

Time

Place

December 17 - 7:00 p.m. - 10:00 p.m.
December 18 - 9:00 a.m. - 5:00 p.m.

State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

December 17-18, 1965

1. Approval of Minutes of November 1965 Meeting (sent 11/26/65)
2. Administrative Matters
MEMO - 65-84
Memorandum 65-82 (sent 11/29/65)
3. Study No. 36(L) - Condemnation Law and Procedure

Obtaining Factual Information

- Memorandum 65-76 (to be sent)
1st SUPP 65-76
4. Study No. 63(L) - Evidence Code

Memorandum 65-77 (sent 12/3/65)
Tentative Recommendation (attached to Memorandum)
1st SUPP Memorandum 65-77
2nd SUPP Memorandum 65-77
5. Study No. 53(L) - Personal Injury Damages as Separate Property

Memorandum 65-78 (enclosed)
Tentative Recommendation (attached to Memorandum)
6. Study No. 62(L) - Vehicle Code Section 17150 and Related Statutes

Memorandum 65-79 (to be sent)
Tentative Recommendation (attached to Memorandum)
7. Study No. 55(L) - Additur and Remittitur

Memorandum 65-80 (enclosed)
Tentative Recommendation (attached to Memorandum)

8. Study No. 51(L) - Right to Support After Ex Parte Divorce

Memorandum 65-81 (to be sent)
Tentative Recommendation (attached to Memorandum)
Research Study (sent 11/10/65)

9. Suit in Common Name, etc.

Memorandum 65-71 (to be sent)
Revised Research Study (to be sent)

MINUTES OF MEETING

of

DECEMBER 17 AND 18, 1965

San Francisco

A regular meeting of the California Law Revision Commission was held at San Francisco on December 17 and 18, 1965.

Present: John R. McDonough, Chairman
Richard H. Keatinge, Vice Chairman
Joseph A. Ball
James R. Edwards
Sho Sato
Thomas E. Stanton (December 18)
George H. Murphy, ex officio

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
Herman F. Selvin

Messrs. John H. DeMouilly, Joseph B. Harvey, and John L. Reeve of the Commission's staff also were present.

Also present on December 17 were the following observers:

Robert F. Carlson, Department of Public Works
David B. Walker, Office of County Counsel, San Diego
John M. Morrison, Office of Attorney General
Willard A. Shank, Office of Attorney General
Clarence B. Taylor, Oakland Attorney

ADMINISTRATIVE MATTERS

Correction of Minutes of October 1965 Meeting. The following correction was made of the Minutes of the October 1965 meeting.

On page 6 of the Minutes as previously approved, after the first paragraph under the heading "Research Contract on Study No. 65(L) - Inverse Condemnation," insert the following new material:

The contract is to provide for travel expenses incurred by the consultant in attending meetings of the Commission or committees thereof, conferences with the Executive Secretary, and legislative hearings. Travel expenses are not to exceed the amounts indicated below:

1965-66 Fiscal Year -- \$150

1966-67 Fiscal Year -- \$850

1967-68 Fiscal Year -- \$850

1968-69 Fiscal Year -- \$900

Travel expenses are to be computed in the same manner as travel expenses for members of the Law Revision Commission.

The period to be covered by the agreement is from November 1, 1965, to June 30, 1969.

Minutes of November 1965 Meeting. The Commission approved the Minutes of the November 1965 Meeting after making the following correction.

Page 12 of the Minutes as submitted by the staff was deleted and the following material was inserted:

STUDY NO. 51 - RIGHT TO SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 65-72 and the first and second supplements thereto.

Mr. McDonough made an extended oral statement in elaboration and supplementation of the first supplement. He urged:

- (1) That the Commission not include in any legislation it recommends on this subject any provisions indicating what law should be applied (i.e., legislative choice of law rules);
- (2) That the Commission include in any legislation it recommends on this subject substantially the following provision:

The provisions of this Title are to be applied only when the law of this state is applicable to the case. Whether the law of this state is applicable is a question of law to be decided by the court;

- (3) That the Commission limit the legislation it recommends on this subject to the substantive and procedural rules which should be applied in those cases in which a court determines that California law is applicable.

