

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1966

CALIFORNIA LAW REVISION COMMISSION

**School of Law
Stanford University
Stanford, California**

THE CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

RICHARD H. KEATINGE <i>Chairman</i>	JAMES R. EDWARDS <i>Member</i>
SHO SATO <i>Vice Chairman</i>	JOHN R. McDONOUGH <i>Member</i>
JAMES A. COBEY <i>Member of the Senate</i>	HERMAN F. SELVIN <i>Member</i>
ALFRED H. SONG <i>Member of the Assembly</i>	THOMAS E. STANTON, JR. <i>Member</i>
JOSEPH A. BALL <i>Member</i>	GEORGE H. MURPHY <i>Ex Officio</i>

COMMISSION STAFF

Legal	Administrative-Secretarial
JOHN H. DEMOULLY <i>Executive Secretary</i>	ANNE SCHMIDT-WEYLAND <i>Administrative Assistant</i>
JOSEPH B. HARVEY <i>Assistant Executive Secretary</i>	LINDA E. BERRY <i>Supervising Secretary</i>
CLARENCE B. TAYLOR <i>Special Condemnation Counsel</i>	VIOLET S. HARJU <i>Secretary</i>
JOHN L. REEVE <i>Junior Counsel</i>	

NOTE

This pamphlet begins on page 1. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

STATE OF CALIFORNIA

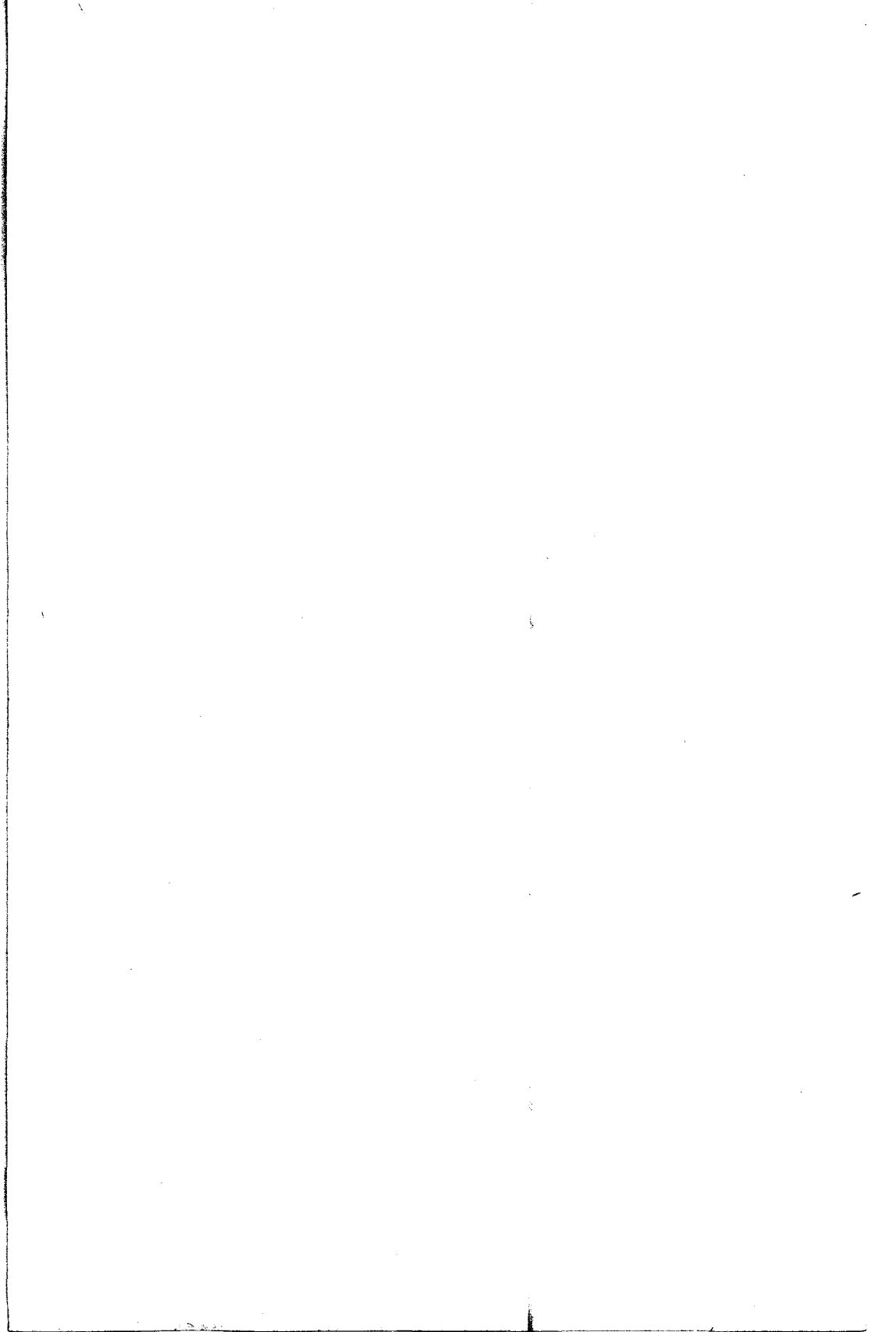
CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1966

