) are satisfied, and proof of acquittal or other dismissal of the prosecution shall be conclusive evidence that the conditions of paragraph (1) of subdivision (a) are not satisfied. Where there is a pending criminal prosecution for conduct of a type described in paragraph (1) of subdivision (a), the court may take such action as is just under the circumstances of the case.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property, subject to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

Comment. Section 1245.270 is new. Except where the defendant is able to demonstrate actual bribery of a criminal character, the section does not affect the holding of People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959)(resolution of necessity precludes judicial review even where it is alleged that the resolution was influenced by "fraud, bad faith, or abuse of discretion"). It should be noted that, where a resolution was influenced by a conflict of interest, the resolution may be subject to direct attack under Government Code Section 91003(b)(Political Reform Act of 1974).

The introductory portion of subdivision (a) makes clear that the defendant need not demonstrate the bribery to the same degree required for a criminal conviction. However, where there has been a prior criminal conviction, the defendant may satisfy his burden of proof by showing the prior conviction. On the other hand, a prior criminal proceeding that ended in acquittal or dismissal for any other reason will preclude the defendant from raising the issue again in the eminent domain proceeding. Subdivision (b). Where there is a pending criminal proceeding, the court may use its discretion to take such actions as staying the eminent domain proceeding until the criminal case is resolved, permitting the eminent domain proceeding to continue while reserving the issue of necessity, or permitting the defendant to make his case on bribery notwithstanding the concurrent criminal action.

§ 1250.150. Lis pendens

The Commission approved for inclusion in AB 11 the amendment of the lis pendens provision to make filing mandatory rather than permissive as provided in Exhibit V to Memorandum 75-3.

§ 1250.360. Grounds for objection to right to take where resolution conclusive

The Commission determined to include in AB 11 the amendment to Section 1250.360 conforming to the 10-year future use period of Section 1240.250, as provided in Exhibit VI to Memorandum 75-3.

§ 1255.410. Order for possession prior to judgment

The Commission revised subdivision (c) of Section 1255.410 to read:

(c) Notwithstanding the time limits for notice prescribed by Section 1255.450, where the plaintiff has shown its urgent need for possession of property, the court may, if it finds that possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken, or the larger parcel of which it is a part, make an order for possession of such property upon such notice, not less than three days, as the court deems appropriate under the circumstances of the case.

§ 1260.220. Divided interests

The Commission requested the staff to supply a memorandum that reexamines the issues surrounding compensation in cases involving divided interests; the reexamination should include the Lynbar case and the approach of the Uniform Code.

§§ 1263.140-1263.150. Date of valuation in case of new trial or mistrial

The Commission revised the date of valuation provisions to provide that, notwithstanding the general rules fixing the valuation date, the valuation date shall not be later than the date of making a postjudgment deposit.

§ 1263.240. Improvements made after service of summons

The Commission determined to include in AB 11 the amendment to Section 1263.240 removing from the statute the language relating to prejudgment deposits and incorporating language permitting the court to limit the extent to which subsequent improvements are considered in determining compensation as provided in Exhibit VIII to Memorandum 75-3.

The staff was directed to consider whether the case of City of Santa Barbara v. Petras, 21 Cal. App.3d 506, 98 Cal. Rptr. 635 (1971), is properly cited in the Comment.

§ 1263.320. Fair market value

The Commission considered a memorandum from Commissioner Balluff distributed at the meeting (attached as Exhibit I hereto), and determined to amend the definition of fair market value to make the text of Section 1263.320 into subdivision (a) and to add the following subdivision:

> (b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

The Comment to this section should be amended accordingly. It should note that, even where there are comparable sales, the expert valuation witness is permitted to use a capitalization or reproduction approach in valuing property as permitted in the Evidence Code.

§ 1263.420. Damage to remainder

The Commission revised subdivision (b) of this section to read:

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

§ 1265.130. Leases

The Commission requested the staff to supply a memorandum that reexamines the issues surrounding compensation where a lease is terminated in a partial taking case.

§ 1265.310 Unexercised options

The Commission directed the staff to further work on the Comment to Section 1265.310 relating to the compensability of options to include a discussion of the rights of the parties where there is a partial taking of property subject to an option. In this connection, the staff should examine the case of Cinmark Investment Co. v. Reichard, 246 Cal. App.2d 498, 54 Cal. Rptr. 810 (1966).

§ 1268.030. Final order of condemnation

The Commission determined, subject to further review, to delete subdivision (a)(1) of Section 1268.030 requiring the condemnation judgment to be final before a final order of condemnation may be made. The Comment should be adjusted accordingly.

§ 1268.130. Increase or decrease in amount of deposit

The Commission determined to amend this section to provide that the property owner may not withdraw any additional amounts deposited pursuant to this section until such time as it is finally determined that he is entitled to it.

§ 1268.710. Court costs

The staff should check the reference in the Comment to this section to Code of Civil Procedure Section 1254(k) to make sure that the reference is correct.

