

January 8, 1976

Time

January 15 • 7:00 p.m. • 10:00 p.m.
January 16 • 9:00 a.m. • 5:00 p.m.
January 17 • 9:00 a.m. • 1:00 p.m.

Place

Hyatt House Hotel, Room 1291
at L.A. International Airport
6225 W. Century Blvd.
Los Angeles, CA 90045

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

January 15-17, 1976

January 15

1. Minutes of November 6-7, 1975, Meeting (sent 12/10/75)
2. Administrative Matters

Executive Session on Personnel Matters

Memorandum 76-3 (sent 12/10/75)

Memorandum 76-4 (sent 12/10/75)

3. Study 65.70 • Inverse Condemnation (Claims Presentation Requirement)

Memorandum 76-2 (sent 12/10/75)
Consultant's Study (attached to Memorandum)
First Supplement to Memorandum 76-2 (sent 1/7/76)

4. Study 36.25 • Condemnation (Byroads)

Memorandum 76-12 (sent 1/7/76)
Recommendation (attached to Memorandum)

5. Study 36.60 • Condemnation (Relocation Assistance)

Memorandum 76-14 (sent 1/7/76)
Recommendation (attached to Memorandum)

6. Study 63.70 • Evidence (Eminent Domain and Inverse Condemnation)

Memorandum 76-6 (sent 12/26/75)

7. Study 52.80 • Undertakings for Costs

Memorandum 76-16 (sent 1/7/76)

January 8, 1976

January 16

8. Study 78.50 - Lessor-Lessee Relations (Unlawful Detainer Proceedings)
Memorandum 76-11 (enclosed)
9. Study 77 - Nonprofit Corporations (Generally)
Memorandum 76-15 (sent 1/7/76)
10. Study 77.20 - Nonprofit Corporations (Organization)
New General Corporation Law (sent 12/26/75)(bring to meeting)
Name; Purpose; Formation
Memorandum 76-7 (sent 12/26/75)
First Supplement to Memorandum 76-7 (sent 12/26/75)
Powers
Memorandum 76-8 (sent 12/26/75)
First Supplement to Memorandum 76-8 (sent 12/26/75)
11. Study 77.40 - Nonprofit Corporations (Members)
Memorandum 76-9 (sent 12/26/75)
12. Study 77.200 - Nonprofit Corporations (Dissolution--Distribution of Assets)
Memorandum 76-10 (sent 12/26/75)
13. 1976 Legislative Program
Oral Report

January 17

14. Study 39.230 - Enforcement of Judgments (Supplementary Proceedings)
Memorandum 75-70 (previously sent; another copy enclosed for Commissioners)(sent 12/10/75)
15. Study 39.260 - Enforcement of Judgments (Nonmoney Judgments)
Memorandum 75-71 (previously sent; another copy enclosed for Commissioners)(sent 12/10/75)
16. Study 39.150 - Credit Card Sales
Memorandum 76-1 (sent 12/10/75)

January 8, 1976

CALIFORNIA LAW REVISION COMMISSION

SCHEDULE FOR FUTURE MEETINGS

February

February 27 - 9:30 a.m. - 4:30 p.m. San Francisco
February 28 - 9:00 a.m. - 12:00 noon

March

March 18 - 7:00 p.m. - 10:00 p.m. Los Angeles
March 19 - 9:00 a.m. - 5:00 p.m.
March 20 - 9:00 a.m. - 12:00 noon

April

April 22 - 7:00 p.m. - 10:00 p.m. San Francisco
April 23 - 9:00 a.m. - 5:00 p.m.
April 24 - 9:00 a.m. - 1:00 p.m.

May

May 20 - 7:00 p.m. - 10:00 p.m. Los Angeles
May 21 - 9:00 a.m. - 5:00 p.m.

June

June 24 - 7:00 p.m. - 10:00 p.m. San Francisco
June 25 - 9:00 a.m. - 5:00 p.m.
June 26 - 9:00 a.m. - 12:00 noon

July

July 22 - 7:00 p.m. - 10:00 p.m. Los Angeles
July 23 - 9:00 a.m. - 5:00 p.m.
July 24 - 9:00 a.m. - 12:00 noon

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 15, 16, AND 17, 1976

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on January 15, 16, and 17, 1976.

Present: John N. McLaurin, Chairman
John J. Balluff
John D. Miller
Marc Sandstrom, January 15 and 16
Thomas E. Stanton, Jr.

