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Memorandum No. 9(1961)

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

Attached on blue paper is a redraft of the discovery statute. In Section 1, present Section 1246.1 is renumbered 1246.8 merely to make room in the code. The statute begins, in substance, with Section 2.

To reflect actions taken at the January meeting, the statute requires the listing of the transactions to be used in cross-examination. The action of the Commission to permit cross-examination of the persons on whose statements and opinions an opposing expert relies has been tied in by permitting cross-examination of all persons listed by the opposing party. This principle might be carried much further, but this is as far as the principle is germane to this statute. A general cross-examination section would belong in the evidence statute.

The tentative pretrial and discovery statute previously approved is also attached so that you may refer to the items the Commission decided should be subject to discovery.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

An act to amend and renumber Section 1246.1 of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4 and 1246.5 to, the Code of Civil Procedure, relating to eminent domain proceedings.

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended and renumbered to read:

[~~1246.1~~] 1246.8. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.1 is added to the Code of Civil Procedure, to read:

1246.1. (a) Any party to an eminent domain proceeding may, not later than 40 days prior to the day set for trial, serve and file a demand to exchange valuation evidence. The demand shall describe the parcel of property and the estate or interest therein upon which valuation evidence

is sought to be exchanged, which description may be made by reference to the complaint. The demand may be served on any party to the proceeding claiming an interest in any of the property described in the demand.

(b) Not later than 20 days prior to the day set for trial, the party that served the demand and each party upon whom the demand was served shall serve and file a statement of valuation evidence. The party that served the demand shall serve his statement of valuation evidence upon each party on whom the demand was served. Each party on whom a demand is served shall serve his statement of valuation evidence upon the party that served the demand.

SEC. 3. Section 1246.2 is added to the Code of Civil Procedure, to read:

1246.2. The statement of valuation evidence shall contain:

(a) The name and office or residence address of each witness who will be called by the party at the trial.

(b) A list of the sales of property and other transactions upon which the party intends to examine any witness at the trial.

(c) The name and office or residence address of each witness who will be called by the party to testify to his opinion of the value of the property described in the demand or of the damage or benefit, if any, to the larger parcel from which such property is taken.

(d) The opinion of each witness listed as required in subdivision (c) of this section as to the value of the property described in the demand and the damage or benefit, if any, which will accrue to the larger parcel from which such property is taken and the data upon which each opinion is based, which may include but is not limited to:

- (1) The highest and best use of the property.
- (2) The applicable zoning and any information indicating a probable change thereof.
- (3) A list of the sales of property and other transactions supporting the opinion.
- (4) The cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used.
- (5) The gross and net income from the property, its capitalized value and the rate of capitalization used.
- (6) A list of the maps, plans and documentary evidence and any other physical evidence upon which the opinion is based and the place where such evidence is available for inspection by the party on whom the statement is served.
- (7) The name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part.
  - (e) With respect to each sale or other transaction listed:
    - (1) The names and business or residence addresses, if known, of the parties to the transaction.
    - (2) The location of the property.
    - (3) The date of the sale or transaction.
    - (4) If recorded, the date of recording and the volume and page where recorded.
    - (5) The consideration and other terms of the sale or transaction.

SEC. 4. Section 1246.3 is added to the Code of Civil Procedure, to read:

1246.3. If a demand to exchange valuation evidence is served and filed:

(a) No witness may be called by the party serving the demand or the party on whom the demand is served unless the name of such witness is listed on the statement of the party who calls the witness.

(b) No evidence is admissible to support the opinion of a witness upon the value of the property described in the demand or upon the damage or benefit which will accrue to the larger parcel from which such property is taken unless such evidence is listed on the statement of valuation evidence of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation evidence may be asked by such parties concerning any sale or other transaction if such sale or transaction was not listed on a statement of valuation evidence served by or upon the party calling the witness.

SEC. 5. Section 1246.4 is added to the Code of Civil Procedure, to read:

1246.4. Notwithstanding the provisions of Section 1246.3, the court may, upon such terms as may be just, permit a party to call witnesses and introduce evidence not listed in such party's statement of valuation evidence and to question witnesses upon sales and other transactions not listed in any statement of valuation evidence on file if such witnesses, evidence or transactions were not discovered prior to the date of the service of the demand through such party's mistake, inadvertance, surprise or excusable neglect.

SEC. 6. Section 1246.5 is added to the Code of Civil Procedure,  
to read:

1246.5. Any person whose name is listed on a statement of valuation  
evidence may be called as a witness by the party on whom the statement  
is served and examined as if under cross-examination.

(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 30, 1960

(36)

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Pre-Trial Conferences and Discovery in  
Eminent Domain Proceedings

Pre-Trial Conferences

The Law Revision 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, particularly with respect to whether the deposition of an expert retained by an opposing party may be taken and, if so, what information may be obtained. 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 and not subject to discovery. Other judges have held that while the report itself and similar communications to the attorney are privileged, the knowledge and opinion of the appraiser are not privileged and are subject to discovery.



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 that, even though such knowledge may have been reported to an attorney, it 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.

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 reliability of the data upon which the appraisal testimony is based, for it will give the parties an opportunity to test such data through investigation prior to trial. At the trial the unreliability of inaccurate data may be revealed either by effective cross-examination or by the introduction of impeaching evidence, and fruitless cross-examination to test the reliability of accurate data may be avoided.

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 made applicable to any action or proceeding in which the value of property is in issue.

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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 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) zoning, (iii) sales and other market data relating to the same or comparable property, (iv) the value of the land and the cost of reproduction or replacement of the improvements thereon less depreciation, and the rate of depreciation used, (v) the capitalization of the income from the property, (vi) his qualifications to express an opinion of the value of the property, (vii) the existence, description, custody and location of any maps, plans or pictures of the property, (viii) the identity and location of any persons having knowledge of

the value of the property or of any matter relevant thereto, (ix) the qualifications of any persons having knowledge of the value of the property to express opinions relating to such value, (x) the identity and location of any persons retained by a party to testify in regard to the value of the property in the proceeding, (xi) 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 and (xii) in eminent domain proceedings, the construction of the improvement in the manner proposed by the plaintiff, severance damage, if any, and special benefits, if any. Nothing in this subdivision limits 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.