In support of this position Mr. McDonough recounted in some detail the considerable changes which have been generally urged by the commentators and adopted by the courts of a number of states in recent years insofar as

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choice of law is concerned. These changes have, he said, been generally in the direction of departing from broad, general choice of law rules (such as place of injury, place of making of a contract, situs of property, and place of domicile) in favor of modes of decision which emphasize the factual relationship of particular states with particular cases (herein of "contacts" and "center of gravity"), and the governmental interest (or lack thereof) of particular states in having their laws applied to particular cases. Mr. McDonough stated that, while he has reservations about many of these departures, they do seem pretty clearly to be the order of the day and that it seems to him very doubtful, indeed, that the legislatures ought to step in at this point to stifle the current judicial trend in this area by the enactment in statutory form of the very kind of broad, general choice of law rules that the courts are clearly trying to get away from. He also gave illustrations of hypothetical support-after-ex-parte-divorce-decree-cases in which, in his opinion, the application of the kind of choice of law rules which either the Commission or its staff now appear to have in contemplation would make little if any sense, given the remote connection of the jurisdiction whose law would thus be applied with any of the parties as of the time of its application--leading him to conclude that the very considerations which have led the courts increasingly to abandon broad, general choice of law rules are no less applicable in these cases than in other kinds of cases in which the courts have found them unsatisfactory. Finally, Mr. McDonough pointed out what he believes are a number of open questions relating to the application of the Full Faith and Credit Clause and other Constitutional provisions in this area,

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the existence of which he believes both complicates and makes additionally unwise any attempt to deal with the complex choice of law problems involved with legislatively enacted choice of law rules of a broad general nature. He argued that, taking these considerations into account, the Commission should leave choice of law in this area to the courts unless and until there is demonstrated a need, in the form of badly decided cases, for legislative intervention and should confine its recommendations to a body of rules that would produce sound results in those cases in which the courts determine that California law should be applied.

After Mr. McDonough's views and arguments had been discussed, a motion was duly made, seconded and adopted that the position he had urged should not be accepted by the Commission at this time and that the staff should be directed to continue its work on Study No. 51 on the hypothesis that the Commission's recommendation on this subject will include provisions relating to what state's law is to be applied. Mr. McDonough voted against the motion.

Future meetings. Future meetings are scheduled as follows:

January	No meeting
February 24, 25, and 26	San Francisco
March	No meeting
April 3 (evening), 4 (all day), 5 (morning only), and 6 (morning only)	Lake Tahoe

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Publication of Commission material in law reviews. The Commission considered Memorandum 65-84 relating to publication of Commission material in law reviews. The Commission approved the publication of research studies where accompanied by the following note:

This Article was prepared by the author for the California Law Revision Commission and is published here with the commission's consent. The Article was prepared to provide the commission with background information to assist the commission in its study of this subject. However, the opinions, conclusions, and recommendations contained in this Article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

The Commission also determined that it should have a letter from the law review that the Commission has authority to consent to the republication of the article after it has been published in the law review and that the Commission itself may republish the article in its pamphlet containing its recommendation to the Legislature.

The Commission considered whether permission should be given to publish tentative recommendations in law reviews. It was agreed that the tentative recommendation on personal injury damages could be published in the U.C.L.A. Law Review with Mr. Brunn's research study with the following note (in the text, not a footnote):

This tentative recommendation is published here so that interested persons will be advised of the commission's tentative conclusions and can make their views known to the commission. Any comments sent to the commission will be considered when the commission determines what recommendation it will make to the California Legislature.

The commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the commission will submit to the Legislature.

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The Commission determined that no tentative recommendation should be published in a law review unless Commission permission is first obtained. However, the Commission believes that publication in a law review is a generally desirable course of action if the particular tentative recommendation is at a stage where such publication is justified.

Topics for consideration during 1966. The Commission considered Memorandum 65-82 and approved the staff's suggestions outlined in that memorandum as the topics that would be considered during 1966 to the extent that time permits.

Special Condemnation Counsel. The Commission discussed the position on the staff as Special Condemnation Counsel. Mr. Clarence B. Taylor, Oakland attorney, indicated that he is interested in the position. (Mr. Spencer, State Department of Public Works, has indicated that he is not interested in the position.)

The Commission plans to create a position equivalent in salary to the Attorney IV in the Department of Public Works. The position would exist from its creation until June 30, 1969.

A motion was unanimously adopted that a research contract be made with Mr. Taylor on the Right to Take to cover the period prior to his TAU appointment, that he be appointed TAU as Special Condemnation Counsel as soon as possible, and that he be appointed Special Condemnation Counsel if his name is reachable on the certified list for Special Condemnation Counsel. It should be recognized that funds will have to be obtained to finance the position.