CALIFORNIA LAW REVISION COMMISSION

**School of Law
Stanford University
Stanford, California**



CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



RICHARD H. KEATINGE
Chairman
SHO SATO
Vice Chairman
SENATOR JAMES A. COBEY
ASSEMBLYMAN ALFRED H. SONG
JOSEPH A. BALL
JAMES R. EDWARDS
JOHN R. McDONOUGH
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
GEORGE H. MURPHY
Ex Officio

December 31, 1966

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

**The California Law Revision Commission herewith submits this
report of its activities during the year 1966.**

Respectfully submitted,
RICHARD H. KEATINGE
Chairman

TABLE OF CONTENTS

	Page
FUNCTION AND PROCEDURE OF COMMISSION-----	7
PERSONNEL OF COMMISSION-----	10
SUMMARY OF WORK OF COMMISSION-----	11
STUDIES ON WHICH THE COMMISSION EXPECTS TO SUBMIT A RECOM- MENDATION TO THE 1967 LEGISLATURE-----	12
CALENDAR OF TOPICS FOR STUDY-----	13
Studies in Progress-----	13
Studies Under Active Consideration-----	13
Other Studies-----	14
Studies to Be Dropped From Calendar of Topics for Study-----	16
Study Relating to Support After an Ex Parte Divorce-----	16
Studies for Future Consideration-----	16
REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCON- STITUTIONAL-----	17
RECOMMENDATIONS-----	18
APPENDIX	
Recommendation Relating to Discovery in Eminent Domain Proceedings-----	19

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1966

FUNCTION AND PROCEDURE OF COMMISSION

The California Law Revision Commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is *ex officio* a nonvoting member.¹

The principal duties of the Law Revision Commission are to:

(1) Examine the common law and statutes of the State for the purpose of discovering defects and anachronisms therein.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, and other learned bodies, judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in the law as it deems necessary to bring the law of this State into harmony with modern conditions.²

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. The Commission may study only topics which the Legislature, by concurrent resolution, authorizes it to study.³

Each of the Commission's recommendations is based on a research study of the subject matter concerned. Many of these studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration.

The consultant submits a detailed research study that is given careful consideration by the Commission. After making its preliminary decisions on the subject, the Commission distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a printed pamphlet.⁴ If the research study has not been previously published, it also is included in this pamphlet.

¹ See CAL. GOVT. CODE §§ 10300-10340.

² See CAL. GOVT. CODE § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE § 10331.

³ See CAL. GOVT. CODE § 10335.

⁴ Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission.

The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the State.⁵ Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is submitted to the Legislature. The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the State.

A total of 57 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.⁶ Thirty-seven of these bills were enacted at the first session to which they were presented; ten bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 57 bills recommended, 47 eventually became law.⁷

⁵ See CAL. GOVT. CODE § 10333.

⁶ The number of bills actually introduced was in excess of 57 since, in some cases, the substance of the same bill was introduced at a subsequent session and, in the case of the Evidence Code, the same bill was introduced in both the Senate and the Assembly.

⁷ Cal. Stats. 1956, Ch. 799, p. 1400 and Ch. 377, p. 1494. (Revision of various sections of the Education Code relating to the Public School System.)

Cal. Stats. 1956, Ch. 1183, p. 2193. (Revision of Probate Code Sections 640 to 646—setting aside of estates.)

Cal. Stats. 1957, Ch. 102, p. 678. (Elimination of obsolete provisions in Penal Code Sections 1377 and 1378.)

Cal. Stats. 1957, Ch. 139, p. 783. (Maximum period of confinement in a county jail.)

Cal. Stats. 1957, Ch. 249, p. 902. (Judicial notice of the law of foreign countries.)

Cal. Stats. 1957, Ch. 456, p. 1308. (Recodification of Fish and Game Code.)

Cal. Stats. 1957, Ch. 490, p. 1520. (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere.)

Cal. Stats. 1957, Ch. 540, p. 1589. (Notice of application for attorney's fees and costs in domestic relations actions.)

Cal. Stats. 1957, Ch. 1498, p. 2824. (Bringing new parties into civil actions.)

Cal. Stats. 1959, Ch. 122, p. 2005. (Doctrine of worthier title.)

Cal. Stats. 1959, Ch. 468, p. 2403. (Effective date of an order ruling on motion for new trial.)

Cal. Stats. 1959, Ch. 469, p. 2404. (Time within which motion for new trial may be made.)

Cal. Stats. 1959, Ch. 470, p. 2405. (Suspension of absolute power of alienation.)

Cal. Stats. 1959, Ch. 500, p. 2441. (Procedure for appointing guardians.)

