3/9/60

Memorandum No. 26(1960)

Subject: Study No. 37(L) - Claims Against Public Officers and Employees.

Professor Van Alstyne's Study was sent to you on March 9, 1960.

As the Study indicates, Professor Van Alstyne has made alternative recommendations. He recommends that there be no requirement that claims against public officers and employees be presented prior to bringing an action. If this recommendation is not accepted by the Commission, he recommends new provisions to replace the existing statute relating to claims against public officers and employees. His recommendations are outlined below.

ABOLISH REQUIREMENT THAT CLAIMS BE PRESENTED PRIOR TO ACTION

Professor Van Alstyne makes the following recommendations:

(1) Repeal the existing claims statutes relating to claims against public officers and employees.

The policy considerations to be taken into account are set out on pages 34-40 of the Study. Sections 800 to 803 of the Government Code, attached as Appendix I of this memorandum, are the only sections that need to be repealed. (As the study indicates, page 4, it is possible to contend that a few special district claims provisions were applicable to claims against district personnel as well as claims against the district itself; but these provisions were repealed by the general claims act of 1959.)

(2) Amend Section 2001 of the Government Code, relating to providing free defense of public officers and employees, to eliminate certain ambiguities therein and to make it clear that Section 2001 authorizes free defense for personnel of all levels of government.

Section 2001 of the Government Code is attached to this memorandum as Appendix II. The proposed amended version of Section 2001 is set out on pages 48 and 49 of the Study. Section 2001 is discussed at pages 37-38 of the Study.

If recommendation (1), above, is adopted by the Commission, the staff recommends that the Commission consider the following additional matters:

(1) A recommendation that a statutory provision be enacted to provide that, notwithstanding any charter or ordinance provision to the contrary, no claim need be filed as a prerequisite to suit against a public officer or employee. Unless the Constitutional Amendment recommended by the Commission as a part of the general claims package is adopted, it is not clear that the state can by statute make charter and ordinance provisions providing for claims against public officers and employees no longer applicable. However, assuming that the Constitutional Amendment is approved by the people, it is highly desirable to make these charter or ordinance provisions no longer applicable. Actually, they represent more of a trap to the plaintiff than do the statutes. This matter is not discussed in the study. But I called Professor Van Alstyne and he agrees that a statutory provision such as suggested above would be highly desirable.

(2) When should the recommended repeal of Sections 800 to 803 become effective? What about claims now barred because of a failure to comply with the appropriate statute or charter or ordinance provision requiring a

filing of a claim but not otherwise barred by the appropriate statute of limitations?

PROVIDE NEW PROCEDURE FOR PRESENTING CLAIMS

The consultant has submitted an alternative recommendation in case the Commission determines that the general policy of the officer and employee claims procedure be retained:

(a) Sections 800-803 of the Government Code should be repealed.

(b) A new series of provisions should be enacted to replace the repealed sections, providing a claims procedure which insofar as possible is consistent with the procedure established for entity claims by the new general claims statute of 1959, and which will eliminate as many potential sources of injustice as possible. A proposed draft is set out on pages 50-57 of the Study. The discussion on pages 1-34 of the Study reveals the present inconsistencies, overlapping provisions and uncertainties of interpretation and application in the present law.

(c) The proposed amendment to Section 2001 of the Government Code should be adopted in the interest of uniformity of application, and because of its importance in relation to the objectives of the claims procedures.

Respectfully submitted,

John H. DeMoully
Executive Secretary

APPENDIX I

Sections 800 to 803 of Government Code

800. As used in this chapter:

(a) "Person" includes any pupil attending the public schools of any school or high school district.

(b) In addition to the definition of public property as contained in Section 1951, "public property" includes any vehicle, implement or machinery whether owned by the State, a school district, county, or municipality, or operated by or under the direction, authority or at the request of any public officer.

(c) "Officer" or "officers" includes any deputy, assistant, agent or employee of the State, a school district, county or municipality acting within the scope of his office, agency or employment.

801. Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a state officer the claim shall be filed with the officer and the Governor.

802. The claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.

803. A cause of action against an employee of a district, county, city, or city and county for damages resulting from any negligence upon the part of such employee while acting within

the course and scope of such employment shall be barred unless a written claim for such damages has been presented to the employing district, county, city, or city and county in the manner and within the period prescribed by law as a condition to maintaining an action therefor against such governmental entity.

APPENDIX II

Section 2001 of Government Code

(a) Whenever any action or proceeding, including a taxpayer's suit, is brought against any officer in his official or individual capacity, or both, of the State or of any district, county, or city

(1) On account of injuries to persons or property resulting from the dangerous or defective condition of any public property or

(2) On account of any action taken or work done by him in his official capacity, in good faith and without malice, or

(b) Whenever any action or proceeding is brought against any officer, in his official or individual capacity, or both, including officers as defined in Article 2, of the State or of any school district, county or municipality on account of injuries to persons or property, alleged to have been received as a result of

(1) The negligence or carelessness of such officer occurring during the course of his service or employment, or

(2) The dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of such officer, it is the duty of the attorney for the State, district, county, municipality, or other public or quasi-public corporation, as the case may be, to act as counsel in defense of such suit, unless provision has been made for the employment of other counsel in connection therewith.

In such event the fees, cost and expenses involved in a suit referred to in subdivisions (a) and (b) are a lawful charge against the State, school district, county or municipality, as the case may be.

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Mtg.

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

NOTICE OF ALIBI IN CRIMINAL ACTIONS

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

March 5, 1960

(40) Revised 3/1/60

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Notice of Alibi in Criminal Actions

A defendant in a criminal action may attempt to establish an alibi - that he was at some place other than the scene of the crime and therefore could not have committed it. The testimony concerning the alibi may take the prosecution completely by surprise. This surprise alibi testimony, when based on perjury, may result in an unjust acquittal because the prosecution has little or no opportunity to investigate the credibility of the alibi witnesses and their statements.

On the other hand, if the prosecution has sufficient notice that an alibi defense will be asserted at the trial, the pretrial investigation will often reveal whether or not the alibi is true. If the defendant has a bona fide alibi, the charges against him can be dismissed. If his alibi is false, the investigation may disclose that fact and the prosecution will have sufficient time to secure rebuttal evidence.

Fourteen states, by statute or court rule, require the defendant to give notice a specified number of days prior to trial if he intends to rely upon an alibi defense. These notice of alibi laws have met with general approval in the states where they have been adopted and appear to be successful in meeting the problems for which they were designed.

The Commission has concluded that, upon demand by the prosecution, the defendant in a criminal action should be required to give notice of his

intention to rely upon alibi testimony of witnesses other than himself. Accordingly, the Commission makes the following recommendations:

1. The defendant should be required to give notice of alibi only if the prosecuting attorney makes a written demand therefor. The demand should include a statement of the specific time and place the prosecution intends to establish at the trial as the time when and place where the defendant participated in or committed the crime. The demand is necessary to provide the defendant with the information he needs to enable him to determine whether he has an alibi for the time and place that will be established at the trial. It may be argued that such a demand is unnecessary because the time and place of the crime is alleged in the indictment or information. However, the indictment or information need not state the precise time and specific place at which the offense was committed and, even where it does state a precise time, the time thus specified is usually preceded by the words "on or about" or is otherwise accompanied by words of extension. Thus there is no assurance that the indictment or information will inform the defendant of the specific time and place the prosecution will establish at the trial.