Absent: Howard R. Williams, Vice Chairman
Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMouilly Nathaniel Sterling
Stan G. Ulrich Robert J. Murphy III

Commission Consultants Present:

G. Gervaise Davis III (nonprofit corporations), January 16
Thomas M. Dankert (condemnation), January 15 and 16
Prof. Gideon Kanner (condemnation), January 15
Prof. Stefan A. Riesenfeld (creditors' remedies), January 17

The following persons were present as observers on days indicated:

January 15

S. Robert Ambrose, County Counsel, Los Angeles
Ernest L. Aubry, Attorney, Los Angeles
Jerrold A. Padem, Attorney, Beverly Hills
John M. Morrison, Office of Attorney General, Sacramento
Anthony J. Ruffolo, Department of Transportation, Los Angeles
James H. Wernicke, Office of Attorney General, Sacramento

January 16

S. Robert Ambrose, County Counsel, Los Angeles
Virgil P. Anderson, California State Automobile Ass'n, Sacramento
Ronald P. Denitz, Tishman Realty, Los Angeles
W. A. Hutchins, California State Automobile Ass'n, San Francisco
Carl Leonard, State Bar Corporations Committee, San Francisco
R. H. Nida, Automobile Club of So. California, Los Angeles
R. U. Robison, Automobile Club of So. California, Los Angeles
Prof. Leslie Rothenberg, Loyola University School of Law, Los Angeles
Thomas E. Shardlow, UCLA Law Student, Los Angeles
Lawrence R. Tapper, Office of Attorney General, Los Angeles

ADMINISTRATIVE MATTERS

Minutes of November 6-7, 1975, Meeting

The Minutes of the November 6-7, 1975, meeting were corrected to reflect that Carl Leonard, an observer on November 7, appeared as a representative of the State Bar rather than the State Automobile Association (page 1). As thus corrected, the Minutes were approved.

Distinguished Service Award to Consultants

The Commission considered Memorandum 76-3 relating to recognition of distinguished service by consultants. The Commission approved the concept of a distinguished service award and decided that the award should be limited to the consultants listed in Exhibit I to Memorandum 76-3, plus Ronald P. Denitz and Carl M. Olsen. The Commission suggested that consideration be given to inclusion in the Commission's Handbook of Practices and Procedures of a policy statement indicating the circumstances under which the distinguished service award will be given.

Consultants on Class Action Study

The Commission considered Memorandum 76-4 and approved the employment of Professor Jack Friedenthal as the Commission's consultant to write a background study on class actions. The compensation should be at least \$5,000 and such greater amount as the budget for 1976-77 permits.

The Commission suggested that at an appropriate future date the staff identify practicing lawyers or law firms actively engaged in class action litigation, both for plaintiff and defense, who might be available to advise the Commission on the practical considerations involved.

New Topics

Professor Leslie S. Rothenberg of the Loyola University School of Law appeared before the Commission to recommend a broadly defined study of the tort compensation system, including an examination of the economic impact of rules of law which internalize and spread the social cost of tortious conduct. He suggested that the most urgent need for such a study is in the areas of professional liability and products liability, the "tip of a rising iceberg." He concluded that, of the various bodies in this state, the California Law Revision Commission is best equipped to conduct a study of this kind and to produce a thorough and credible recommendation.

Although the Commission had some reservations about undertaking such a study in view of the need for economic and other nonlegal expertise, the resources required by a study of such broad scope and extended duration, and the inevitable political dimension of any reform proposal, the Commission indicated its willingness to make such a study if;

1. The Governor, state legislative leadership, and the State Bar Board of Governors want the Commission to make such a study;
2. Such a study were adequately funded;
3. The Governor resists pressure to appoint to the Commission representatives of special interest groups having an interest in the outcome of such a study; and
4. A special legislative committee were appointed at the appropriate time to review the tentative recommendations of the Commission and to provide feedback concerning their political feasibility.

Minutes
January 15, 16, and 17, 1976

The Commission determined not to request authority to make such a study, believing that the initiative should come from the Legislature. The Executive Secretary was directed to communicate these views orally to Assemblyman McAlister and Senator Stevens.

STUDY 36.25 - CONDEMNATION (BYROADS)

The Commission considered Memorandum 76-12 relating to condemnation by private persons for byroads and utility easements, and a letter dated January 7, 1976, from Roger M. Sullivan, Esq., on behalf of the State Bar Committee on Condemnation. The letter was handed out at the meeting and a copy of it is attached to the Minutes of this meeting as Exhibit I.

The Commission made the following decisions:

1. Approved the staff recommendation to amend proposed Section 1001(b) of the Civil Code (contained in the Commission's Recommendation Relating to Condemnation for Byroads and Utility Easements of October 1975) to read:

(b) Any owner of real property may acquire by eminent domain an appurtenant easement over private property for which there is a great necessity to provide utility service to, or access to a public road from, the owner's property. . . .

2. Reaffirmed its prior decision that byroad condemnation authority is needed because of inadequacies in the common law doctrine of way of necessity.

3. Disapproved the addition of language to the Comment to proposed Section 1001 of the Civil Code dealing with the question of use of neighboring existing easements.