Civil Code § 1001

The Commission directed the staff to redraft Civil Code Section 1001 as a separate bill for Commission review at the next meeting. The redraft should be based upon the draft in Exhibit XI to Memorandum 75-3 but should omit the sentence reading: "The public shall be entitled, as of right, to use and enjoy the easement which is taken."

Health & Safety Code § 8501

The Commission determined to add to AB 278 the provision to permit condemnation for cemetery expansion by nonprofit cemetery authorities and corporations sole as provided in Exhibit XII to Memorandum 75-3.

EXHIBIT I--STUDY 36.300

Minutes
April 4 and 5, 1975

MEMORANDUM RE: Sections 1263.310 and 1263.320

You will recall at our last meeting we deferred reconsideration of Sections 1263.310 and 1263.320 until the April meeting and there was some discussion about the recommendation of the Uniform Code Commission as a possible alternative.

My attention has been drawn to the fact that our proposal, insofar as it appears to stipulate "market value," as the sole criterion for the valuation of properties in condemnation is at variance with the cases and could possibly lead to come confusion, particularly in the condemnation of what are some times referred to as special purpose properties for which there is no ascertainable market value. This differentiation has been recognized both in the federal cases as well as in the decisions of the California courts in which the rule is frequently stated that fair market value is not the exclusive standard by which just compensation is

measured*

U. S. v. Miller 317 U.S. at 373 (1943)
U. S. v. Virginia 365 U.S. 624, 633 (1961)
U. S. v. Commodities Trading Corporation
339 U.S. 121, (1949)
U. S. v. Douglas 207 F. (2d) 381 (1953)
State of California v. U. S. 395 Fed. (2d)
261 (1968)
Citizens Utilities Co. v. Superior Court
59 Cal 2d 805, 817 (1963)
Pacific Gas and Electric v. County of San Mateo
233 C.A. 2d 268, (1965)

An attempt is made to avoid the effect of this stipulation by the comment in which reference is made to alternative methods of valuation such as the cost of substitute facilities, value based on capitalized earnings, replacement cost less depreciation, etc. In contrast to this I note that Section 1004 of the Uniform Code Commission recommendation provides as follows:

> (a) Except as provided in subsection (b), (1) the fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy; and (2) the fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.
>
> (b) The fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional

replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) includes (1) the cost of a functionally equivalent site; (2) the cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing inprovements of substantially comparable character and of the same or equal utility; and (3) the cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities."

It is my thought that this recommendation has the advantage of recognizing the distinction drawn in the case law between properties as to which there is an ascertainable market value and those where the amount of the award, of necessity, must be based on other considerations. Another argument in support of this approach which recommends itself to me lies in the strong possibility of confusion that could result in the minds of the jury from instructions which would presumably require them to find the "market value"of property in such cases (when there is none) and would also call for determining the cost of substitute facilities or replacement cost less depreciation, etc. I think we must even consider the possibility—perish the thought—that some judges might go astray.

Since we aren't setting out to change the substantive law in this area, I think we should avoid the

temptation to codify a different formulation and then attempt to preserve the existing law by a comment. It seems to me that the Uniform Code proposal avoids that problem.

Quite frankly, I do not understand the policy considerations underlying all that is contained in (b) of the Uniform Code recommendation above but feel in any event the provisions of (a) are desirable. This would also resolve the State Bar's proposal to add the word "normally" to our recommendation.

John J. Balluff

JJB/ens

Minutes
April 4 and 5, 1975

THE FAIR MARKET VALUE CONCEPT OF JUST COMPENSATION IS NOT AN ABSOLUTE STANDARD NOR AN EXCLUSIVE METHOD OF VALUATION

THE FEDERAL CASES HOLD FAIR MARKET
VALUE IS NOT AN ABSOLUTE STANDARD
NOR AN EXCLUSIVE METHOD OF VALUATION

The usual standard of just compensation is market value. But that is far from being the only standard that may be used. It came into being in "an effort to find some practical standard . . ."; but "(i)t is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose . . ."(United States v. Miller, supra, 317 U.S. at 373-374 (1943). ". . . In some cases," the Court has said, "this criterion cannot be used . . . because, in the circumstances, market value furnishes an inappropriate measure of actual value." (United States v. General Motors Corp., 323 U.S. 373, 379, 89 L.Ed. 311, 319). A large part of the reason for resorting to a market-value formula is to eliminate the influence of subjective value to either the condemnor or condemnee (See, e.g., United States v. Miller, supra, 317 U.S. at 374, 375 (1945)). But, whatever the reason may be, it is clear that bare market value is not always the only criterion of just compensation. "The Court in an endeavor to find workong rules that will do substantial justice has adopted practical standards, including that of market value (citation). But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases." (United States v. Cors, 337 U.S. 325, 332 (1949).