2. The demand of the prosecuting attorney for the notice of alibi also should state the name and address of each witness upon whom the prosecution intends to rely to establish the defendant's presence at the scene of the crime, including witnesses whose testimony will be limited to the authentication of documentary evidence. If the defendant is required to reveal the identity of his alibi witnesses, it seems only fair to require the prosecution to reveal the identity of the witnesses it will use to establish the presence of the defendant at the scene of the crime. The fact that the defendant is entitled to a transcript of the testimony at the grand jury proceeding or at the

preliminary examination does not necessarily mean that he is informed of the identity of the prosecution's witnesses. If the offense is one triable in an inferior court there will be no grand jury proceeding or preliminary examination. If it is one triable in the superior court there may be a waiver of the preliminary examination or, if there is a grand jury proceeding or a preliminary examination, the prosecution may present only enough evidence to obtain an indictment or to support an information.*

3. The defendant's notice of alibi should state the place at which the defendant claims to have been at the time stated in the prosecuting attorney's demand and the name and address of each witness other than himself upon whom the defendant intends to rely for alibi evidence, including witnesses whose testimony will be limited to the authentication of documentary evidence. The prosecution cannot make a satisfactory investigation of the alleged alibi unless it is furnished with this information.

4. Alibi testimony of persons other than the defendant should be excluded at the discretion of the trial court if the defendant fails without good cause to file the required notice of alibi after receiving the demand from the prosecuting attorney. By placing the exclusion of such testimony within the discretion of the trial judge the effect of the statute can be avoided in those cases where a strict application might result in an unfair trial.

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* Under the procedure used in some states, the prosecution is not required to give the names of its witnesses until after the defendant has filed his notice of alibi. However, requiring the prosecution to list its witnesses in its demand for a notice of alibi eliminates an extra step in the procedure and thus keeps it from becoming too cumbersome. Moreover, invoking this procedure is discretionary with the prosecution; a demand need not be made if the prosecutor concludes that the disclosure of the names of his witnesses is not worth the information he may receive in return.

5. The defendant should be allowed to give alibi testimony himself, notwithstanding his failure to file and serve the required notice of alibi. The alibi statutes in other states make no distinction between the testimony of witnesses and the testimony of the defendant. However, the purpose of a notice of alibi statute is to preclude the use of surprise alibi witnesses when the prosecution has insufficient time to investigate the credibility of such witnesses and their statements. The prosecution should be able to make an adequate investigation of the whereabouts of the defendant and his credibility without a notice of alibi. Moreover, it might be thought to be unfair to preclude the defendant from testifying personally as to any matter material to his defense. In any event, an uncorroborated alibi will be of slight value to the defendant.

6. If the defendant serves a notice of alibi, the trial court should be authorized, in its discretion, to exclude the testimony of any witness for the prosecution concerning the presence of the defendant at the time and place specified in the demand unless such witness was listed in the demand or good cause is shown why such witness was not so listed. The prosecution should be subject to the same sanction as the defendant to insure compliance with the terms of the statute.

7. The notice of alibi and demand for the notice of alibi should be inadmissible as evidence and no reference or comment should be allowed in the presence of the jury as to the fact that a notice or demand was served or as to the contents thereof. Under the proposed statute, the defendant is forced to give a notice of alibi at a time prior to the trial in any case where he believes that he <u>may</u> rely upon an alibi at the trial. If the defendant decides at the trial that he does not want to rely upon an alibi defense, the fact that

he gave a notice of alibi to protect his right to use alibi testimony should not be used against him. For example, the defendant may decide not to use his alibi defense if he discovers, after giving a notice of alibi, that his only alibi witness has a criminal record and bad reputation. The defendant should be similarly protected where he uses an alibi defense at the trial but decides not to use one of the witnesses listed in his notice of alibi.

Revised 3/1/60

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

An act to add Chapter 4a (commencing with Section 1028.1) to Title 6 of Part 2 of the Penal Code, relating to evidence in criminal actions.

The people of the State of California do enact as follows:

SECTION 1. Chapter 4a (commencing with Section 1028.1) is added to Title 6 of Part 2 of the Penal Code, to read:

CHAPTER 4a. NOTICE OF ALIBI

1028.1. As used in this chapter, "alibi evidence" means evidence that the defendant in a criminal action was, at the time specified in the demand for a notice of alibi, at a place other than the place specified in the demand; but "alibi evidence" does not include testimony of the defendant himself as to an alibi.

1028.2. Not less than 10 days before the day set for trial, the prosecuting attorney may serve on the defendant or his attorney and file a demand that the defendant serve and file a notice of alibi if the defendant is to rely in any way upon alibi evidence at the trial. The demand shall:

(a) State the time and place that the prosecuting attorney intends to establish at the trial as the time when and place where the defendant

participated in or committed the crime. If the prosecuting attorney intends to establish more than one time and place where the defendant participated in or committed the crime, the demand shall state each such time and place.

(b) State the name and residence or business address of each witness upon whom the prosecuting attorney intends to rely to establish the defendant's presence at each time and place specified in the demand.

(c) State that the defendant is required by Chapter 4a (commencing with Section 1028.1) of Title 6 of Part 2 of the Penal Code to serve and file a notice of alibi if he is to rely in any way upon alibi evidence at the trial.

(d) State that the defendant need not serve or file a notice of alibi if he is to rely only upon his own testimony to establish an alibi.

(e) Be signed by the prosecuting attorney.

1028.3. If a demand for a notice of alibi is served pursuant to Section 1028.2 and the defendant is to rely in any way upon alibi evidence, he shall, not less than five days before the day set for trial, serve on the prosecuting attorney and file a notice of alibi which shall:

(a) State the place or places where the defendant claims to have been at the time or times stated in the demand.

(b) State the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence.

(c) Be signed by the defendant or his attorney.

1028.4. At any time before trial, the court before which the criminal action is pending may, in its discretion, upon good cause shown:

(a) Order that the time of service of the notice of alibi be shortened.

(b) Order the amendment of the demand for a notice of alibi or the

amendment of the notice of alibi.

The party who obtains the order shortening the time of service of the notice of alibi or authorizing or requiring the amendment shall promptly serve a copy of the order on the opposing party.

1028.5. If the defendant serves a notice of alibi, the court may, in its discretion, exclude testimony of a witness offered by the prosecuting attorney to establish the presence of the defendant at a time and place specified in the demand for a notice of alibi unless:

(a) The name and residence or business address of the witness was included in the demand; or

(b) Good cause is shown why the demand failed to include the name and residence or business address of the witness and why the demand was not amended under Section 1028.4 to include such name and address.

1028.6. Subject to Sections 1028.7 and 1028.8, if a notice of alibi is required to be served by the defendant under this chapter, the court may, in its discretion, exclude alibi evidence offered by the defendant unless:

(a) The information relating to such evidence was included in the notice of alibi as required by Section 1028.3; or

(b) Good cause is shown why the notice of alibi was not served or, if a notice of alibi was served, good cause is shown why it failed to include the information relating to such evidence as required by Section 1028.3 and why it was not amended under Section 1028.4 to include such information.

1028.7. If the prosecuting attorney at the trial seeks to establish that the defendant participated in or committed the crime at a time or place other

than the time and place specified in the demand for the notice of alibi:

(a) The testimony of a witness offered by the defendant shall not be excluded because the defendant failed to comply with the provisions of this chapter; and

(b) Upon motion of the defendant, the court may grant a continuance as provided in Section 1050.

1028.8. Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter.

1028.9. Neither the notice of alibi nor the demand for a notice of alibi is admissible as evidence in the criminal action. No reference or comment may be made before the jury concerning:

(a) The contents of a notice of alibi or the contents of a demand for a notice of alibi.

(b) Whether or not a notice of alibi or a demand for a notice of alibi was served and filed.

Nothing in this section is intended to prevent the court from examining a notice of alibi and demand for a notice of alibi for the purpose of ruling on the exclusion of evidence under Sections 1028.5 and 1028.6.