STUDY 36.25 - EXHIBIT I

Minutes
January 15, 16, and 17, 1976

LAW OFFICES

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CHARLES D. CUMMINGS

OF COUNSEL
EDWARD P. DOWNES
DENNIS G. HARRAVY

PLEASE REFER TO
OUR FILE NO.

January 7, 1976

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Mr. John H. DeMouilly
Executive Secretary

Dear John:

Please be advised that the State Bar Committee on Condemnation has voted to recommend enactment of Civil Code Section 1001 in the following form:

"Any person may, without further legislative action, acquire private property for any use specified in section 1240.010 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is "an agent of the state," or "a person in charge of such uses" within the meaning of those terms as used in such title."

As you will note the above represents substantially the same language that existed prior to repeal of the section last year. The members of the Committee (representing both Governmental agencies and private condemnors) all felt that the section has functioned without being abused since its enactment in 1872 and represents an important "safety valve" on those infrequent occasions where a property owner is landlocked in one respect or another.

In addition it was the feeling of the Committee that the requirement to obtain prior legislative approval called for by the proposed Section 1245.325 would tend to negate the relief granted by this section and would be subject to bureaucratic delays and other political considerations. We request the Law Revision Commission to reenact the section as proposed.

STUDY 36.25 - EXHIBIT I

Minutes

January 15, 16, and 17, 1976

Mr. John H. DeMouilly
January 7, 1976
Page Two

The Committee has unanimously approved the Law Revision recommendation dated October 1975 which applies the provision of the relocation assistance act contained in Government Code Section 7267, et seq. to quasi public and private condemnors subject to the following additional provision:

"In the absence of reasonable standards, the relocation assistance guidelines of the California State Department of Transportation shall be applied to the extent appropriate."

The reason for the proposed addition is to provide some guidelines in cases where questions arise in the administration of the guidelines. It is the feeling of the Committee that the standards adopted by the State Department of Transportation have been workable and should be applied to private condemnors also.

In the event the Commission desires to hear further from our Committee, I will be happy to arrange for a representative to appear before the Commission at any time that you would suggest.

Yours very truly,



Roger M. Sullivan
of THORPE, SULLIVAN, WORKMAN,
THORPE & O'SULLIVAN

RMS:mb

cc: Kurt Melchior
John Horgan
William Eades
Tom Dankert
James Jefferis
John Malone

STUDY 36.60 - CONDEMNATION (RELOCATION ASSISTANCE)

The Commission considered Memorandum 76-14 concerning the Commission's Recommendation Relating to Relocation Assistance by Private Condemnors (October 1975).

The Commission determined that Section 7276 and The Comment thereto should be revised in the following manner:

7276. A If a resolution is adopted under Section 1245.330 consenting to the acquisition of the property by eminent domain, a person acquiring real property by eminent domain, purchase, or otherwise, shall provide relocation advisory assistance and shall make any of the payments required of public entities by this chapter. This section does not apply to public utilities which are governed by Section 600 of the Public Utilities Code or to public entities which are governed by this chapter.

Comment. . . . Section 7276 extends this application to eminent domain acquisitions, and to negotiated settlements after adoption of a resolution consenting to the condemnation of the property under Section 1245.330, by private condemnors other than public utilities. . . .

The Commission also considered a letter dated January 7, 1976, from Roger M. Sullivan, Esq., on behalf of the State Bar Committee on Condemnation (handed out at the meeting). A copy of the letter is attached to these Minutes under Study 36.25--Condemnation (Byroads). The letter suggested adding the following sentence to the relocation assistance provision of the Government Code:

In the absence of reasonable standards, the relocation assistance guidelines of the California State Department of Transportation shall be applied to the extent appropriate.

The Commission approved the proposal in principle, but referred it to the staff for additional work on the drafting of the proposal. The Commission requested that the staff investigate the extent to which the "guidelines" of the Department of Transportation are published, either in the California Administrative Code or elsewhere.

Minutes
January 15, 16, and 17, 1976

STUDY 52.80 - UNDERTAKINGS FOR COSTS

The Commission considered Memorandum 76-16 and the attached letter from attorney Ernest L. Aubry expressing concern about several aspects of the initial staff draft of a recommendation relating to undertakings for costs (attached to Memorandum 75-74 of September 23, 1975). Mr. Aubry also appeared personally and made an oral presentation.

The Commission noted that several of Mr. Aubry's points had been resolved by changes in the initial staff draft made at Commission meetings on October 11 and November 6, 1975. The Commission thanked Mr. Aubry for his viewpoints and took no further action.

