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9/21/60

Memorandum No. 79 (1960)

Subject: Study No. 36(L) - Pre-Trial and Discovery

Attached is a revised recommendation and proposed statute relating to pre-trial and discovery in eminent domain proceedings. In the statute, the strike-out and underscoring in subdivision (2) indicate changes from the draft that was before the Commission at its August meeting. As subdivision (2) is entirely new, it will be completely underscored as it will appear in the Commission's final recommendation.

We must send a tentative recommendation and statute on pre-trial and discovery to the State Bar Committee after our September meeting if we want to get the reaction of the State Bar Committee prior to the time we print our recommendation.

Respectfully submitted,

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Assistant Executive Secretary

(36)

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

PRE-TRIAL AND DISCOVERY IN
EMINENT DOMAIN PROCEEDINGS

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

September 21, 1960

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Pre-Trial and Discovery in

Eminent Domain Proceedings

The Law Revision Commission has considered and reports herein on pre-trial procedure and discovery in eminent domain proceedings.

Pre-Trial Procedure

The Commission recommends no legislation relating to pre-trial conferences in eminent domain proceedings because, under present California law, such conferences are governed by court rules promulgated by the Judicial Council. The enactment of statutes in this area would result in a confusing and hybrid pre-trial system governed partly by statute and partly by rule.

Discovery

There is considerable uncertainty among the bench and bar concerning the scope of discovery in eminent domain proceedings under California's statutory discovery rules. The study prepared for the Law Revision Commission reveals that some judges have held that virtually all of the information contained in an appraisal report is privileged, while others have held that the report itself and similar communications to the attorney are privileged but the knowledge and opinion of the appraiser are not privileged.

The more restrictive decisions dealing with discovery in eminent domain proceedings are inconsistent, the Commission believes, with the general development of California law relating to discovery in other areas of litigation. For example, recent decisions discussed in the study have held that the knowledge of an expert is not privileged and, even though such knowledge may have been reported to an attorney, is subject to discovery on the ground that knowledge which is not otherwise privileged does not become privileged merely by being communicated to an attorney. These cases recognize that it is only the communication itself that is privileged.

The Commission does not believe that the discovery rules should be applied any differently in eminent domain proceedings than in other actions and proceedings. It recommends, therefore, that the scope of discovery in eminent domain proceedings be clarified by legislation. The legislation proposed by the Commission would, in effect, simply reaffirm that the established principle -- that any matter, not privileged, which is relevant to the subject matter of a lawsuit is subject to discovery -- is fully applicable to eminent domain proceedings. In an eminent domain proceeding, such relevant matter includes opinions on the value of the property and the supporting data upon which they are based, for this is the evidence upon which the findings of value must be based. Such relevant matter also includes information which may be used for impeachment, such as information relating to an expert's expenses and fees which is admissible under Code of Civil Procedure Section 1256.2.

If information of this character is explicitly made subject to discovery prior to trial, the trial itself may be expedited in some cases, and in

others settlement may be facilitated. Even more important, such discovery will tend to assure the accuracy of the data relied on in appraisal testimony. Unless the opposing party knows in advance of the data upon which an expert at the trial has relied in determining the value he cannot effectively test the reliability of such data through cross-examination. This is because the expert usually relates facts that he has learned from others and the participants in the transactions relied upon are seldom before the court. The opposing party may not be able to introduce evidence to impeach the reliability of such data because it may be too late to obtain such evidence or even to learn of its existence. If such data are discoverable this problem is obviated. Fruitless cross-examination to test the reliability of data that is accurate may be thus avoided. Moreover, value is usually proved by expert testimony; and if both parties know in advance of the trial the range of expert opinion as to the value of the property, they may be willing to settle the case rather than run the risk of a verdict anywhere within the range of the expert testimony.

As the Commission does not believe that the discovery rules should be applied differently in eminent domain proceedings than in other actions and proceedings, the legislation proposed by the Commission is applicable to any action or proceeding in which the value of property is in issue.

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

An act to amend Section 2016 of the Code of Civil Procedure relating to depositions and discovery.

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

SECTION 1. Section 2016 of the Code of Civil Procedure is amended to read:

2016. (a) Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. Such depositions may be taken in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein. After commencement of the action, the deposition may be taken without leave of court, except that leave of court, granted with or without notice, and for good cause shown, must be obtained if the notice of the taking of the deposition is served by the plaintiff within 20 days after service of the summons on, or appearance of, the defendant. The attendance of witnesses may be compelled by the use of subpoena as provided in Chapter 2 (commencing with Section 1985), Title 3, Part 4 of this code.

(b) (1) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of the other party, including the existence, description, nature, custody, condi-

tion and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(2) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, in an action or proceeding in [eminent-domain] which the value of property is in issue the deponent, including any person retained or employed by a party to give such party his opinion of the value of the property or to testify in the proceeding as an expert, may be examined regarding the value of the property and his opinion thereof and upon any matter, not privileged, relevant thereto, including but not limited to (i) the highest and best use of the property and any other use for which the property is adaptable, (ii) ~~the applicable~~ zoning, (iii) sales and other market data relating to the same or comparable property, (iv) in eminent domain proceedings, the construction of the improvement in the manner proposed by the plaintiff, severance damage, if any, and [v] special benefits, if any, [vi] the value of the land and the cost of reproduction or replacement of the improvements thereon less depreciation, and the rate of depreciation used, [vii] the capitalization of the income from the property, [viii] his qualifications to express an opinion of the value of the property, [ix] the existence, description, custody and location of any maps, plans or pictures of the property, [x] the identity and location of any persons having knowledge

of the value of the property or of any matter relevant thereto, [~~(xi)~~] (x) the qualifications of any persons having knowledge of the value of the property to express opinions relating to such value, (xi) the identity and location of any persons retained by a party to testify in regard to the value of the property in the proceeding and (xii) the expenses and fees paid or to be paid by any party to the proceeding to the deponent or to any person to obtain his opinion of the value of the property or to testify in the proceeding. Nothing in this subdivision shall be deemed to limit the extent to which any person may be examined under subdivision (b)(1) of this section.

(3) It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with

respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.

(c) Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of this code.

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify

because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) Subject to the requirements of this section, a party may offer in evidence all or any part of a deposition, and if such party introduces only part of such deposition, any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Subject to the provisions of subdivision (c) of Section 2021 of this code, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. Except where the deposition is

used under the provisions of paragraph (2) of subdivision (d) of this section, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent, or for explaining or clarifying portions of the said deposition offered by an adverse party, makes the deponent the witness of the party introducing the deposition, as to the portions of the deposition introduced by said party. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by another party.

(g) When any reference is made to this section or any portion thereof in any other section of this code or in any other law, such reference shall extend to and include all amendments heretofore or hereafter made to this section.