The trend in eminent domain law has been away from the idea that it is enough merely to pay the value of that which the condemnor takes instead of that which the condemnee loses. The law has moved to the principle that the true and fair measure is indemnity to the condemnee for his loss. ". . . Lately there has been a pronounced shift toward genuine recognition of the principle of indemnity. . ." (Kratovil and Harrison, Eminent Domain--Policy and Concept, 42 Cal. Law Rev. 596, 616; Witkin, Summary of California Law (7th Ed.), Vol. 3, p. 2039, Sec. 228).

The indemnity criterion of loss to the owner has been expressly adopted by the U.S. Supreme Court in Boston Chamber of Commerce v. Boston 217 U.S. 189, 195 (1910), and by the California Courts in People v. Lynbar, Inc. 253 Cal. App. 2d 870, 882 (1969) and Merced Irr. Dist. v. Woolstenhulme 4 Cal. 3d 478, 494 (1971).

In the leading case of United States v. Miller 317 U.S. 369, 374 (1942)) the Court said:

> "Where, for any reason, property has no market resort must be had to other data to ascertain its value."

The Supreme Court restated the principle controlling the determination of "just compensation" in United States v. Virginia S.&.P.Co. 365 U.S. 624, 633 (1961) as follows:

> "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as

good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.' Olson v. United States 292 US 246, 255, 78 L ed 1236, 1244, 54 S Ct 704. In many cases this principle can readily be served by the ascertainment of fair market value--'what a willing buyer would pay in cash to a willing seller.' United States v. Miller, 317 US 369, 374, 87 L ed 336, 342, 63 S Ct 276, 147 ALR 55. See United States v. Commodities Trading Corp. 339 US 121, 123, 94 L ed 707, 711, 70 S Ct 547; United States v. Cors, 337 US 325, 333, 93 L ed 1392, 1399 69 S Ct 1086. But this is not an absolute standard nor an exclusive method of valuation. See United States v. Commodities Trading Corp. supra (339 US at 123); United States v. Cors, supra (337 US at 332); United States v. Miller, supra (317 US at 374, 375); United States v. Toronto N. & R. Nav. Co. 338 US 396, 94 L ed 195, 70 S Ct 217."

The Supreme Court in United States v. Commodities Trading Corporation 339 U.S. 121, 123 (1949) said:

"First. The questions presented are controlled by the clause of the Fifth Amendment providing that private property shall not be 'taken for public use, without just compensation.' This Court has never attempted to prescribe a rigid rule for determining

what is 'just compensation' under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards."

In United States v. Cors, 337 U.S. 325, 330-331 (1949), the court said:

> "The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not Headnote 2 contain any definite standards of fairness by which the measure of "just compensation" is to be determined. United States ex rel. Tennessee Valley Authority v. Powelson, 319 US 266, 279, 280, 87 L ed 1390, 1399, 1400, 63 S Ct 1047; United States v. Petty Motor Co. 327 US 372, 377, 90 L ed 729, 734, 66 S Ct 596. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. United States v. Miller, 317 US 369, 374, 87 L ed 336, 342, 63 S Ct 276, 147 ALR 55. But it has refused Headnote 3 to make a fetish even of market value, since it may not be the best measure of value in some cases."

It is interesting to note that the Supreme Court of the United States in considering reproduction costs held that "due regard to construction costs, conditions, wages and prices affecting value" at the time of the valuation (here the date of the take), must be given (Standard Oil Co. v. Southern Pacific Company 268 U.S. 146, 155-6, 160 (1925)).

The Supreme Court of the United States cases have been followed by various Federal Courts.

The situation is well pointed up in United States v. Douglas 207 F. (2d) 381, 383 (Ninth Circuit, 1953), in which the Court states:

> "It is true that ordinarily value is arrived at by a determination of 'market value,' or of 'fair market value.' But there are exceptional cases in which market value could not be used as a test of 'just compensation.'[9] As stated in United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L Ed. 336, 'Where, for any reason, property has no market resort must be had to other data to ascertain its value!...."

The footnote 9 above is as follows:

> "9. Ordinarily, where the value of lands or goods is to be ascertained, and they are of such a kind, and so situated, as to be available for sale in the ordinary course of trade or dealing,

the market value is perhaps the best test, and under such circumstances it is usually adopted in this Commonwealth. . . But market value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to." Beale v. Boston, 166 Mass. 53, 55, 43 N.E. 1029, 1030. In accord see United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402, 70 S.Ct. 217, 94 L.Ed. 195; Kimball Laundry Co. v. United States, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L.Ed. 1765. Cf. Orgel, supra, Sec. 17.

Again the Ninth Circuit after quoting the language in U.S. v. Virginia 365 U.S. 624, 633 (1961) heretofore quoted in this memorandum, pointed out in State of California v. United States 395 Fed. (2d) 261, 268 (1968) in an action where the State of California in that case was in the same position as this moving defendant, that is, the State's property had been taken for a street:

"The rule requiring the payment of the cost of 'substitute facilities' is an application of these principles, not an exception to them. It enables the court or jury to award the amount required as just compensation in situations where market value or other standards of valuation cannot rationally be applied or where their application would not put

the owner 'in as good a position . . . as if his property had not been taken.' It cannot, consistently with the Fifth Amendment, be used to deny an owner compensation when a taking has inflicted loss. We have been cited to no case permitting such a use of the rule, and a suggestion by the United States that it might be so employed was expressly rejected in United States v. City of Jacksonville, Arkansas, 257 F.2d 330 (8th Cir. 1958).