STUDY 39.230 - ENFORCEMENT OF JUDGMENTS
(SUPPLEMENTARY PROCEDURES)

The Commission began its consideration of the draft of Chapter 5 (Supplementary Procedures) of the Enforcement of Judgments title which was attached to Memorandum 75-70. The Commission made the following decisions:

§ 705.010. Power of court commissioner and referee; contempt

The staff should consider reorganizing this section and putting it at the end of the article on examination of judgment debtors and third persons indebted to them. The existing law concerning whether court commissioners may issue orders for examinations should be retained; hence, if there is no decision permitting commissioners to issue such orders (other than in Los Angeles County), subdivision (a) should be deleted. The staff should also consider the power of commissioners to conduct examinations and issue orders applying property to the satisfaction of judgments provided in subdivision (b). Subdivision (c) should be reworded substantially as follows:

(c) Any A person is eligible for appointment as a referee appointed pursuant to the provisions of this article shall be an attorney duly licensed to practice law in all the courts of this state at least only if such person has been a member of the State Bar for at least five years prior to the date of such appointment.

In subdivision (d) it should be made clear that only the judge can punish for contempt of court. The staff should also consider whether the provision of Section 721 that the judge or court ordering the reference may punish for contempt for violation of an order of a referee should be continued.

§ 705.020. Examination of judgment debtor

In subdivision (a), the word "properly" should be deleted from the phrase "whenever a writ of execution against property of a judgment debtor may properly

be issued . . .", because it is superfluous. The Comment should state that the intent of this phrase is to preclude issuance of an order for examination where the enforcement of the judgment is stayed or where the time for issuance of a writ has passed. Subdivision (b) should be redrafted as follows:

(b) Notwithstanding subdivision (a), a judgment debtor may not be required to appear and answer more ~~frequently~~ than once every four months. ~~However-nothing~~ Nothing in this section shall be construed to restrict the rights granted by Section 705.030.

The staff should consider the meaning of the language in Section 714 concerning several debtors in the same judgment and whether Section 705.020 adequately provides for a situation where there are several judgment debtors.

The Commission considered the suggestion in the note following Section 705.020 relating to the New York procedure for subpoenas and interrogatories and decided to continue existing California law.

§ 705.030. Examination where judgment debtor unjustly refuses to apply property to the judgment

Subdivision (b), providing for the arrest of the judgment debtor and his imprisonment unless he gives an undertaking, should be deleted because it is inconsistent with the policies stated in the Commission's Recommendation Relating to Civil Arrest.

§ 705.040. Examination of debtor of judgment debtor

The language in brackets at the beginning of subdivision (a) should be replaced by the phrase "whenever a writ of execution against property of a judgment debtor may be issued, whether or not a writ of execution has been issued or returned" This avoids the necessity under current law of obtaining a writ of execution, the purpose of which apparently is to show

that a writ can be issued. The \$50 minimum amount of indebtedness provided in subdivision (a) should be raised to \$250. The staff should consider replacing the phrase "in the case of a corporation, any officer or member thereof" with language from the federal discovery statute to the effect that a corporate officer or employee having the requisite knowledge may be required to appear and be examined. The provision in brackets in subdivision (a) concerning the right of a spouse not to testify should be retained.

In subdivision (b), it should be provided that the judgment creditor supplies the address of the judgment debtor to the clerk for purposes of sending the judgment debtor notice of the examination.

§ 705.050. Order applying property to satisfaction of judgment; adverse claim

The staff should further consider the provision in subdivision (b) for a restraining order against the third person who denies the debt. It was suggested that it might not be constitutional to provide for an automatic temporary restraining order without requiring a hearing on the likelihood that the third person will transfer or waste the property or abscond. However, an automatic temporary restraining order may be appropriate to prevent the third person from paying the judgment debtor or transferring property to him. It was also suggested that the staff consider putting a time limit on the temporary restraining order.

§ 705.060. Arrest of person ordered to appear

The last paragraph of Section 714, which provides that it is a misdemeanor to fail to serve an order to appear on a person if that person is subsequently arrested for failure to appear, should be continued in Section 705.060.

STUDY 63.70 - EVIDENCE (EMINENT DOMAIN AND
INVERSE CONDEMNATION)

The Commission began consideration of Memorandum 76-6 and the provisions of the Evidence Code relating to value, damages, and benefits in condemnation and inverse condemnation cases (Sections 810-822). The Commission considered Sections 810 through 816 but did not reach Sections 817-822.

The Commission took the following action:

1. The question of whether Section 810 should be broadened, so that the special rules of evidence for valuation of property in eminent domain and inverse condemnation would be applied to other proceedings where fair market value must be determined, should be considered after the necessary decisions have been made concerning possible amendments to Sections 811-822.

2. Recommended no change in Sections 811 and 812.

3. Determined to retain the language of subdivision (a) of Section 813, limiting evidence of value of property to opinion testimony (rejecting the less restrictive approach of the Uniform Eminent Domain Act).

4. Reaffirmed its previous tentative recommendation that Section 813(a)(2) be amended to read:

813. (a) The value of property may be shown only by the opinions of:

* * * * *

(2) The owner of any right, title, or interest in the property ~~or-property-interest~~ being valued.

