

9/26/77

Memorandum 77-63

Subject: Schedule for Work--Priorities for Topics

Each fall, in addition to reviewing suggested new topics, the Commission sets priorities for work on its current calendar of topics and schedules its work for the next few years. It should be recognized that any schedule must be tentative since new topics may intervene and since it is difficult to predict the amount of time that will be required to prepare a recommendation on any particular topic. In addition, priorities may require revision in light of requests or suggestions from legislative committees.

The current calendar of topics authorized for Commission study is set out in the draft of the Annual Report (attached to Memorandum 77-62) on pages 1621-1626. The discussion of each topic in the draft notes the present status of work on that topic.

This memorandum discusses the future prospects for selected topics and presents the staff recommendations for priorities. The staff recommends that the Commission's resources during the next year be devoted to finishing up the two major studies presently underway--the guardianship and conservatorship revision and the comprehensive enforcement of judgments statute. Other smaller topics, such as general assignments for the benefit of creditors, selected evidence problems, and selected eminent domain problems, should be worked into the agenda as time is available. A rough schedule for submission of recommendations to future legislative sessions is set out as Exhibit 1 (pink).

Creditors' remedies. The Commission has been through all parts of the comprehensive enforcement of judgments draft at least once, and many parts more than once. The Commission has retained a consultant to prepare a separate study on the homestead exemption, which should be available next spring. A Pacific Law Journal article (of poor quality) may be published concerning retroactive application of changes in exemption statutes. This project could be completed for introduction in the 1979 legislative session (the beginning of the next two-year session) if we followed the schedule attached as Exhibit 2 (yellow). This is an ambitious schedule and one that the Commission may be unable to meet.

The Commission decided at the April 1977 meeting to undertake a study of the law relating to general assignments for the benefit of creditors with a view to introducing a bill in the near future. The staff will commence work on this shortly to the extent time is available when not consumed by the major studies underway.

Evidence. We have in hand Professor Friedenthal's survey of the differences between the Federal Rules of Evidence and the California Evidence Code. We have also received an independent suggestion that the Commission undertake this topic. See Exhibit 3 (green). We could work on individual aspects of this study and work them into the agenda as the Commission's and staff's time permits.

Child custody, guardianship, and related matters. It now appears that the guardianship-conservatorship revision cannot be accomplished for the 1978 legislative session and will have to be completed with the view to introduction in the Legislature in 1979. This will give an adequate opportunity to the State Bar Probate Committee and the Land Title Association to carefully review the legislation; it will also permit wide dissemination of the tentative recommendations for comment and revision.

The guardianship revision is just one aspect of the first phase of the child custody study--to make uniform the standards in all proceedings for awarding custody of a minor. The staff will investigate the other types of proceedings where custody of a minor is awarded (there are at least seven) to determine if the uniform standard can be incorporated with a minimum disruption of the law. This can be done on a nonpriority basis.

Inverse condemnation. Our consultants, Professor Kanner and Mr. Dankert, have both felt the Commission should give priority to the inverse condemnation study and have suggested a number of aspects of the study that the Commission could profitably work on. Chairman McLaurin and Commissioner Miller have also suggested aspects that would be worth working on. The Commission, at its May 1977 meeting, decided to defer a decision on what aspects of inverse condemnation to study and what priority to give them until it has received the advice of the State Bar Committee on Condemnation. Mr. Fadem, the State Bar Committee chairman, has advised us that this is a top priority matter for the committee and that we will have the committee's suggestions before the end of October.

The staff suggests we defer any decisions on this subject until we receive the committee's suggestions.

Class actions. Some time ago, the Commission determined that Professor Friedenthal should be our consultant on class actions. The Commission determined to delay work on the topic pending development of the Uniform Act and the development of a more extensive body of case law relating to class actions. Professor Friedenthal reports that he will be in a position to commence work on the background study in about a year and a half.

Discovery in civil cases. Discovery has been on our inactive agenda; the State Bar has been active in this field. The staff believes that we should continue to defer active study of this topic.

Possibilities of reverter powers of termination.

Marketable Title Act and related matters. The California Land Title Association is reviewing the provisions of the Uniform Act that relate to these topics and will submit a report to the Commission concerning the changes it recommends be made in the Uniform Act if those provisions are to be recommended for enactment in California. The report should be in our hands before the end of the year. The staff does not believe we should undertake a major study such as this until we have completed work on at least one of the major studies presently underway.

Arbitration. There is a committee of the State Bar presently working on the arbitration statute. They have obtained enactment of a provision authorizing mechanics' liens in arbitration; they will be investigating the application of attachment and other provisional remedies in arbitration. The staff believes the Commission should do nothing on this problem unless asked to by the committee.