Cal. Stats. 1959, Ch. 501, p. 2443. (Codification of laws relating to grand juries.)

Cal. Stats. 1959, Ch. 528, p. 2496. (Mortgages to secure future advances.)

Cal. Stats. 1959, Ch. 1715, p. 4115 and Chs. 1724-1728, pp. 4132-4156. (Presentation of claims against public entities.)

Cal. Stats. 1961, Ch. 461, p. 1540. (Arbitration.)

Cal. Stats. 1961, Ch. 589, p. 1738. (Rescission of contracts.)

Cal. Stats. 1961, Ch. 636, p. 1838. (Inter vivos marital property rights in property acquired while domiciled elsewhere.)

Cal. Stats. 1961, Ch. 657, p. 1867. (Survival of actions.)

Cal. Stats. 1961, Ch. 1612, p. 3439. (Tax apportionment in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1613, p. 3442. (Taking possession and passage of title in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1616, p. 3459. (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject.)

Cal. Stats. 1963, Ch. 1681. (Sovereign immunity—tort liability of public entities and public employees.)

Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)

Cal. Stats. 1963, Ch. 1682. (Sovereign immunity—insurance coverage for public entities and public employees.)

Cal. Stats. 1963, Ch. 1683. (Sovereign immunity—defense of public employees.)

Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)

Cal. Stats. 1963, Ch. 1685. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 1686. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1965, Ch. 299. (Evidence Code.)

One of the proposed constitutional amendments was approved and ratified by the people;⁸ the other was not approved by the Legislature.

A total of 1,764 sections of the California statutes has been affected by Commission recommended legislation that was enacted by the Legislature: 923 sections were added, 365 sections were amended, and 476 sections were repealed.

Cal. Stats. 1965, Ch. 653. (Sovereign immunity—claims and actions against public entities and public employees.)

Cal. Stats. 1965, Ch. 1151. (Evidence in eminent domain proceedings.)

Cal. Stats. 1965, Ch. 1527. (Sovereign immunity—liability of public entities for ownership and operation of motor vehicles.)

Cal. Stats. 1965, Chs. 1649, 1650. (Reimbursement for moving expenses.)

⁸ CAL. CONST., Art. XI, § 10 (1960). (Power of Legislature to prescribe procedures governing claims against chartered cities and counties and employees thereof.)

PERSONNEL OF COMMISSION

As of December 31, 1966, the membership of the Law Revision Commission is :

	<i>Term expires</i>
Richard H. Heatinge, Los Angeles, <i>Chairman</i> -----	October 1, 1967
Sho Sato, Berkeley, <i>Vice Chairman</i> -----	October 1, 1969
Hon. James A. Cobey, Merced, <i>Senate Member</i> -----	*
Hon. Alfred H. Song, Monterey Park, <i>Assembly Member</i> -----	*
Joseph A. Ball, Long Beach, <i>Member</i> -----	October 1, 1969
James R. Edwards, San Bernardino, <i>Member</i> -----	October 1, 1967
John R. McDonough, Stanford, <i>Member</i> -----	October 1, 1967
Herman F. Selvin, Los Angeles, <i>Member</i> -----	October 1, 1967
Thomas E. Stanton, Jr., San Francisco, <i>Member</i> -----	October 1, 1969
George H. Murphy, Sacramento, <i>ex officio Member</i> -----	†

In February 1966, Mr. Clarence B. Taylor was appointed to the staff of the Commission as Special Condemnation Counsel. Mr. Taylor had previously served as a special consultant on condemnation law and procedure.

In October 1966, Mr. John L. Reeve resigned from the staff of the Commission to enter private law practice.

* The legislative members of the Commission serve at the pleasure of the appointing power.

† The Legislative Counsel is *ex officio* a nonvoting member of the Commission.

SUMMARY OF WORK OF COMMISSION

During 1966, the Law Revision Commission was engaged in two principal tasks:

- (1) Work on various assignments given to the Commission by the Legislature.¹
- (2) A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.²

The Commission held four two-day meetings and six three-day meetings in 1966.

¹ See this report, *infra* at 13-16.

² See this report, *infra* at 17.

STUDIES ON WHICH THE COMMISSION EXPECTS TO SUBMIT A RECOMMENDATION TO THE 1967 LEGISLATURE

The Commission expects to submit a recommendation on the following topics to the 1967 Legislature:

- (1) Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property
- (2) Additur
- (3) Discovery in Eminent Domain Proceedings
- (4) Vehicle Code Section 17150 and Related Statutes
- (5) Abandonment or Termination of a Lease
- (6) The Evidence Code
 - Number 1—Evidence Code Revisions
 - Number 2—Agricultural Code Revisions
 - Number 3—Commercial Code Revisions
- (7) The Good Faith Improver of Land Owned by Another
- (8) Suit by and Against Unincorporated Associations

CALENDAR OF TOPICS FOR STUDY

STUDIES IN PROGRESS

During the year covered by this report, the Commission had on its agenda the topics listed below, each of which it had been authorized and directed by the Legislature to study. The Commission proposes to continue its study of these topics.¹

Studies Under Active Consideration

1. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person (Cal. Stats. 1957, Res. Ch. 202, p. 4589).
2. Whether the law relating to additur and remittitur should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).
3. Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1963 Report at 115 (1963)).²
4. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).³
5. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects (Cal. Stats. 1965, Res. Ch. 130, p. 5289).