* * * * *

Comment. Section 813(a)(2) is amended to make clear that not only the fee owner of the property, but any person having a compensable interest in the property, may testify as to the value of the property or his interest therein. Cf. Code Civ. Proc. §§ 1235.170 ("property" defined) and 1263.010 (right to compensation).

Minutes
January 15, 16, and 17, 1976

5. Referred to staff the language proposed to be added as subdivision (a)(3) of Section 813 in a previous tentative recommendation of the Commission, with instructions to draft language applicable to officers or employees of partnerships and unincorporated associations and to consider whether the Comment should indicate that the court has the power to restrict the number of witnesses who may testify as to value.

6. Recommended no change in subdivision (b) of Section 813, or in Sections 814 and 815.

7. Referred to staff the language proposed to be added as subdivision (c) of Section 816 in a previous tentative recommendation of the Commission, with instructions to draft language codifying the rule that great latitude is allowed in cross-examination of an expert witness. It was also suggested that language be put in the Comment indicating that, while the court should be liberal in allowing an expert witness wide discretion in his selection of comparable sales, the court should still adhere to the standard in the statute that comparable sales must not be too remote in time, space, and character. The staff was also directed to check the last paragraph of the proposed Comment explaining subdivision (c) of Section 816 (noting that existence of project enhancement or blight on comparable sales is one aspect of relevance) in view of a possible similar Comment in the eminent domain law.

Minutes
January 15, 16, and 17, 1976

STUDY 65.70 - INVERSE CONDEMNATION (CLAIMS
PRESENTATION REQUIREMENT)

The Commission considered Memorandum 76-2, the attached consultant's study, and the First Supplement to Memorandum 76-2. The Commission was advised that the Assembly Judiciary Committee approved the State Bar bill to eliminate the claims presentation requirement in inverse condemnation cases and had sent the bill to the Assembly consent calendar.

The Commission decided to table the subject until the ultimate fate of the State Bar bill is determined.

Minutes
January 15, 16, and 17, 1976

STUDY 77 - NONPROFIT CORPORATIONS (GENERALLY)

The Commission devoted considerable time to discussing the general approach to the nonprofit corporations study and matters of organization and drafting. The general topics of discussion are noted below.

Comments of Professor Oleck

The Commission considered Memorandum 76-15, along with a letter from Professor Oleck distributed at the meeting and attached as an Exhibit hereto, relating to the general approach to the nonprofit corporations study and to the role of the Attorney General in supervising nonprofit corporations. The Commission directed the staff to write a letter to Professor Oleck thanking him for his interest in its work and requesting him to elaborate some of his concerns with the management of nonprofit corporations. The Commission also requested the staff to indicate that, while it does not have sufficient funds to retain the professor as a consultant, it would welcome the opportunity to hear from him personally if he should be in California for other reasons.

Comments of Attorney General's Office

The Commission heard a presentation by Mr. Lawrence Tapper of the State Attorney General's Office--Charitable Trust Division. Mr. Tapper reported that the California Attorney General has a whole staff of qualified and dedicated investigative experts, including four auditor-investigators in Los Angeles, three in San Francisco, and a full registry in Sacramento; at last count, the entire charitable trust staff numbered 28. The Attorney General maintains a registry of charitable corporations pursuant to the Uniform Supervision of Trustees for Charitable Purposes Act (Govt. Code §§ 12580-12597), which currently includes 15,000 foundations. The Charitable

Trust Division has instituted a system of computer checks whereby suspect transactions by foundations in the registry are flagged for investigation.

Mr. Tapper had a number of suggestions for improvement of the Attorney General's supervisory role, including notification to the Attorney General of mergers and consolidations and of radical changes in the purpose clause of the articles. He agreed to give some consideration to the possibility of requiring nonprofit corporations to characterize themselves as membership or charitable, and to requiring notice to the Attorney General of distribution of substantially all of the corporate assets.

Comments of Commission Consultant

The Commission's consultant, Mr. G. Gervaise Davis III, raised a number of questions concerning the general approach to drafting the nonprofit corporation law.

(1) Mr. Davis suggested that the new law be organized in three basic divisions: (a) general provisions, (b) provisions relating to charitable corporations, and (c) provisions relating to special nonprofit corporations. The staff reported that its experience in the initial phases of the study was that separate divisions for membership corporations and charitable corporations, at least, were not necessary: Special provisions for charitable corporations could be inserted immediately following the general provisions in cases where it is necessary to make a distinction. The Commission determined to continue its study in the manner suggested by the staff but, towards the conclusion of the study, it will review the number of special provisions and determine at that time whether separate divisions would be advisable.

