11/8/60

Memorandum No. 97 (1960)

Subject: Study No. 36 - Condemnation (Pretrial and Discovery)

We did not receive many comments on the tentative recommendation relating to discovery in eminent domain proceedings. The letters we have received are attached to this memorandum for your information. In connection with the Department of Public Works letter, that agency has offered to work out a statute providing for the exchange of information relating to comparable sales. As soon as we receive the draft of the proposed statute, we will forward it for your consideration.

We have received a letter from the Legislative Counsel suggesting some technical modifications. We have also received letters from the following persons:

Attorneys for public entities.

Chief of Legal Division, Department of Public Works

City Attorney of San Francisco

County Counsel of San Diego

Attorneys in private practice.

Ralph G. Lindstrom, Los Angeles

Walter Gould Lincoln, Solana Beach

Richard L. Huxtable, Los Angeles

Four of the six letter writers expressed either approval or a qualified approval of our statute. Two of the letter writers, Public Works and San Diego, disapproved of our proposals. San Francisco states that our proposed

legislation "should prove helpful."

Mr. Lindstrom states that he approves of our proposal; however, he complains of language in subdivision (4)(f). He is concerned that the introduction of a deposition for impeachment purposes might make the deponent the witness of the party introducing the deposition. The language Mr. Lindstrom complains of is language which is in the existing law. The problem involved is not directly related to the subject of our amendment and is not within the scope of our study; hence there is no need to consider it at this time.

Mr. Lincoln refers to our recommendation as "excellent", but suggests that a provision be added requiring each side at the pretrial conference to divulge the names of all experts to be called as witnesses and to disclose all the comparable sales to be relied on at the trial.

Mr. Huxtable's suggestions are similar to those made by Mr. Lincoln. Mr. Huxtable points out that the trial of a condemnation case is already so expensive that small property owners often cannot afford to litigate; and discovery procedures, though desirable in theory, increase the cost of the litigation to the parties. To lessen the burden of discovery to the condemnee, he suggests that, if the condemner takes the deposition of a condemnee's appraiser, the condemner should be required to pay the cost of that deposition, including the cost of a copy for the property owner's attorney and the appraiser's fee for appearing at the deposition. He indicates that it might also be desirable to require the condemner to pay the cost of a deposition taken by the property owner of the condemner's experts. Justification for imposing these costs on the condemner may be found in Heimann v. Los Angeles, 30 Cal.2d 746, 752-3 (1947). That case

held that the Constitution requires the condemner to pay the costs of a condemnation proceeding, for otherwise a condemnee would receive less than "just compensation". However, other cases have held that the costs the condemner must pay do not include fees for expert witnesses in excess of ordinary witness fees. (C.C.P. § 1871; Metropolitan Water Dist. v. Adams, 23 Cal.2d 770 (1944); People v. Bowman, 173 C.A.2d 416 (1959).)

Another important consideration pointed out by Mr. Huxtable is that appraisers are not dealing with a static factual situation: the value of the property may change from day to day. Frequently an appraiser does not formulate his final opinion until shortly before the trial. Hence, Mr. Huxtable believes that a deposition of an early, tentative opinion might be used unfairly to impeach the final opinion given at the trial.

In view of these considerations, Mr. Huxtable suggests that the parties be required to file, not less than five days prior to trial, a special pleading stating (1) the highest and best use of the property and the reasonable probability of any zone change and (2) the sales of the same or comparable property to be relied on at the trial. He believes this procedure will be more efficient, will consume less time and involve less expense than the deposition procedure. However, he does not object to the deposition procedure so long as the deposition is obtained by interrogatories; but he does object to the taking of oral depositions of expert witnesses unless the property owner is protected against the additional costs.

San Diego and Public Works both believe that, if the Commission really believes that the discovery rules in eminent domain should not be different than the rules in other proceedings, the Commission should

broaden the discovery statute so that it would be applicable to experts in personal injury cases as well as to experts in property valuation cases. However, both Public Works and San Diego object to the proposed statute because they do not believe opinions should be discoverable in any case. San Diego states that our legislation abolishes both the attorney-client privilege and the work-product rule in property valuation cases alone. San Diego believes a party should be able to discover only those facts that are in the hands of another person that are unavailable to himself. The letter points out that sales data are available to both parties in the county recorder's office. The letter further complains that the effect of our statute will be one-sided in that condemners usually complete their investigation and appraisals before pretrial, while condemnees seldom do so. Hence, discovery will benefit the condemnee but will reveal nothing to the condemner.