¹ Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

The legislative directives to make these studies are listed after each topic.

² See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendations and Studies at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1-5 (1961). The substance of two of these recommendations was incorporated in legislation enacted in 1966. Cal. Stats. 1966, Ch. 1151, p. 2990 (evidence in eminent domain proceedings); Ch. 1649, p. 3744, and Ch. 1650, p. 3746 (reimbursement for moving expenses). See also *Recommendation and Study Relating to Condemnation Law and Procedure: Number 1—Discovery in Eminent Domain Proceedings*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1963). For a legislative history of this recommendation, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 213 (1963).

³ See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 211-212 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1 (1963).

See also *Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act*, 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1965). For a legislative history of this recommendation, see 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 314 (1965).

6. Whether Vehicle Code Section 17150 and related statutes should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1962, Res. Ch. 23, p. 94; 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1962 Report at 20 (1963)).
7. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).
8. Whether the Evidence Code should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).⁴
9. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 17 (1957)).
10. Whether the law relating to the use of fictitious names should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 18 (1957)).
11. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised (Cal. Stats. 1966, Res. Ch. 9; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589; 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 18 (1957)).
12. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised (Cal. Stats. 1966, Res. Ch. 9; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 25 (1957)).

Other Studies

1. Whether the law relating to devises and bequests to a trustee under, or in accordance with, terms of an existing inter vivos trust should be revised and whether the law relating to a power of appointment should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).
2. Whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases (Cal. Stats. 1955, Res. Ch. 207, p. 4207; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1955 Report at 28 (1957) (description); 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 13 (1959) (legislative history)).
3. Whether the law relating to the allocation or division of property on divorce or separate maintenance should be revised (Cal. Stats. 1966, Res. Ch. 9).
4. Whether the law relating to the rights of a putative spouse should be revised (Cal. Stats. 1956, Res. Ch. 42, p. 263; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 26 (1957)).

⁴ See *Recommendation Proposing an Evidence Code*, 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1 (1965). A series of tentative recommendations and research studies relating to the Uniform Rules of Evidence was published and distributed for comment prior to the preparation of the recommendation proposing the Evidence Code. See 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 1, 101, 201, 601, 701, 801, 901, 1001, and *Appendix* (1964). For a legislative history of this recommendation, see 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 912-914 (1965). See also *Evidence Code With Official Comments*, 7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001 (1965).

5. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised (Cal. Stats. 1956, Res. Ch. 42, p. 263; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 29 (1957)).
6. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 15 (1957)).
7. Whether the Small Claims Court Law should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 16 (1957)).
8. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 19 (1957)).
9. Whether Civil Code Section 1698 should be repealed or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 21 (1957)).
10. Whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 23 (1957)).
11. Whether California statutes relating to service of process by publication should be revised in light of recent decisions of the United States Supreme Court (Cal. Stats. 1958, Res. Ch. 61, p. 135; see also 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 18 (1959)).
12. Whether Section 1974 of the Code of Civil Procedure should be repealed or revised (Cal. Stats. 1958, Res. Ch. 61, p. 135; see also 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 20 (1959)).
13. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales (Cal. Stats. 1959, Res. Ch. 218, p. 5792; see also Cal. Stats. 1956, Res. Ch. 42, p. 463; 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1956 Report at 21 (1957)).
14. Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised (Cal. Stats. 1966, Res. Ch. 9).⁵

⁵This topic is a continuation of an earlier topic. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere* at E-1 (1957); for a legislative history of this recommendation, see 2 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1958 Report at 13 (1959); 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere* at I-1 (1961); for a legislative history of this recommendation, see 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1962 Report at 15 (1963).

STUDIES TO BE DROPPED FROM CALENDAR OF TOPICS FOR STUDY

Study Relating to Support After an Ex Parte Divorce

In 1957, the Commission was authorized to make a study to determine whether a former wife, divorced in an action in which the court did not have personal jurisdiction over both parties, should be permitted to maintain an action for support.¹

The Commission requested authority to make this study because the California Supreme Court had held in *Dimon v. Dimon*,² that a former wife whose marriage had been terminated by an ex parte divorce granted by a Connecticut court could not subsequently maintain an action for support against her former husband in California.³ After the Commission had commenced its study, the California Supreme Court decided *Hudson v. Hudson*,⁴ which overruled the *Dimon* case. Accordingly, the Commission recommends that this topic be dropped from its calendar of topics.

STUDIES FOR FUTURE CONSIDERATION

The Commission now has an agenda consisting of 26 studies in progress, some of substantial magnitude, that will require all of its energies for a number of years. For this reason, the Commission is not at this time requesting authority to undertake additional studies.