(2) Mr. Davis noted that, in many instances, the new General Corporation Law is poorly drafted and suggested that in such cases the nonprofit corporations provisions might profitably depart from the precise wording or organization of the General Corporation Law. The staff concurred with Mr. Davis that the new law is poorly drafted but expressed a reluctance to depart from its text except in egregious cases: Having the two statutes as nearly similar as possible will aid in the interpretation of both laws as well as being a help to the practitioner active in both fields. The Commission determined that, as a general policy, it would follow the new law but would feel free to depart from it where it believed clarity could be achieved without affecting the substance of the provisions.

(3) Mr. Davis suggested that it would be helpful to define membership and charitable corporations for the purposes of determining the applicability of general provisions of the nonprofit corporation law. The staff reported that its experience so far in the study leads it to believe that the differences in treatment are so few as to render such a definition unnecessary. The Commission decided to defer a decision on this point but requested the staff to keep a tally of the instances in which types of nonprofit corporations are distinguished for special treatment.

Use of Nonprofit Corporations Statutes of Other Jurisdictions

The Commission discussed the extent to which reform efforts in other jurisdictions should be drawn upon in drafting the new nonprofit corporation law. The Commission instructed the staff to look to the other jurisdictions in areas of the law in which there appeared to be controversy or tension and to reproduce sample provisions for the Commission's use. The staff should also bring copies of the other laws to Commission meetings for reference purposes.

STUDY 77 - EXHIBIT I

Minutes

January 15, 16, and 17, 1976



WAKE FOREST UNIVERSITY SCHOOL OF LAW

Box 7206 Reynolda Station

Winston-Salem, North Carolina 27109

(919) 725-9711

January 12, 1976

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. Sterling:

Thanks for the copies of your December 1975 and January 6, 1976 memoranda, apparently sent to me by Mr. John H. De Mouilly, Executive Secretary.

Your statement in Memo 76-15 (1/6/76), last sentence, leads me to comment on the assumption therein. You said: "He also appears to be concerned with misuse of the charitable corporation form; we assume that this will be adequately controlled in California through supervision by the Attorney General and restrictions on distributions of assets."

Taking the last part first, I suggest that there will not be any enormous bulk of assets to be distributed if self-servers control the corporation without much public scrutiny prior to the time for such distribution.

This emphasizes the importance of my utter disbelief that present-style Attorneys-General Offices' supervisions suffice to keep non-profit corporations "adequately controlled." In fact the spot checking by present attorney-general (or Secretary of State) offices is pathetically inadequate almost everywhere. A whole staff of qualified and dedicated investigative experts is what is needed, and is found almost in no such office; rather, a few politically selected young amateurs are "the staff" in many places -- or even a single part-time recent law school graduate. And of course almost nobody likes the prospect of need for more tax money for support of new and expensive administrative agencies or agents. But my experience with current (and past) supervision in several states has led me to view the present standards of supervision as generally a rather bad joke.

STUDY 77 - EXHIBIT I

Mr. Nathaniel Sterling

Minutes

January 15, 16, and 17, 1976

-2-

January 12, 1976

S.E.C. supervision usually will not apply, as an outside "safety factor." The I.R.S. only very recently set up for the first time a new division to supervise non-profit (tax exempt) organizations, and has barely begun to crack down on tax evasions employing non-profit corporation form; and its experience may be helpful in setting up a proper state supervisory structure and staff.

More specifically, and unbeloved as it may be, a stern statutory rule (with teeth) requiring regular and detailed sworn reports by all non-profit organizations -- as to who is who (and his or her other positions and holdings), and what is what ("minutes," plus financial data in detail) should be set up. Perjury rules should be stated in this statute.

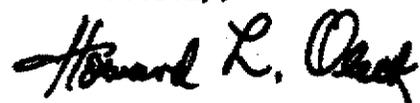
In effect this advocates a positively aggressive view of the duties of the supervisory authority where charitable status is claimed by anyone or any group.

Incidentally, too, this requires sharp reversal of the idea of tight limitation of the ultra vires doctrine. I believe that any fraudulent or self-serving action should be open to quo warranto attack, as ultra vires. The grant of the advantages of corporate (e.g., at least "dual personality") status should be viewed as basically limited, rather than as basically unlimited. If this means multiplication of lawsuits by "aggrieved persons or factions," then we must bear that burden; supporting it by a system of heavy fines (or other criminal punishment) for those who betray their claims to be altruistic people. Your statute draft seems to echo the desire of management in business corporations not to be annoyed by any questioning of the right of the seigneur to rule.

All this moralizing may sound very "ivory tower" to hardboiled business lawyers who mostly derive their fees from management rather than from shareholders. But my lack of childlike faith in unscrutinized allegations of noble purposes is the result of long and too-often-bitter experience with non-profit organization managements. The "proprietary mentality" of officers in non-profit organizations is even less restrained (by fear of challenge by public authorities) than in business organizations.