The district court's ruling limiting the State of California to proof of need for substitute facilities was therefore error. The State was prejudiced if loss from the taking might have been established by other evidence."

There are gathered a good number of cases to this effect in a recent extensive annotation at 40 ALR 3rd 143 entitled "Eminent Domain: Cost of Substitute Facilities as Measure of Compensation paid to State or Municipality for Condemnation of Public Property" (1971).

CALIFORNIA CASES DO NOT RESTRICT
THE COURTS TO THE EXCLUSIVE USE
OF THE MARKET VALUE APPROACH

In the recent Supreme Court of California decision in Merced Dist. v. Woolstenhulme, 4 Cal. 3rd 478, 488 (1971), the court carefully said:

> "It has long been established in general the compensation required is to be measured by the market value of the property . . . . "

and the Court of Appeal in City of Downey v. Royal, 215 C.A. 2d 523, 529 (1962), said:

> "Ordinarily, the market value of land which is taken in eminent domain is the measure of damages for the condemnation thereof. . . . "

RECENT CALIFORNIA CASES HOLD THE
"FAIR MARKET VALUE" IS NOT THE
EXCLUSIVE STANDARD BY WHICH TO
MEASURE JUST COMPENSATION

The leading case in California that holds "fair market value" is not the exclusive standard by which to measure just compensation is Citizens Utilities Co. v. Superior Court, 59 C. 2d 805, 817 (1963), where the court had before it the condemnation of an entire utility. The court said:

" "Fair market value" is not the exclusive standard by which to measure just compensation, and it is widely recognized that such a standard is meaningless when, as here, a public utility is being condemned. (*United States* v. *Cors*, 337 U.S. 325, 332 [69 S.Ct. 1086, 93 L.Ed. 1392]; *Natural Soda Prod. Co.* v. *City of Los Angeles*, 23 Cal.2d 193, 201 [143 P.2d 12]; *Basin Oil Co.* v. *Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 606 [271 P.2d 122]; *Frusluck* v. *City of Fairfax*, 212 Cal.App. 2d 345, 367-368 [28 Cal.Rptr. 357] (and cases there cited); and see generally 3 Nichols on Eminent Domain (3d ed. 1950) § 8.6, pp. 28-31; 1 Orgel on Valuation under Eminent Domain (2d ed. 1953) §§ 37-38, pp. 172-179; Kratovil and Harrison, *Eminent Domain—Policy and Concept* (1954) 42 Cal.L.Rev. 596; Note, *supra*, 68 A.L.R.2d 392, 398-400.)"

The above case was cited in Pacific Gas and Electric v. County of San Mateo, 233 C.A. 2d 268, 274 (1965), where the court said:

"There is no fixed rule for the measure of damage to an interest in real property. Witness this statement in Frusluck v. City of Fairfax, 212 Cal.App.2d 345, 367 (28 Cal.Rptr. 357):

'Ordinarily, the recognized measure of damages in cases such as this (inverse condemnation) is the difference in the value of the real property immediately before and immediately after the injury. (Citations.) This method, however, is not exclusive. Accordingly, where appropriate to a particular situation, the measure of damages may be the cost of making repairs (citations); the loss of use of the property (citations); the loss of use of the property (citations); lost profits (citation); loss of prospective profits (citations); increased operating expenses

pending repairs (citation); all of the detriment proximately caused by the injury as in other tort actions (citations); and present and prospective damages that are natural, necessary or reasonable incident of the taking of property (citation)."

(See also Code Civ. Proc., Sec. 1248, subd. 6.) In Citizens Utilities Co. v. Superior Court, 59 Cal.2d 805 (31 Cal.Rptr. 316, 382 P.2d 356), the court observed at page 817: "'Fair market value' is not the exclusive standard by which to measure just compensation, and it is widely recognized that such a standard is meaningless when, as here, a public utility is being condemned." Plaintiff's relocation cost as the measure of damages is the proper measure in this case.

(See Wofford Heights Associates v. County of Kern, 219 Cal.App.2d 34 (32 Cal.Rptr. 870); County of Los Angeles v. Wright, 107 Cal.App.2d 235, 241 (236 P.2d 892).)