¹ Cal. Stats. 1957, Res. Ch. 202, p. 4589.

² 40 Cal.2d 516, 254 P.2d 528 (1953) (Traynor, J. dissenting).

³ See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 25 (1957).

⁴ 52 Cal.2d 735, 344 P.2d 295 (1959). The *Hudson* case held that an ex parte divorce obtained by the husband in another state did not prevent the wife from maintaining an action for support in California.

REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last Annual Report was prepared.¹ It has the following to report:

(1) No decision of the Supreme Court of the United States holding a statute of this state repealed by implication or unconstitutional has been found.

(2) No decision of the Supreme Court of California holding a statute of this state repealed by implication has been found.

(3) Two decisions of the Supreme Court of California holding statutes of this state unconstitutional have been found.

In *Weaver v. Jordan*,² the California Supreme Court held the Free Television Act (submitted by the initiative and approved by the electors, November 3, 1964—commonly known as Proposition 15), which undertook to ban the business of home subscription television, unconstitutional.

In *In re Perez*,³ the Supreme Court of California held Penal Code Section 1203.2a unconstitutional insofar as that section formerly purported to permit sentence in the absence of and without notice to a probationer committed to a state prison. Section 1203.2a was amended by Chapter 2079 of the Statutes of 1963 to make the section consistent with constitutional requirements.

¹ This study has been carried through 65 Adv. Cal. 325 (1966) and 384 U.S. 1116 (1966).

² 64 Adv. Cal. 243, 49 Cal. Rptr. 537, 411 P.2d 289 (1966).

³ 65 Adv. Cal. 223, 53 Cal. Rptr. 414, 418 P.2d 6 (1966).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics listed as studies in progress on pages 13-15 of this report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends that the Legislature take appropriate action to effect the repeal of the Free Television Act (submitted by the initiative and approved by the electors, November 3, 1964).

APPENDIX

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

DISCOVERY IN EMINENT DOMAIN PROCEEDINGS¹ BACKGROUND

The use of ordinary discovery procedures in a condemnation case to discover the opinion of an appraiser or other expert, and the data on which it is based,² presents problems that do not exist when discovery is sought from an ordinary witness. These special problems and a feasible method of achieving discovery in eminent domain proceedings "with minimum waste motion and with fairness to all concerned" are discussed in *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 202-204, 41 Cal. Rptr. 721, 726-728 (1964):

The problem of fairness and mutuality in discovery proceedings involving an expert in advance of trial presents considerations absent from the case of the usual fact witness. The expert normally has no relevant information about the case but has been employed, usually by counsel, in the hope he can develop favorable relevant opinions on specific matters. The expert may examine specific items of evidence, such as questioned documents, anatomy in a personal injury, books and accounts in an accounting, specific machinery in a breach of warranty, or, as here, real property in a condemnation proceeding. If the expert forms an opinion on the subject, he has created potential relevant evidence, and if he later qualifies as an expert and testifies to his opinion, he has given relevant evidence.

To complicate his position, the expert normally wears two hats. He is employed by counsel to form an opinion which he may later present as a witness in court. He is also engaged as an advisor on trial preparation and tactics for the case and in this latter capacity serves as a professional consultant to counsel on the technical and forensic aspects of his specialty. From the point of view of counsel, the expert's freedom to advise counsel, to educate coun-

¹The Law Revision Commission was first directed to study condemnation law and procedure in 1956. See Cal. Stats. 1956, Res. Ch. 42, p. 263. In 1965, the Legislature again directed the Commission to study this topic. See Cal. Stats. 1965, Res. Ch. 130, p. 5289.

²It is well established that opinions of experts and pertinent valuation data are subject to discovery in eminent domain proceedings. *San Diego Professional Ass'n v. Superior Court*, 58 Cal.2d 194, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d 180, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); *People v. Donovan*, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962); *Mowry v. Superior Court*, 202 Cal. App.2d 229, 20 Cal. Rptr. 698 (1962). See also *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964); *Scotsman Mfg. Co. v. Superior Court*, 242 Cal. App.2d ----, 51 Cal. Rptr. 511 (1966).

sel on the technical problems of his case, to prepare him to handle unfamiliar data in court, to analyze the availability of expert opinion and the need for its use, all without hindrance from the opposing side, are important elements of counsel's privacy of preparation. Consultation between expert and counsel may appropriately be given broad immunity from discovery, both as to expert and as to counsel, because none of the expert's opinion, professional though it may be, is relevant evidence in the case. To the contrary, his opinion is and will remain wholly irrelevant and immaterial as evidence until the expert is called as a witness on the trial and shown to be qualified to give competent opinion testimony on a matter in which he is versed and which is material to the case. . . .