I commend to the commission the idea of a nonpartisan "blue ribbon standing commission" (or "division") in the Secretary of State and/or Attorney-General's Office, to (1) grant, (2) supervise, (3) revoke, and (4) institute punishment proceedings for abuse of -- all non-profit-privileged organizations.

Sincerely,



Howard L. Oleck
Professor of Law

HLO:a

STUDY 77.20 - NONPROFIT CORPORATIONS (ORGANIZATION)

The Commission commenced consideration of Memorandum 76-7 relating to the name, purposes, and formation of nonprofit corporations. The Commission made the following decisions with respect to the draft statute:

§ 5000. Short title

This section was tentatively approved.

§ 5110. Application of general provisions

This section was tentatively approved. The Comment should indicate that the general provisions of the preliminary part of the Corporations Code may be applicable.

§ 5111. Scope of division

This section should be redrafted to state that the General Nonprofit Corporation Law applies to all nonprofit corporations presently existing or hereafter formed, followed by enumerated exceptions. The section or Comment should also make clear that the provisions of the General Corporation Law do not apply to nonprofit corporations; the Comment might indicate that decisions under comparable provisions of the General Corporation Law may be an aid to interpretation, however. The Comment should note that special provisions applicable to nonprofit corporations in other codes which are not repealed remain in effect.

§ 5115. Filing by Secretary of State

This section should be revised to make clear that, if the Secretary of State refuses to file an instrument because it does not conform to law, and if the instrument is resubmitted with an opinion of an attorney that it does conform to law, the date of filing is the date the instrument was originally received. The

Minutes
January 15, 16, and 17, 1976

staff should investigate the procedure whereby articles are filed with the Franchise Tax Board in order to ascertain whether anything in this section interferes with that procedure.

§ 5116. Delayed effective date of instruments

Subdivision (a) was revised to refer to instruments that are to "become effective on a date not later ~~no more~~ than 90 days after the filing date." The meaning of the phrase "by appropriate corporate action" in subdivision (b) should be ascertained by communication with the Secretary of State to enable Commission action on this section.

§ 5117. Instruments conforming to law

This section was tentatively approved.

§ 5120. Application of definitions

This section was tentatively approved.

§ 5122. Articles

This section was tentatively approved, subject to Commission review of certificates of incorporation (when foreign corporations are studied) and agreements of merger (when mergers are studied).

§ 5124. Corporation

This section should be redrafted to define business corporations. In the nonprofit corporation law, the term corporation should always be modified by either "business" or "nonprofit."

Other definitions

The Commission directed that definitions of "association" and "instrument" be initiated or at least places reserved for them in the nonprofit corporation law.

Minutes
January 15, 16, and 17, 1976

STUDY 77.200 - NONPROFIT CORPORATIONS (WINDING UP AND
DISSOLUTION--DISTRIBUTION OF ASSETS)

The Commission commenced consideration of Memorandum 76-10 relating to distribution of assets by a nonprofit corporation on dissolution. The Commission made the following decisions with respect to the draft statute:

§ 7011. Notice to Attorney General

This section was tentatively approved, with the phrase "reasonably required" substituted for "specified" in the last sentence. The staff should give consideration to whether the notice should also be required in cases of merger, radical change of purposes, or divestment of assets; the staff should also give consideration to possible penalties for failure to comply with this section.

§ 7032. Distribution among members or in accordance with articles

The Commission approved the concept that members of a nonprofit corporation may receive assets on dissolution absent other disposition required in the articles. The Commission directed the staff to give some consideration to permitting other disposition to be designated in the bylaws. In addition, the determination of "respective rights" might be elaborated, and the requirement of "equal distribution" among members should be reviewed.

§ 7033. Return of assets held on condition

This section was tentatively approved.

§ 7034. Disposition of assets held on trust or by charitable corporation

Subdivision (a) of this section, providing for distributions of nonprofit corporations in conformity with the doctrine of cy pres should be revised to (1) permit distribution to other nonprofit organizations and (2) require

Minutes
January 15, 16, and 17, 1976

distribution not in accordance with cy pres but in accordance with the purposes for which the assets were received on trust. The staff should consult statutes of other jurisdictions to determine how these problems are handled elsewhere.

The staff should give consideration to placing a time limit in subdivision (b) for bringing a petition for court supervision of the distribution.

STUDY 78.50 - LESSOR-LESSEE RELATIONS
(UNLAWFUL DETAINER PROCEEDINGS)

The Commission considered Memorandum 76-11, the proposal of Mr. Ronald P. Denitz which was attached to the memorandum, and Mr. Denitz' letter of January 15, 1976, which was handed out at the meeting, concerning possible changes to Section 1174 of the Code of Civil Procedure and Section 1952 of the Civil Code (unlawful detainer). A copy of Mr. Denitz' letter is attached to these Minutes as Exhibit I.