THE EARLIER CALIFORNIA CASES
THAT STRETCH THE FAIR MARKET
VALUE CONCEPT

The early cases hereafter discussed talked about stretching the concept of fair market value. However, this stretching of the fair market value concept did not include all the elements of value, as evidenced by the later case of Citizens Utilities Co. v. Superior Court, 59 C. 2d 805, 817 (1963), where the court had before it the condemnation of an entire utility. The court said:

> "'Fair market value' is not the exclusive standard by which to measure just compensation, and it is widely recognized that such a standard is meaningless when, as here, a public utility is being condemned. (*United States* v. *Cors*, 337 U.S. 325, 332 [69 S.Ct. 1086, 93 L.Ed. 1392]; *Natural Soda Prod. Co.* v. *City of Los Angeles*, 23 Cal.2d 193, 201 [143 P.2d 12]; *Basin Oil Co.* v. *Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 606 [271 P.2d 122]; *Frustuck* v. *City of Fairfax*, 212 Cal.App. 2d 345, 367-368 [28 Cal.Rptr. 357] (and cases there cited); and see generally 3 Nichols on Eminent Domain (3d ed. 1950) § 8.6, pp. 28-31; 1 Orgel on Valuation under Eminent Domain (2d ed. 1953) §§ 37-38, pp. 172-179; Kratovil and Harrison, *Eminent Domain—Policy and Concept* (1954) 42 Cal.L.Rev. 596; Note, *supra*, 68 A.L.R.2d 392, 398-400.)"

The above case was cited in Pacific Gas and Electric v. County of San Mateo, 233 C.A. 2d 268, 274 (1965), where the court said:

"In Citizens Utilities Co. v. Superior Court, 59 Cal. 2d 805 (31 Cal.Rptr. 316, 382 P.2d 356), the court observed at page 817: '"Fair market value" is not the exclusive standard by which to measure just compensation, and it is widely recognized that such a

standard is meaningless when, as here, a public utility is being condemned.' Plaintiff's relocation cost as the measure of damages is the proper measure in this case. (See Wofford Heights Associates v. County of Kern, 219 Cal. App. 2d 34 (32 Cal.Reptr. 870); County of Los Angeles v. Wright, 107 Cal.App.2d 235, 241 (236 P.2d 892).)"

Various early cases talked of stretching the fair market value concept.

In San Diego Land, etc. Co. v. Neale, 78 Cal. 63, 68-9 (1888), in a condemnation case for the purpose of a reservoir, the court said:

> "The problem, then, is to ascertain what is the market value. Now, where there is an actual demand and current rate of price, there can be but little difficulty. But in many instances, as in the case before us, there is no actual demand or current rate of price, either because there have been no sales of similar property, or because the particular piece is the only thing of its kind in the neighborhood, and no one has been able to use it for the purposes for which it is suitable and for which it may be highly profitable to use it. In such case it has been sometimes said that the property has no market value, in the strict sense of the term. (*Chicago & N. W. R'y* v. *C. & E. R. R.*, 112 Ill. 607; *Lake S. & M. S. R'y* v. *C. & W. I. R. R.*, 100 Ill. 33; *St. Louis R. R.* v. *Chapman*, 38 Kan. 307.) And in one sense this is true. But it is certain that a corporation could not for that reason appropriate it for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which, in a general sense, may be said to be the market value. And in such an inquiry it is manifest that the fact that the property has not previously been used for the purposes in question is irrelevant. The current of authority sustains these views."

In Joint Highway Dist. No. 9 v. Railroad Company 128 C.A. 743, 759 (1933)), the court said of a railroad right-of-way:

"In a number of cases it has been held proper to admit evidence of reproduction cost as an aid to determining value, especially when the property is adapted to a particular enterprise and there are ordinarily no willing buyers and hence no market for that type of property."

In People v. Ocean Shore Railroad 32 Cal. 2d 406, 425-6 (1948) the court said of the same railroad right-of-way under consideration in the preceding case cited above:

"In this connection the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as the measure of value, but to the extent that the prospect of such use affects the market value of the land."

Another right-of-way case is City of Downey v. Royal 215 C.A. 2d 523, 529 (1962) where the Court quoted with approval the above Ocean Shore Case (supra) and then quoted from People v. Jones 67 C.A. 2d 531, 537 as follows:

"When land taken in eminent domain is reasonably suitable and may be legally used for purposes which would enhance its value, that fact should be taken into account in estimating the market value of the tract . . . The apparent fact that there is no market value of the land, in a strict sense, does not entitle plaintiff to take lands without paying just compensation."

The Court stated of another case:

> "The reasoning of the last quoted decision is sound and does not conflict with the rule that market value is not necessarily the same as the value of the property to its owner."

In Joint Highway Dist. No. 9 v. Railroad Company, 128 C.A. 743, 760-1 (1933), the court said:

> "Appellant further states that the market value 'cannot be based on cost of reproduction, plus appreciation, less depreciation.' There is some conflict of authority on the question of the admissibility of evidence to show such cost of reproduction, but we believe that when it appears that property is improved so as to make it peculiarly adaptable for its highest available use and there may be said to be a market for the property for such use, the cost of reproduction of such improvements becomes a factor in the determination of market value and to that extent the opinions of the witnesses may 'be based on' such cost. This does not mean, however, that such cost of reproduction is the market value of the land, for other factors, including demand, enter into the ultimate determination of market value."