Eminent domain. We have received a number of suggestions for aspects of eminent domain law that are in need for further study:

(1) Exhibit 4 (buff) is a letter from an attorney concerned about the valuation of public utility property in eminent domain proceedings. The letter was accompanied by several briefs, much too voluminous to reproduce. The staff would be reluctant to get involved in this controversy; we suggest that the material be forwarded to the Public Utilities Commission.

(2) The Commission's recommendation relating to evidence of market value of property (attached to Memorandum 77-66) notes that the Commission plans to devote further study to the simplification of Revenue and Taxation Code Section 4986, which relates to apportionment of taxes on property taken by eminent domain (among other topics). Two persons have submitted suggestions for the improvement of the provision, but we have not reproduced their letters. The staff suggests that the revision of Section 4986 be done when time permits on a nonpriority basis.

(3) The Commission has also received suggestions, among the comments on the evidence of market value recommendation, that studies be made of aspects of the rules relating to valuing property at a highest and best use for which it is not zoned at the date of valuation. One suggestion is that, where a party wishes to show a reasonable probability of a zoning change, the party must also state what conditions would probably be attached to the change (dedications of land, improvements at owner's cost, and the like). The staff believes this is unnecessary since the opposing party can and does point out these factors. See, e.g., *City of Fresno v. Cloud*, 26 Cal. App.3d 113, 102 Cal. Rptr. 874 (1972). Another suggestion is that property be valued at its highest and best use without there first being shown a reasonable probability of a zoning change in the near future to permit that use. The staff believes this suggestion would stand no chance of enactment; moreover, the test is a court-developed test (and a reasonable one), the abrogation of which would involve the Commission deeply in the futile effort to draft reasonable appraisal standards. Finally, it is suggested that property be valued without taking into consideration the fact that its value could be lowered by police power exercise (such as impairment of access). The staff does not believe this is a problem in existing law. The cases have held that, if property is valued taking into account the probability of a zoning change, it must also be valued on the basis of any required dedications. See, e.g., *People v. Investors Diversified Servs., Inc.*, 262 Cal. App.2d 367, 68 Cal. Rptr. 663 (1968). However, the staff has not discovered any cases that have held that property which is already devoted to its highest and best use is to be valued on the basis that the police power could be used to lower its value, such as by impairment of access.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

POSSIBLE RECOMMENDATIONS FOR 1979 LEGISLATIVE SESSION

- (1) Retroactivity of exemptions from execution
- (2) Homestead exemption
- (3) Comprehensive statute on enforcement of judgments
- (4) Elimination of overlap between guardianship and conservatorship laws
- (5) General assignments for benefit of creditors
- (6) Selected aspects of eminent domain law

POSSIBLE RECOMMENDATIONS FOR 1980 LEGISLATIVE SESSION

- (1) Comprehensive statute on enforcement of judgments if not completed for 1979
- (2) Revisions of Evidence Code
- (3) Adoption and child custody
- (4) Selected aspects of inverse condemnation law

POSSIBLE RECOMMENDATIONS FOR 1981 LEGISLATIVE SESSION

- (1) Class actions
- (2) Marketable Title Act and related matters
- (3) Discovery in civil cases

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EXHIBIT 2

SUGGESTED SCHEDULE FOR COMPLETION OF RECOMMENDATION FOR
COMPREHENSIVE STATUTE ON ENFORCEMENT OF JUDGMENTS

- January 1978 - Approve draft of tentative recommendation for distribution for comment in mimeographed form
- April 1978 - Tentative recommendation revised to reflect decisions made at January 1977 meeting and prepared and sent out to Professor Riesenfeld, levying officers, court clerks, State Bar Committee, and other interested groups
- September and October 1978 Meetings - Review comments on tentative recommendation and revise same
- October 1978 - Approve recommendation for printing
- January 1979 - Recommended legislation introduced
- March 1979 - Recommendation available in printed form

SUGGESTED TOPIC FOR LAW REVISION COMMISSION STUDY

Your name: Prof JAMES R. ADAMS

Address: McGeorge School of Law, Univ. of Pac.

3200 Fifth Ave., Sacramento, CA 95817

Telephone number: (916) 449-7101

Specific problem in existing statutory or decisional law that needs study (please include references to any relevant code sections and significant cases of which you are aware):

Revision of Evidence Code

(Authorized topic list)

More than fifteen states have adopted codes patterned after the new Federal Rules of Evidence or the Uniform Rules of Evidence (1974). Many others are in the process of doing the same.

This should not be too difficult, to study; the existing code has its problems and much discussion has already taken place with regard to the strengths and weaknesses of the new codes.