Under the general name of fairness the courts have continued to respect privacy of preparation for trial, even under the modern expansion of the machinery of discovery. This policy was made explicit in California by the addition in 1963 of Code of Civil Procedure, section 2016, subdivision (g): "It is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage to his adversary's industry or efforts." Under such a policy a party cannot substitute the wits of his adversary's expert for wits of his own in analyzing the case. . . .

* * * *

Nevertheless the initial status of the expert, as consultant and possible witness, changes its character at that point in the suit when it has become known he will actually testify as a witness. When it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute, then his opinion has become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery.

With recognition of these problems the courts have attempted to work out methods of mutual disclosure of the opinions of potential witnesses which will achieve desired results with minimum waste motion and with fairness to all concerned. In condemnation proceedings this has taken the form of an exchange of reports of experts during the final pretrial proceedings immediately in advance of trial. The key element is mutuality. Were the courts not rigorous in insisting on mutuality of disclosure and were they to adopt a soft and wishy-washy attitude toward recalcitrant litigants reluctant to comply with their orders, they would quickly inhibit any genuine disclosure in advance of trial in the case of opinion witnesses, for parties could merely claim, as petitioners did here, they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial.

The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the party seeking discovery must be ready and willing to make an equitable exchange. . . . [Citations omitted.]

The Commission has concluded that the obstacles to effective discovery in eminent domain cases may be overcome by legislation providing for an exchange before trial of written statements of valuation data. This technique is not novel; it is used in eminent domain proceedings in the Los Angeles Superior Court³ and in the United States District Court in Los Angeles.⁴ A similar procedure is provided in other states by court rule or by statute.⁵

Although some trial courts now require a pretrial exchange of valuation data, legislation is needed to establish a uniform procedure throughout the state.⁶ Such legislation would provide a relatively inexpensive means of discovery in eminent domain proceedings and would reduce the necessity for interrogatories and depositions.

It is true that requiring an exchange of valuation data before trial may also require the parties to prepare their cases somewhat earlier than is now the practice in some areas of the state. But the pretrial exchange has several offsetting advantages. First, it will tend to assure the reliability of the data upon which the appraisal testimony is based. The parties will have had an opportunity to test the data through investigation prior to trial. The opportunity for pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference may serve a more useful function. Having checked the supporting data in advance, the parties may be able to stipulate at the pretrial conference to highest and best use, to the comparability of other sales, to the admissibility of other evidence, and perhaps even to the amounts of certain items of damage. Of course, this objective can be fully achieved only if the pretrial rules provide for the holding of the pretrial conference subsequent to the time for exchange of valuation data.

³ See *Swartzman v. Superior Court*, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964), hearing denied by Supreme Court. See also McCoy, *Pretrial in Eminent Domain Actions*, 38 L.A. BAR BULL. 439 (1963), reprinted in 1 MODERN PRACTICE COMMENTATOR 514 (1964).

⁴ See RULES OF PROCEDURE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, Rule 9 (effective June 1, 1966).

⁵ E.g., MD. RULES PROC., Rule U12; N.Y. COURT OF CLAIMS, Rule 25a. See also PA. STAT. ANN., Tit. 26, § 1-703(2) (Purdon).

⁶ This view has been expressed to the Commission by the State Bar Committee on Condemnation Law and Procedure, attorneys who ordinarily represent condemnees, and representatives of various public agencies.

RECOMMENDATIONS

To provide for an exchange of valuation data before trial, the Commission makes the following recommendations:⁷

1. Not later than 10 days after the memorandum to set has been served and filed, any party to an eminent domain proceeding should be permitted to serve on any adverse party a demand to exchange valuation data. Thereafter and at least 10 days prior to trial, both the party serving the demand and the party upon whom the demand has been served should be required to serve on each other statements setting forth specified valuation data, such as the names of expert witnesses, the names of all witnesses who will testify as to value, the opinions of the valuation witnesses, and certain of the data upon which the opinions are based.

Within 10 days after being served with a demand, the party served should be permitted to serve a cross-demand on any other party interested in the same parcel of property. This privilege will protect a party from being required to reveal his valuation data to a person with only a nominal interest in the proceeding while receiving no significant information in return.

Compliance with these requirements will be relatively inexpensive. An appraisal report ordinarily contains all the valuation data required to be listed in the statement and a copy of the report can be made a part of the statement. Of course, the listing of required data is not intended to enlarge the extent to which the data may be admissible as evidence at the trial of the case.

2. The Judicial Council should be authorized to adopt rules prescribing times for serving demands and cross-demands, and a time for serving statements of valuation data, that differ from the times recommended above. This will permit the Judicial Council to adjust the times specified in the statute so that the exchange can take place before the pretrial conference if the Judicial Council concludes that this practice will make the pretrial conference significantly more effective. So that the parties will not be required to incur the expense of preparing their appraisal data until a short time before trial, any rules adopted by the Judicial Council should require that the trial be held within 35 days from the date on which the statements must be exchanged.