The above cases that here are classified as stretching the fair market value concept must be compared with the statement in Citizens Utilities Co. v. Superior Court, 59 C.2d 805, 817 (1963), that

> "'Fair market value' is not the exclusive standard by which to measure just compensation . . . . "

Likewise, the case of City of Pleasant Hill v. First Baptist Church, 1 C.A. 3rd 384 (1969), in no way sets aside the Citizens Utilities Co. (supra) case. In fact, the Pleasant Hill (supra) case does not mention the Citizens Utilities Co. (supra) case, and also does not mention Pacific Gas and Electric v. County of San Mateo, 233 C.A. 2d 268, 274 (1965).

It is not thought the rambling opinion of City of Pleasant Hill v. First Baptist Church, 1 C.A. 3rd 384, 396-400, 403-408 (1969), is of any assistance in this problem. Portions are quoted below.

> The principal issue at the trial was whether the church had suffered any severance damages. All witnesses who testified, whether concerning suitable use, or value or both, agreed that before the taking the highest and best use of the property was for church purposes. All those appraising the property approached the question of value by appraising the land on the basis of comparable sales, and the improvements on the basis of reconstruction cost, some with, and some without an allowance for depreciation.[1]

[1]Evidence was introduced of isolated sales of a church property, and the city at first objected to evidence of reproduction cost as manifesting the value of the improvements. Nevertheless, it appears that the parties and witnesses either expressly (witness Orr for plaintiff, and witness Wallace for defendant) or tacitly recognized the rules articulated in *First Baptist Church* v. *State Dept. of Roads* (1965) 178 Neb. 831 [135 N.W.2d 756], as follows: "Where there is proof that there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, the general rule is that resort may be had to some other method of fixing the value of property. *Newton Girl Scout Council, Inc.* v. *Massachusetts Turnpike Authority*, 335 Mass. 189 [138 N.E.2d 769]. See, 4 Nichols on Eminent Domain (3d ed.), § 12.32, pp. 217 to 228; 5 Nichols on Eminent Domain

(3d ed.), § 18.41 (3), p. 230, § 18.42, p. 234; Jahr, Eminent Domain, §§ 71, 78, 82, pp. 102, 111, 116 (specialty uses), §§ 83, 84, pp. 117, 118 (properties of nonprofit organizations); 1 Orgel on Valuation Under Eminent Domain (2d ed.), §§ 30, 37 to 40, especially at pp. 177 to 179, 181 to 183; Manify, *Elements of Damages in Eminent Domain*, 34 B.U.L. Rev. 146, 151, 152; McCormick, *The Measure of Compensation in Eminent Domain*, 17 Minn. L.Rev. 461, especially at pp. 467 to 470.

"Depending on the nature of the property, the authorities have supported different methods of determining value in these situations. Expert testimony as to reproduction or replacement cost, less depreciation, has been approved in many cases as competent foundation evidence to support an opinion as to valuation. See 4 Nichols on Eminent Domain (3d ed.), § 12.32, notes 18 and 19, pp. 227, 228, and cases cited thereunder." (178 Neb. at pp. 836-837 [135 N.W.2d at pp. 759-760]. In addition to authorities cited, see *Assembly of God Church of Pawtucket* v. *Vallone* (1959) 89 R.I. 1, 10 [150 A.2d 11, 15-16]; *Graceland Park Cemetery Co.* v. *City of Omaha* (1962) 173 Neb. 608, 611 [114 N.W.2d 29, 31]; *City of Chicago* v. *Farwell* (1919) 286 Ill. 415, 419-420 [121 N.E. 795, 797]; *Idaho-Western Ry. Co.* v. *Columbia Conference etc. Synod* (1911) 20 Idaho 568, 583 [119 P. 60, 65, 38 L.R.A. N.S. 497]; Condemnation Practice (Cont.Ed. Bar 1960) § 2.23, p. 34). These rules have been recognized but not applied in this state. (See *People* v. *Ocean Shore R. R., Inc.* (1948) 32 Cal.2d 406, 427-428 [196 P.2d 570, 6 A.L.R.2d 1179], and its reference to *City of Los Angeles* v. *Klinker* (1933) 219 Cal. 198, 211-212 [25 P.2d 826, 90 A.L.R. 148] and *Joint Highway Dist. No. 9* v. *Ocean Shore R. R. Co.* (1933) 128 Cal.App. 743, 759-760 [18 P.2d 413]; also *Napa Union High School Dist.* v. *Lewis* (1958) 158 Cal.App.2d 69, 73 [322 P.2d 39], and *People* v. *Jones* (1945) 67 Cal.App.2d 531, 537 [155 P.2d 71].)

STUDY 36.520 - EMINENT DOMAIN (CONFORMING CHANGES--
SPECIAL DISTRICT LAWS)

Desert Water Agency Law § 15

The Commission considered Memorandum 75-24 and a subsequent letter from the counsel for the Desert Water Agency presented by the staff orally at the meeting. The Commission determined to amend AB 129 to delete the sentence labeled #1 in Exhibit I to Memorandum 75-24 and to make no change in the sentence labeled #2.

STUDY 39.32 - WAGE GARNISHMENT PROCEDURE

The Commission considered Memorandum 75-28 and the First and Second Supplements thereto. The recommendation and proposed legislation was approved for printing and submission to the Legislature after the following changes were made:

(1) On page 1 of the "Summary of Recommendations," the discussion of "Comprehensive statute" was deleted.

(2) Additional editorial changes in the preliminary portion of the recommendation (marked on Commissioner's copies) are to be taken into account in preparing the copy for the printer.

(3) On page 22 of the statute, the second sentence of subdivision (b)(2) was revised to read:

> An employer upon whom a withholding order for support is served shall withhold and pay over earnings of the employee pursuant to such order notwithstanding the requirement of another earnings withholding order.

(4) On page 23, in the sentence starting "Thus, for example, if the employee is laid off . . . ." a reference to a leave of absence without pay should be added.

(5) Section 723.126 should be revised to require that the employer's return include the date of service of the earnings withholding order on the employer.

(6) Section 723.105 requires a filing with the court clerk. Section 690.50 should be checked to see if it requires a filing with the "court clerk" rather than with the court. If Section 690.50 requires a filing with the "court" rather than with the "court clerk," Section 723.105 should be revised to conform. [Section 690.50 requires filing with the clerk of court.]

(7) The effect of the new bankruptcy provisions on the continuing effect of a wage garnishment order should be checked and an appropriate mention might be made in a Comment of the bankruptcy provisions.

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 75-27 and the attached staff draft of the Recommendation Relating to Amendments to the Attachment Law. (The First Supplement to Memorandum 75-27 on prelevy third-party claims was distributed for the meeting, but was not considered.) The Commission decided that the expiration date of the existing attachment law should be extended for one year to December 31, 1976, and the effective date of the Attachment Law should be postponed to January 1, 1977. This postponement will afford the Commission an opportunity to devote sufficient time to resolve problems which have been identified in the Attachment Law as it was enacted and to permit the enactment of any necessary amendments and drafting of forms before the new law goes into effect. The Commission also made the following decisions:

Nonnegotiable instruments. Section 482.080, which provides for issuance of a turnover order directing the defendant to transfer possession of the property sought to be attached, should be amended to permit issuance of a turnover order at the hearing on issuance of the writ or thereafter which would direct the defendant to transfer possession of any documentary evidence of the liability attached. If such a turnover order is issued at the time the writ is issued, it would be conditioned on the prior levy on the liability. This amendment makes unnecessary the proposed alternative of amending either Section 481.160 or 488.370. The last sentence of Section 481.050, which defines "chose in action," should be amended to read: "The term includes liability on a nonnegotiable instrument which is otherwise negotiable within Division 3 (commencing with Section 3101) of the Commercial Code but which is not payable to order or to bearer and an interest in or a claim under an insurance policy." This amendment makes no substantive change but makes clear that liability on a nonnegotiable instrument is a chose in action.

§ 483.010. Actions in which attachment authorized. This section should be amended to provide that an attachment may be issued against a corporation or partnership (regardless of whether it is organized for profit) without the necessity of finding that the corporation or partnership is engaged in a trade, business, or profession. This amendment would make the Attachment Law the same as existing law in its application to business corporations and partnerships; it probably represents a change as regards nonprofit corporations and partnerships. Subdivision (c), which provides that attachment may not be issued where the subject of the contract is used primarily for personal, family, or household purposes, would protect a nonprofit corporation from attachment in appropriate circumstances. In the case of an individual, the "engaged in a trade, business, or profession" standard should be eliminated; attachment should be issuable against an individual defendant on a contract claim arising out of the conduct by the defendant of a trade, business, or profession.

§ 486.050. Temporary protective order effect on transfers. The staff should consider whether the first clause of subdivision (a) reading "except as otherwise provided in subdivision (b) and in Sections 486.040 and 486.060" should be retained. Subdivision (b) and Section 486.060 both contain "notwithstanding" clauses, but Section 486.040 does not. The third, fourth, and fifth sentences of the first paragraph of the Comment, giving examples of descriptions of property subject to the temporary protective order, should be deleted.

STUDY 63.60 - ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE

The Commission considered the revised Comment to proposed Evidence Code Section 1500.5. The question whether, by defining "duplicates" in Section 1500.5, the proposed statute might create some confusion with regard to traditional "originals," such as two copies of a contract or lease executed at the same time, was raised. The Commission examined the definition of "writing" in Section 250 of the Evidence Code and determined that this definition did not solve the problem. The staff pointed out that all the exceptions to the best evidence rule are phrased in terms of "the writing" or "the writing itself" and that an introduction of a definition of "original" would require substantial changes in the 1500 series of the Evidence Code as well as other sections of the Evidence Code.

The Commission requested the staff to obtain copies of the newly adopted Federal Rules of Evidence together with the Advisory Committee Notes. The Commission directed the staff to examine the Uniform Rules of Evidence and the new Federal Rules to determine in which manner we could most appropriately add a reference to a contemporaneously executed original to avoid any confusion which Section 1500.5(a) might create.

The Commission voted to proceed with the study of admissibility of duplicates at this time rather than to await a comprehensive study of the new Federal Rules and to add explanatory language to either Section 1500.5, Section 250, or to the Comment to Section 1500.5 to deal with any ambiguity regarding what constitutes an original.

APPROVED

_____
Date

_____
Chairman

_____
Executive Secretary

The Commission's recommendation would be effectuated by enactment of the following measure:

Evidence Code § 1500.5. Admissibility of duplicates

SECTION 1. Section 1500.5 is added to the Evidence Code, to read:

1500.5. (a) For purposes of this section, a "duplicate" is a counterpart produced by the same impression as the writing itself, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the writing itself.

(b) A duplicate of a writing is not made inadmissible by the best evidence rule unless (1) a genuine question is raised as to the authenticity of the writing itself or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the writing itself.

Comment. Section 1500.5 states an exception to the best evidence rule not now contained in existing California statutes but adopted by the United States Congress in the Federal Rules of Evidence. Pub. L. No. 93-595 (Jan. 2, 1975). Subdivision (a) defines a "duplicate" in the same terms as does Federal Rule of Evidence 1001(4), and subdivision (b) provides, in conformity with Federal Rule of Evidence 1003, that such duplicates are not normally made inadmissible by the best evidence rule.

As defined by subdivision (a), a "duplicate" must be produced by a technique which accurately reproduces the writing itself. Thus, a subsequent copy of a document, whether handwritten or typed, cannot qualify as a "duplicate." Because a "duplicate" is a product of a method which insures accuracy, many commentators have urged that it should be admitted into evidence as if it were the original writing itself. See, e.g., C. McCormick, Evidence § 236 (2d ed. 1972); B. Witkin, California Evidence § 690 (2d ed. 1966); J. Wigmore, Evidence § 1234 (Chadbourn ed. 1972). The courts have consistently permitted carbon copies to be

admitted into evidence, treating them as originals. The courts have relied in these cases on the fact that the carbons were produced contemporaneously with the original. See Edmunds v. Atchison, Topeka & Santa Fe Ry., 174 Cal. 246, 162 P. 1038 (1917); People v. Lockhart, 200 Cal. App.2d 862, 871, 19 Cal. Rptr. 719, ___ (1964); Pratt v. Phelps, 3 Cal. App. 755, 757, 139 P. 906, ___ (1914). Evidence Code Section 1550 provides that photographic copies made and preserved in the ordinary course of business satisfy the requirements of the best evidence rule. However, under existing statutes, it has been held that the California courts lack power to go beyond these special cases to permit the admission of photographic copies made, for example, specifically for litigation. Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 116 Cal. Rptr. 412 (1974).

Under subdivision (b), duplicates will not be admitted into evidence if either a genuine question is raised as to the authenticity of the writing itself or in the circumstances admission of the duplicate would be unfair. If, for example, a party opposing admission of a duplicate alleges specific facts indicating that the writing from which a duplicate has been made is a forgery, the court may require that the original be produced for examination before permitting the copy to be introduced into evidence. Additionally, if the unique size, shape, or certain physical characteristics of the original make it necessary for the original to be presented in court in order for a party properly to examine or cross-examine witnesses, it may be unfair in the circumstances to admit the duplicate in lieu of the original writing itself.

As in all cases involving introduction of a writing, when offering a duplicate, the proponent of the evidence must authenticate it. See Evid. Code §§ 1400-1421. In the vast majority of cases, such authenticating evidence will also be sufficient to meet any claim that the duplicate should not be admitted under Section 1500.5(b). If the proponent of the duplicate is concerned that a challenge to admission cannot be overcome by the evidence on authentication, the proponent may, for example, (1) obtain a stipulation as to admissibility or (2) utilize the procedure set out in Code of Civil Procedure Section 2033 to obtain an admission of the genuineness of the original. If a party opposes introduction of the duplicate, the court should consider the conduct of the

parties in determining whether it would be unfair "in the circumstances" to admit the duplicate including, for example, the fact that the parties have relied on the duplicate during the preliminary stages of the proceedings or that the party opposing the introduction reasonably could have been expected to demand production of the original (see Code Civ. Proc. § 2031) or to use other discovery procedures to obtain the original.

If the duplicate contains only a portion of the writing itself or is in some respect incomplete, and the opposing party indicates that the entire writing is, or may be, needed for effective cross-examination or fully to explain the portion offered, the court may require that the proponent produce at his option either the entire original or an adequate duplicate of the entire writing. See Evid. Code § 356. Cf. United States v. Alexander, 326 F.2d 726 (4th Cir. 1964).