If you are aware of any statutes in other states that might be helpful in solving the problem, please indicate:

See above comments; many have written on the new codes already.

If you are aware of any law review article or other publications relevant to the problem, please list below:

I am the consultant on the South Dakota revision committee. As such, I have gathered material from other states that is not published but might be of interest (e.g., Alaska and Oklahoma).

EXHIBIT 4

JORDON GRAY (1877-1967)
 W. D. CARY (1982-1943)
 FRANK A. FRYE (1904-1970)
 JOHN M. CRANSTON
 JAMES W. ARCHER
 FRANK KOCKRITZ
 SYERLING HUTCHESON
 THOMAS C. ACKERMAN, JR.
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 RICHARD ALEXANDER BURT
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 ROBERT AMES
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 AMES K. SMITH
 ROBERT G. COPELAND
 AVI D. MONAHAN
 TIMOTHY V. MCFARLAND
 PETER G. AYLRARD
 ALPH M. PRAY, III
 KNOX BELL
 ERNY D. ROSS
 AVI D. GEERDES
 AMES F. STIVEN
 LANCE C. SCHAEFFER
 WILLIAM E. BEAMER
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May 20, 1977

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California Law Revision Commission
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Re: South Bay Irrigation District v.
 California-American Water Company
 61 Cal.App.3d 944

Gentlemen:

I have reviewed your current tentative recommendations relating to evidence of market value of property. I have no particular comment to make with respect to your recommendations, but they prompt me to write to you concerning other current problems in the field which I believe need attention.

The Fourth Appellate District Court recently rendered its decision in the above-entitled matter. It ruled, erroneously I believe, as follows:

1. That legislative police power rate regulation value is judicial eminent domain power just compensation value, in spite of the nationwide authorities that hold to the contrary;
2. That capitalizing the actual income attributable to business conducted on condemned property sets just compensation under Evidence Code Section 814, in spite of the admonition contained in Evidence Code Section 819;
3. That condemned public utility property is to be valued fully burdened by its dedication to a public use, and not for its highest and best use, in spite of the fact that condemned public agency property is valued for its highest and best use free of its dedication to a public use;

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4. That the only market data to be permitted in evidence to determine just compensation for condemned public utility property is the prices paid by private investors, by reason of Evidence Code Section 822(a), in spite of the evidence that substantially all sales of public utilities are to unregulated public agencies who, by reason of their nonregulated and tax-exempt status, pay prices far in excess of the prices paid by private investors;

5. That the reconstruction cost new less depreciation approach to value is of no relevance in determining the just compensation to be paid for a California public utility, in spite of Evidence Code Section 820, in spite of the almost exclusive reliance on this approach to value by the California Public Utilities Commission in the eminent domain proceedings held before it, and in spite of the nationwide authorities stating that RC&LD is the most accurate approach to value available in setting just compensation for a public utility;

6. That an opinion as to just compensation for a single district can be based on a book apportionment of a bulk purchase price paid for a number of separate public utility districts, even though the bulk apportionment inherently involves an opinion as to the value of the other districts not being condemned, in violation of Evidence Code Section 822(d);

7. That no part of the attorneys and expert witness fees incurred by the condemnee (in excess of \$3.5 million) are recoverable.

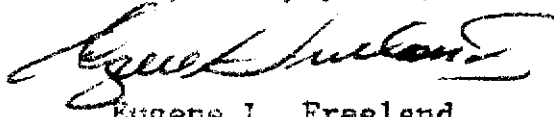
One of the most unfair areas of our law is that of eminent domain. For some reason which completely baffles me, our courts have refused to recognize that eminent domain is a judicial, not a legislative, power and that it is the courts, not the legislature, which must determine the breadth of, and award, just compensation. Over the years, especially through the efforts of your commission and the cooperation of the legislature, the law has been made increasingly fair. However, it remains basically a heavy burden on property owners. And now, if public agencies are able to acquire public utilities operating within their boundaries at original cost depreciated

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rate base plus a premium - at actual regulated income capitalized - when those public agencies are not regulated and are tax-exempt, the demise of much of the public utility industry is predictable.

I have cited no specific authority for the statements of law or fact I make in this letter. Rather, I enclose copies of my briefs. If any of my thoughts appear to have merit as representing an area of the law for which some change is in order, I will be happy to pinpoint the relevant sections of the briefs.

Very truly yours,



Eugene L. Freeland

ELF:s1

Enclosures

P.S. The court also erroneously ruled, contrary to Code of Civil Procedure Sections 632 and 634 and Rule 232(e) of the California Rules of Court, that the trial court, in an eminent domain case need make no special findings when requested to do so, and the finding "Just compensation is the sum of _____." is all that is needed.

ELF