3. If a demand and a statement of valuation data are served, a party should not be permitted to call a witness to testify on direct examina-

⁷ These recommendations are based in part on the Commission's 1963 recommendation on the same subject. See *Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings*, 4 CAL. LAW REVISION COMM'N, REP., REG. & STUDIES 701 (1963). The recommendation and an abridged version of the related study are reprinted in 1 MODERN PRACTICE COMMENTATOR 459 (1964). The legislation introduced to effectuate the 1963 recommendation passed the Senate but died in the Assembly Judiciary Committee. See 4 CAL. LAW REVISION COMM'N, REP., REG. & STUDIES at 213 (1963). In preparing this recommendation, the Commission has taken into account the objections that were made to the earlier recommendation.

tion during his case in chief to any information required to be listed upon a statement of valuation data unless he has listed the witness and the information in the statement he served on the adverse party. Nor should the party be permitted to call an expert witness to testify on direct examination during his case in chief unless he has listed the witness in such statement.

This sanction is necessary to enforce the required exchange of statements of valuation data. The same procedural technique is used to enforce the exchange of physicians' statements under Code of Civil Procedure Section 2032 and the service of copies of accounts under Code of Civil Procedure Section 454. The sanction, however, should be limited to a party's case in chief so that cross-examination and rebuttal are unaffected by the required exchange of valuation data; it is often difficult to anticipate the evidence required for proper rebuttal or cross-examination.

4. The court should be authorized to permit a party to call a witness or to introduce evidence notwithstanding the party's failure to list such information in his statement of valuation data upon a showing that he made a good faith effort to comply with the statute, that he diligently gave notice to the adverse party of his intention to call the witness or to introduce the evidence, and that prior to serving the statement he either (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to list the witness or to discover or list the evidence through mistake, inadvertence, surprise, or excusable neglect. These standards would parallel those now applied in granting a new trial upon newly discovered evidence (Code of Civil Procedure Section 657) and in relieving a party from default (Code of Civil Procedure Section 473).

5. The procedure recommended for an exchange of valuation data before trial should be supplemental to ordinary discovery procedures.

PROPOSED LEGISLATION

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

An act to add a chapter heading immediately preceding Section 1237 of, and to add Chapter 2 (commencing with Section 1272.01) to Title 7 of Part 3 of, the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. A chapter heading is added immediately preceding Section 1237 of the Code of Civil Procedure, to read:

CHAPTER 1. EMINENT DOMAIN GENERALLY

SEC. 2. Chapter 2 (commencing with Section 1272.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 2. DISCOVERY IN EMINENT DOMAIN PROCEEDINGS

1272.01. (a) Not later than 10 days after the memorandum to set has been served and filed, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange valuation data.

(b) A party on whom a demand is served may, not later than 10 days after the service of the demand, serve upon any adverse party and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data in compliance with Sections 1272.01 and 1272.02 of the Code of Civil Procedure not later than 10 days prior to the day set for trial and, subject to Section 1272.05 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination during your case in chief any matter required to be set forth in your statement of valuation data."

(d) Not later than 10 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement

upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement upon the party who served the demand or cross-demand.

(e) The Judicial Council may, by rule, prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the times specified in this section, but such rule shall provide that the trial will be held within 35 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rule may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).

Comment. Section 1272.01 provides a procedure to facilitate a simultaneous exchange of valuation data in eminent domain cases. The procedure is not mandatory; it applies only if it is invoked by a party to the proceeding.

Subdivision (a) refers to the memorandum to set required by Rule 206 of the California Rules of Court.

Subdivision (e) is included so that the Judicial Council may adopt rules that will permit the exchange of data prior to the pretrial conference.

1272.02. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business or residence address of each person intended to be called as a witness by the party to testify to his opinion of the value of the property described in the demand or cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken.

(c) The name and business or residence address of each person upon whose opinion the opinion referred to in subdivision (b) is based in whole or in substantial part.

(d) The opinion of each witness listed as required in subdivision (b) of this section as to the value of the property described in the demand or cross-demand and as to the amount of the damage and benefit, if any, to the larger parcel from which such property is taken and the following data to the extent that the opinion is based thereon:

(1) The highest and best use of the property.

(2) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(3) A list of the sales, contracts to sell and purchase, and leases supporting the opinion.

(4) The cost of reproduction or replacement of the existing improvements on the property less whatever depreciation or obsolescence the improvements have suffered and the method of calculation used to determine depreciation.

(5) The gross income from the property, the deductions from gross income, the resulting net income, the reasonable

net rental value attributable to the land and existing improvements thereon, the rate of capitalization used, and the value indicated by such capitalization.

(6) If the property is a portion of a larger parcel, a description of the larger parcel from which the property is taken.

(e) With respect to each sale, contract, or lease listed under paragraph (3) of subdivision (d):

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page where recorded.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

Comment. Section 1272.02 itemizes the information to be listed in the statement of valuation data.