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Research Contract on the Right to Take. A motion was made by Mr. Keatinge, seconded by Mr. Edwards, and unanimously adopted that a research contract be made with Mr. Clarence B. Taylor, Oakland attorney, to prepare a research study on The Right to Take in Eminent Domain Proceedings (as outlined in detail in the Minutes of the October 1965 Meeting). The amount of compensation is to be \$2,000. One-half of this amount is to be paid Mr. Taylor when approximately one-half of the study is completed. It is contemplated that the study will be completed in approximately two months of full time work.

The Executive Secretary was directed to execute the contract on behalf of the Commission.

Distribution of Agenda materials. The Executive Secretary was directed to advise persons receiving agenda materials on eminent domain that the Commission does not have sufficient funds to continue to send such materials to persons who do not attend Commission meetings. Such persons will, of course, receive copies of tentative recommendations when they are distributed for comment.

STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE
OBTAINING FACTUAL AND STATISTICAL INFORMATION

The Commission considered Memorandum 65-76 and the First Supplement thereto.

Letter to persons on mailing list. The Commission approved the sending of the letter contained in Memorandum 65-76 to persons on our distribution list after making the following revisions in the letter:

The words "any defects there may be" were substituted for "the defects" in the last line of the first paragraph of the proposed letter.

In the third line of the second paragraph, the words "led to or caused" were substituted for "required."

In the fourth paragraph, the words "we hope you will consider" were substituted for "should be considered."

Interim committee assistance. It was decided that interim committees should not be contacted at this time. Later, when specific tentative conclusions are reached, the Commission will consider whether interim committees should be contacted. Probably interim committees should not be contacted until the 1967 legislative session is concluded.

Securing information during the next few months. The staff is to prepare a questionnaire designed to obtain information as to the extent of condemnation (or purchase) for particular types of public uses. This would give the Commission a picture of the various major uses, like the Department of Public Works, of the power of condemnation for public use. The questionnaire will be submitted for Commission consideration before it is sent out.

Request for certain information from Department of Public Works. It was suggested that the Department of Public Works consider the feasibility

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of making a study of a representative sample to determine what effect a provision offsetting benefits against the entire award would have. Mr. Carlson was asked to discuss such a study with the appropriate persons in the Department of Public Works and to report to the Commission on whether such a study appears to be feasible. It was recognized that the amount of benefits in past takings will not be known to the extent they exceed the severance damages. The study should consider the effect of a strict "before and after" test (considering general and special benefits and general and special damages) and also the effect of offsetting special benefits only against the entire award.

Information from other agencies. It was suggested that various major condemnors be contacted to determine what kind of information is available in the form of reports that have already been prepared. It was noted that County Counsels may already have such information for school districts. It was suggested that the Executive Secretary either call or visit the offices of major condemning agencies to determine what is already available and could be provided.

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STUDY NO. 44 - THE FICTITIOUS NAME STATUTE

The Commission considered Memorandum 65-71 and the related research study and made the following decisions:

1. The fictitious name statute is to be repealed.
2. The various licensing statutes that incorporate the fictitious name statute by reference are to be amended to require that the information now provided in compliance with the fictitious name statute be filed with the appropriate licensing agencies which shall maintain a roster of their licensees who carry on their licensed activity using a fictitious name.

A tentative recommendation, including proposed legislation, is to be prepared for the February meeting to effectuate these decisions.

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STUDY NO. 51 - RIGHT TO SUPPORT AFTER EX PARTE DIVORCE

The Commission considered Memorandum 65-81 and Commissioner McDonough's response thereto. the following actions were taken:

Section 272

The Commission rescinded the action it had previously taken to require application of California law to determine all questions arising in post-divorce support cases. The staff was asked to redraft the section to make the law of the last matrimonial domicile the applicable law to determine the rights of the parties. This redraft will be presented at the next meeting for consideration.

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STUDY NO. 53(L) - PERSONAL INJURY DAMAGES

The Commission considered Memorandum 65-78 and the tentative recommendation distributed therewith. The following actions were taken:

Section 163.5

The last two lines of the section were revised as follows:

. . . such damages ~~for personal injuries to the spouse~~ is the separate property of the injured spouse.

The Assistant Executive Secretary reported that the Association of Casualty Insurers had indicated that most personal liability insurance policies (including automobile) apparently do not exclude coverage for interspousal torts. Thus, the assumption underlying Section 163.5 that most interspousal tort litigation is between spouses who have lost any community of interest may not be true. The Casualty Insurers Association will provide a fuller report from its headquarters in New York.

Section 171a

The word "noncontractual" was inserted before "liability" in subdivision (b). Conforming textual changes should be made.

Section 902

Section 902 should be amended to provide that the cross-complaint may be filed within 100 days after service of the complaint or within the time to file an answer, whichever period is greater in length.

Section 903

Section 903 was revised to read:

903. For the purpose of service under Section 417 of a cross-complaint for contribution under this chapter, the cause of action against the contribution cross-defendant is deemed to have arisen at the same time that the plaintiff's cause of action arose.

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Section 904

The word "the" was changed to "a" immediately preceding "negligent" in order to make clear that the contribution cross-defendant is entitled to a jury decision on his wrongful conduct as well as on proximate cause.

Section 171c

The exception in the first paragraph was revised as follows:

. . . except that the husband may use such community property received as damages to pay for

In the first line of the last paragraph, the word "such" was restored immediately preceding the word "money" and the word "her" immediately following "money" was deleted.

Tentative Recommendation

As revised, the tentative recommendation was approved for distribution.

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STUDY NO. 55 (L) - ADDITUR

The Commission considered Memorandum 65-80 and the attached tentative recommendation on additur.

The Commission substituted the following for paragraph (1) of subdivision (a) of Section 662.5:

(1) A new trial limited to the issue of damages is otherwise appropriate.

This change was made to eliminate the problem that might otherwise exist re compromise verdicts. See page 2 of Memorandum 65-80. The suggested revision of the comment set out on pages 2 and 3 of Memorandum 65-80 was also approved.

The tentative recommendation was approved for distribution to interested persons for comment.

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STUDY NO. 62(L) - VEHICLE CODE SECTION 17150 AND RELATED
STATUTES

The Commission considered Memorandum 65-79 and the tentative recommendation distributed therewith. The following actions were taken:

Section 17150.5

The Commission concluded that it would not recommend either repeal or amendment of this section.

Section 17158

The Commission concluded that it would not recommend revision of the guest statute to eliminate the liability of an owner to a guest for negligence resulting in an injury while the owner is not driving.

Sections 900-907

The contribution provisions will be revised to keep them consistent with the recommendation on personal injury damages.

Tentative Recommendation

The tentative recommendation as revised was then approved for distribution.

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STUDY NO. 63 (L) - EVIDENCE CODE

The Commission considered Memorandum 65-77, the first and second supplements thereto, a letter from Professor Fleming of the University of California, and the tentative recommendation. The following actions were taken:

Section 411

A revision of this section was considered but no action to revise it was taken.

Section 646

The staff was directed to add a provision to Section 646 requiring the judge, on request, to give an instruction on res ipsa loquitur. The instruction would indicate that where the party against whom the presumption operates has introduced evidence of due care, the jury may still infer negligence. The comment should be revised to discuss the matter of instruction in something of the same fashion that the matter was discussed in the staff's letter of December 14, 1965, to Judge Richards of the BAJI committee.

Section 669

The section proposed in the first supplement to Memorandum 65-77 was revised to read as follows:

669. (a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

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(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

The requirement of a criminal sanction for the violation was deleted.

As revised, the section is to be included in the tentative recommendation. This inclusion, however, is only for the purpose of securing comments on the deletion of the requirement of a criminal sanction. The section has not actually been approved by the Commission, and a vote approving the section will be necessary before the section can be included in the final recommendation.

Sections 952, 992, and 1012

The last clause of Sections 992 and 1012 is to be revised as follows:

. . . and includes a diagnosis made and the advice given by the . . .

In Section 952, a revision comparable to that made in Sections 992 and 1012 is also to be made. These revised sections are to be added to the tentative recommendation.

The comments should indicate that the revisions are made to preclude a construction of the sections that might leave uncommunicated diagnoses and professional opinions unprotected by the privileges involved. Such a construction would virtually destroy the privileges. The comments will say neither that the revisions change the law nor that they do not change the law.

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Section 1017

The words "or withdraw" are to be added to the section immediately before "a plea based on insanity."

Tentative Recommendation

The tentative recommendation as revised was approved for distribution.