The Commission made the following decisions:

1. No change should be made to the existing language of subdivision (b) of Section 1174 of the Code of Civil Procedure concerning treble damages.

2. No change should be made to the existing language of subdivision (c) of Section 1174 concerning restoration of the tenant to his estate upon payment of the judgment within five days.

3. The Commission approved (with Commissioner Stanton dissenting) the concept of codifying, either in Section 1174 or in a separate section, existing law which converts an unlawful detainer action into an ordinary civil action for damages when the tenant surrenders possession before trial and gives the court discretion to grant the plaintiff leave to amend his complaint to seek damages for loss of future rent. The proposal to make mandatory the granting of the plaintiff's application for leave to amend in such circumstances was disapproved.

The proposal was returned to the staff with directions to study the matter further and to give additional consideration to the following problems:

1. Whether, after the tenant surrenders possession, the plaintiff may in some circumstances be required to join additional parties under existing

rules of joinder (e.g., an assignor or guarantor not in possession) and how the rights of such parties can be protected.

2. Whether the original complaint in unlawful detainer might be drawn to put the tenant on notice that damages for loss of future rent will be sought in the unlawful detainer action if the tenant surrenders possession before trial, thereby obviating the need to amend to seek such damages.

3. How an amendment to Section 1174 to apply the contract concept of damages contained in Section 1951.2 of the Civil Code to unlawful detainer actions can be drawn to keep clear the distinction between situations where there is a lease and situations where there is not.

4. Whether application of the contract concept of damages contained in Section 1951.2 to unlawful detainer actions would reallocate the burden of pleading and proof on the issue of mitigation of damages.

APPROVED

_____ Date

_____ Chairman

_____ Executive Secretary



STUDY 78.50 - EXHIBIT I

Minutes
January 15, 16, and 17, 1976

(213) 477-1818

Tishman Realty & Construction Co., Inc.

WEST COAST HEADQUARTERS
10980 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90024
B-I CONTRACTOR'S LICENSE NO. 170730

January 15, 1976

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Study 78.50 - Lessor-Lessee Relations
(Unlawful Detainer Proceedings)

Dear John:

I am gratified that Memorandum 76-11 dated January 6, 1976 substantially approves the proposal for amending Section 1174 of the Code of Civil Procedure and Section 1952 of the Civil Code in order to make possible the award of "1951.2 damages" in an unlawful detainer proceeding after the tenant has vacated.

However, two aspects of the proposal were disapproved by Staff and, as to the disapproval of Proposal III (making mandatory the present discretion to grant Plaintiff's leave to amend in order to plead prospective damages after the tenant vacates), I urge that the disapproval be reconsidered in the light of the following:

Prior to the enactment of Section 1951.2 in 1970, the Court enjoyed a judicially developed discretionary right to grant leave to make the type of amendment in question. Prior to Section 1951.2 becoming effective, it was both judicially and legislatively impossible for the Court to permit the kind of an action which Section 1951.2 contemplates. However, when the Legislature enacted Section 1951.2 it gave to the Landlord an unqualified right to seek in a plenary separate action the complete range of expectancy damages as are detailed in Section 1951.2. If the Plaintiff-Landlord could in any and all events

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-2-

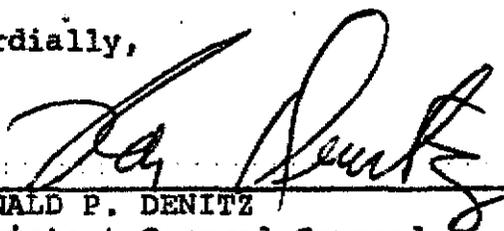
John H. DeMouilly

January 15, 1976

file a separate action to recover these "1951.2 damages", it would simply invite a multiplicity of actions if the revision of Code of Civil Procedure Section 1174 made the amendment of Plaintiff's unlawful detainer complaint merely discretionary.

I realize that in a limited number of cases the statute of limitations might be an issue, but in the vast majority of factual situations the Plaintiff in an unlawful detainer action will have pursued his action well within the minimum two year statute of limitations which would be applicable to even an oral month to month tenancy. Consequently, it would be justifiable (based upon the legislative change brought about by Section 1951.2) for the Commission to recommend a change (albeit substantive) obligating the Court to permit an amendment of the unlawful detainer Complaint to prevent a multiplicity of actions, particularly since the tenant will have been well aware from the unlawful detainer proceedings of the Plaintiff-Landlord's intent to litigate with reference to the tenancy and will, of course, be given ample time by the Court to plead to the amended Complaint; in this latter connection, I certainly would not object to an insertion in the Statute of a provision making mandatory a 30 day right to Answer the amended Complaint.

Cordially,



RONALD P. DENITZ
Assistant General Counsel

RPD/svh