Subdivision (a). The expert witnesses required to be listed in the statement include not only the experts who will be called to testify concerning value, damages, or benefits, but also the experts who will testify concerning other matters that the trier of fact must know in order to understand and weigh the valuation testimony. See EVIDENCE CODE §§ 813(b), 814. For example, in a case involving a partial taking, if a party intends to present expert testimony concerning the character of the improvement proposed to be constructed by the plaintiff (see EVIDENCE CODE § 813(b)), the proposed witness' name must be listed. Similarly, a party would be required to list the name of a structural engineer who is to testify concerning the structural soundness of an existing building or a geologist who is to testify concerning the existence of valuable minerals on the property.

Subdivision (b). Subdivision (b) requires that the statement include the name and address of each witness who will be called to give opinion testimony concerning value, damages, or benefits. Although subdivision (a) requires that the names and addresses of all proposed expert witnesses be included in the statement, subdivision (b) requires the identification of those experts listed in the statement who are to give opinion testimony concerning value, damages, or benefits and requires the listing of the owner of the property if the owner is to testify concerning value, damages, or benefits. See EVIDENCE CODE § 813(a)(2) (owner may testify concerning value).

Subdivision (c). Subdivision (c) requires that the valuation statement list the name and address of any expert who will not be called as a witness by the party but upon whose opinion the testimony of any valuation witness he plans to call will be based in whole or in part. This information is needed by the adverse party not only for ordinary discovery purposes but also to enable him to utilize his right under Section 804 of the Evidence Code to call the expert and examine him as if under cross-examination concerning his opinion.

Subdivisions (d) and (e). These subdivisions require that the statement contain the opinion of each witness as to value, damages, and benefits, and the basic data upon which that opinion is based. *Cf.* EVIDENCE CODE §§ 814–821. Ordinarily the appraisal report prepared by an expert witness will contain all of the required valuation data and a copy of the report can be made a part of the statement.

1272.03. (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

(1) Determines to call an expert witness not listed in his statement of valuation data;

(2) Determines to call a witness not listed in his statement of valuation data for the purpose of having such witness testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken;

(3) Determines to have a witness called by him testify on direct examination during his case in chief to any data required to be listed in the statement of valuation data but which was not so listed; or

(4) Discovers any data required to be listed in his statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Section 1272.02 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

Comment. Section 1272.03 requires that a party promptly advise the adverse party if the party intends to call a witness or use valuation data that was not listed on the statement of valuation data. Compliance with the section does not, however, insure that the party will be permitted to call the witness or use the valuation data. See Section 1272.05.

1272.04. Except as provided in Section 1272.05, if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to Section 1272.01:

(a) No party required to serve and file a statement of valuation data may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the name and address of such witness are listed in the statement of the party who calls the witness.

(b) No party required to serve and file a statement of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken unless the name and address of such witness are listed in the statement of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed in a statement of valuation data unless such data is listed in the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

Comment. The sanction provided by Section 1272.04 is necessary to insure that the parties will make a good faith exchange of the statements of valuation data. Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the statement. See Section 1272.05 and the Comment to that section.

It should be noted that nothing in Section 1272.04 precludes a party from calling a witness on rebuttal or having a witness testify concerning valuation data on rebuttal; the section limits only the calling of a witness or testimony concerning valuation data on direct examination during his case in chief. Thus, a party is free to call additional witnesses or to use valuation data not listed in his valuation statement where it is necessary to do so in order to rebut the other party's contentions. A party also is free to bring out additional valuation data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness even though such valuation data was not listed in his statement.

The court should exercise diligence to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this chapter by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been used during the case in chief and such valuation data presented during direct examination.

1272.05. (a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to data on direct examination, during the party's case in chief where such witness or data is required to be, but is not, listed in such party's statement of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 and 1272.02, that he has complied with Section 1272.03, and that, by the date of the service of his statement of valuation data, he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such data; or

(2) Failed to determine to call such witness or to discover or list such data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the fact that the opposing party may

have relied upon the statement of valuation data and will be prejudiced if the witness is called or the testimony concerning such data is given.

Comment. Section 1272.05 allows the court to permit a party who has made a good faith effort to comply with Sections 1272.01–1272.03 to call a witness or use valuation data that was not listed in his statement of valuation data. The standards set out in the section are similar to those applied under Code of Civil Procedure Section 657 (for granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default). The court should apply the same standards in making determinations under this section. The consideration listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section.

1272.06. The procedure provided in this chapter does not prevent the use of other discovery procedures or limit the matters that are otherwise discoverable in eminent domain proceedings.

Comment. The pretrial exchange of valuation data provided in this chapter is supplemental to other discovery procedures. Section 1272.06 makes this clear and also makes it clear that the list of matters in Section 1272.02 is not an exclusive list of the matters that may be discovered in an eminent domain proceeding.

1272.07. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Comment. The admission of evidence in eminent domain proceedings is governed by Evidence Code Sections 810–822 and other provisions of the Evidence Code. The exchange of information pursuant to this chapter has no effect on the rules set out in the Evidence Code.

o