Public Works believes that Holm v. Superior Court, 42 Cal.2d 500, holds that statements and facts gathered "either from independent witnesses or employees of a party" for transmission to an attorney to assist his preparation for litigation are privileged. However, the letter also recognizes that the provisions of Code of Civil Procedure Section 2016(b) were adopted for the purpose of repudiating the work-product doctrine of Hickman v. Taylor, 329 U.S. 495. Public Works indicates that it would favor a statute requiring the exchange of comparable sales prior to trial. Such legislation, it believes, would avoid a needless "dress rehearsal" of the experts' testimony and would avoid needless additional attorneys' fees, appraisers' fees, reporters' fees and transcript fees.

Holm v. Superior Court does not hold precisely what it is cited for

in these letters. It held that communications by a client, including communications made by way of reports and photographs, to an attorney for purposes of litigation are privileged. It did not hold that all expert's investigations are privileged nor did it hold that all information gathered by an attorney is privileged. As a matter of fact, it is San Francisco v. Superior Court, 37 Cal.2d 227, that sets forth the general rules as to privilege in this area; and that case held that the privilege protects only the confidential communications by a client to a doctor or other person employed as an agent of a lawyer for the purpose of transmission to the lawyer for litigation purposes, although it also held that such communication may be made by submitting to an examination. In Wilson v. Superior Court, 148 Cal. App.2d 433 (1957), the District Court of Appeal stated that the attorney-client privilege would protect information gathered by an expert from an inspection of the client's property if the client showed his property to the expert in confidence so that the expert might communicate his observations to a lawyer. (This observation was questioned in Grand Lake Drive In v. Superior Court, 179 ACA 139, 144 (1960).) However, the Wilson case also held that an expert's opinion is subject to discovery if not based upon confidential matters. The opinion of an expert in condemnation cases is usually based upon his investigations of the market and not upon confidential communications by the property owner. Recent cases such as Price v. Superior Court, 161 Cal. App.2d 650 (1958), San Francisco v. Superior Court, 161 Cal. App.2d 653 (1958) and Jorgensen v. Superior Court, 163 Cal. App.2d 513 (1958) have made it clear that the doctrine of the Holm case does not protect all information gathered by agents of an attorney. The work-product rule of Hickman v. Taylor is inapplicable because, in the Hickman case, the attorney sought to discover another attorney's notes as to what third parties had said. The third parties were available; hence the information sought was neither evidence in the case nor would it lead to

subdivision (g) relating to cross references, we have picked up the provisions of such sections as 2030 and 2031 without amending them. Therefore, it seems to the staff that it is necessary to retain the Commission's proposal as a part of Section 2016.

The foregoing discussion presents the following alternatives:

(1) The Commission may propose the statute previously approved. In connection with this proposal, the Commission may wish to add a provision that the costs of taking a deposition from a condemnee'e appraiser shall be borne by the condemner. This addition was suggested by Mr. Huxtable, and Public Works, too, commented upon the costliness of the deposition procedure. The Commission should be aware, though, that a study is being prepared on the entire subject of recoverable costs.

(2) The Commission may propose the statute previously approved and may, in addition, propose the enactment of legislation requiring the exchange of certain valuation data a short time -- perhaps five days -- before trial. This proposal was made by Mr. Lincoln. The information exchanged might include the following:

Comparable sales (suggested by Huxtable, Public Works, Lincoln)

The names of experts to be called as witnesses (suggested by Lincoln)

Highest and best use and reasonable probability of zone change (Huxtable)

The information required to be exchanged might also include the material specified in the Commission's discovery statute. Our correspondents, though, believe that the listed items are the most frequently contested items. As previously indicated, such a statute will be sent to you prior to the November meeting in a Supplement to this memorandum.

(3) The Commission may propose only a statute requiring the exchange

of information. This suggestion was made by Public Works and Mr. Huxtable, and it is probable that such a statute would be acceptable to those who have approved the present tentative draft.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary