

2/10/61  
June 15, 1961

Revised

Memorandum No. 16(1961)

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

This memorandum supersedes Memorandum No. 16(1961), dated June 5, 1961, which you may destroy. The attached recommendation is unchanged from the version previously sent; but several minor changes - all indicated by ~~strikeout~~ and underline - have been made in Sections 1246.2, 1246.3 and 1246.4 in order to make the language of this statute similar to that of the evidence statute as it was finally enacted. The last page of the letter attached as Exhibit I has also been revised.

Attached on buff paper is a draft recommendation and a revision of the statute relating to pretrial conferences and discovery in eminent domain cases. The statute appears as revised by the Commission at its May 1961 meeting. The material underscored or in ~~strikeout~~ type indicates language changes that the Commission has not yet approved. Section 1246.5 of the previous statute has been completely rewritten and renumbered and changes from the preceding version are not shown.

The Commission may wish to consider the following material in connection with the current draft of the statute.

1. In Section 1246.3 the words "demand to exchange valuation evidence and a" are added before the word "statement" in the first line. At the May 1961 meeting the Commission decided that the sanctions in Section 1246.3 should apply only if a demand and a statement are served and filed. To

accomplish this the words "pursuant to Section 1246.1" were added. The staff believes that the additional language referring to the demand will make the intent of the Commission even clearer.

2. In connection with the same section, Section 1246.3, the Commission may wish to consider whether a party should be restricted to introducing evidence listed upon his own statement (as is now provided) or whether he should be permitted to introduce evidence contained in a statement served upon him as well.

3. Section 1246.5 is the section that was numbered 1246.5 in the previous draft. Since the section, as revised by the Commission, deals only with the introduction of evidence at the trial, it appears more appropriate to locate it in the vicinity of other sections dealing with the introduction of evidence at the trial. Accordingly, the section has been renumbered to locate it following the sections of the 1961 evidence statute. As revised, the section no longer appears to be germane to a recommendation relating to pretrial conferences and discovery; however, because of the breadth of the title of the bill, there appears to be no constitutional problem in including this section in the proposed statute.

4. In Section 1246.4, the language from C.C.P. Section 473 pertaining to relief from default, does not seem adequate to cover all situations. It does not clearly apply to situations where evidence is discovered that was not in existence prior to the cut-off date. Hence, the staff recommends the addition of the standard that exists under C.C.P. Section 657 for granting a new trial because of newly discovered evidence as an additional ground for admitting evidence not listed on the statement of valuation evidence.

5. Another section has been added to the proposed statute so that the time for the service of a map in partial taking cases will correspond to the time schedule set up in our proposal. In this section, Section 1247b, the alterations shown by ~~strikeout~~ and underline are changes from existing law.

6. The Commission should also consider the manner in which the Judicial Council should be approached for the purpose of working out a satisfactory pretrial schedule in eminent domain cases. Exhibit I (green pages) attached is a rough draft of a letter to the Chairman of the Judicial Council.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

Relating to Pretrial Conferences and Discovery in  
Eminent Domain Proceedings

There has been considerable uncertainty among the bench and bar concerning the scope of discovery in eminent domain proceedings under California's discovery legislation, 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. 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 attorneys are privileged the knowledge and opinion of the appraiser are not privileged and are subject to discovery.

As the value of the pretrial conference is dependent to a great extent upon the discovery process, the judicial limitations upon the scope of discovery in eminent domain proceedings have severely impaired the value of pretrial in these proceedings. The study prepared for the Law Revision Commission reveals that many experienced practitioners in this field believe that pretrial merely prolongs eminent domain litigation and adds to its expense.

The principal -- and often the only -- issue involved in eminent domain litigation is the value of the property being taken or damaged. Therefore, if pretrial is to serve its purpose in this type of case

workable rules for the discovery of valuation data must be developed. The Commission believes that the development of such rules will expedite the trial in many cases and in others will facilitate settlement. Equally important, discovery of valuation data will tend to assure the reliability of the data upon which the appraisal testimony given at the trial is based, for the parties will have an opportunity to test such data through investigation prior to trial.

A major obstacle to the extension of discovery in eminent domain proceedings has been the problem of the compensation of the expert. It seems unfair for one party to impose upon the adverse party, against his will, the added expense of the expert's testimony in a discovery deposition. Even if the problem of the allocation of the expense were readily soluble, the amount of the expense involved in taking the deposition of an expert often would make this form of discovery impractical. Another major obstacle to the extension of effective discovery procedures to eminent domain is the fact that often appraisers do not complete their appraisals until shortly before the actual trial; hence, the pertinent data have often not been accumulated until after the time for completion of discovery -- the time of the pretrial conference.

The Commission believes that these obstacles may be overcome by a procedure requiring service of written documents containing the pertinent valuation data prior to the pretrial conference. This technique is not novel; a variation of this procedure is now used in some federal district courts in eminent domain proceedings and similar procedures appear in the statutes of some other states. Analogous procedures appear in California statutes relating to other fields where the

problems are comparable. For example, Code of Civil Procedure Section 454 provides that, upon demand, the items in an account sued upon must be delivered to the adverse party; and, if such delivery is not made, the party suing upon the account may not give any evidence thereof at the trial. Similarly, Code of Civil Procedure Section 2032 provides for a compulsory exchange of physicians' reports under certain circumstances and prohibits the introduction of testimony by an examining physician if his report has not been exchanged. A procedure similar to the procedures utilized in the cited sections, the Commission believes, will overcome the principal obstacles to the extension of effective discovery procedures to eminent domain cases.

Accordingly, the Commission recommends the enactment of legislation that would have the following provisions:

1. At an appropriate time before the trial of an eminent domain proceeding, any party to the proceeding should have the right to serve on any other party a demand to exchange valuation data. Thereafter, at a time prior to the pretrial conference,<sup>1</sup> both the party serving the demand and the party on whom the demand is served should be required to serve statements setting forth the valuation data they expect to rely on at the trial. These statements should include the names of the

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1. The proposed statute requires that the demand be served at least 40 days prior to trial and that the statement of valuation evidence be served at least 20 days prior to trial. Under existing pretrial procedures, these time limits do not provide assurance that the statements will be exchanged prior to the pretrial conference. As valuation opinions are subject to change as more data are acquired, it is desirable to keep the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible. The Commission is hopeful that the Judicial Council will modify the pretrial rules to permit the holding of the pretrial conference in eminent domain cases after the completion of the procedures

witnesses who will testify as to the value of the property, the opinions of these witnesses and the data upon which the opinions are based. Documentary material may be referred to and be made available for inspection. The statement should also list the data upon which the party serving the statement plans to question the adverse party's witnesses. The furnishing of this information will permit the parties to check the supporting data and will thus enable them at pretrial to stipulate to the admissibility of certain evidence and, perhaps, even stipulate as to the amount of certain items of damage.

The Commission realizes that this recommendation will require the parties to an eminent domain proceeding to prepare their cases by the time of the pretrial conference rather than by the time of the trial. But the Commission believes that this preparation will make the pretrial conference meaningful in eminent domain proceedings and will curtail the time required for the actual trial of the case.

2. Section 1247b of the Code of Civil Procedure, which now requires the condemner in partial taking cases to serve a map of the affected parcel upon the condemnee if requested to do so, should be amended so that the time for the service of the map will be the same as the time for the service of the remainder of the valuation data.

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required in the proposed statute, i.e., within 20 days of the time set for the trial. If the Judicial Council believes a different time schedule for the pretrial conference in eminent domain cases is necessary, the Commission may adjust its recommendation to ensure that the procedures here required are completed before the pretrial conference.

3. If a demand and a statement of valuation evidence are served, a party should not be permitted to introduce valuation evidence not listed upon the statement he served on the other party, and he should not be permitted to question adverse witnesses upon data listed on neither his nor the other party's statement. These sanctions are needed to enforce the required exchange of valuation statements. This is the same procedural technique used to enforce the required exchange of physicians' statements under Code of Civil Procedure Section 2032 and to enforce the required service of the accounting under Code of Civil Procedure Section 454. Of course, the court should have the power to permit a party to introduce, or to examine witnesses concerning, evidence not listed if such evidence could not have been discovered with the exercise of reasonable diligence or was not discovered through mistake, inadvertence, surprise or excusable neglect prior to the service of the party's statement of valuation evidence. These are the standards now applied by the courts 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) and it is appropriate to permit the court to apply the same standards here.

4. If at the trial a valuation witness relies upon the statements of others as a basis for his opinion, the adverse party should be permitted to call such persons and examine them as if under cross-examination. For example, if a witness gives his opinion as to the value of the property and bases this opinion in part upon another opinion as to the value of the underlying mineral deposits, the adverse party should have as much right to cross-examine the author of the



opinion as to the value of the mineral deposits as he does to cross-examine the witness on the stand concerning his opinion of the value of all of the property.

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

An act to amend and renumber Section 1246.1 of, to amend Section 1247b of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4 and 1248.5 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 upon which valuation evidence is sought to be exchanged, which description may be made by reference to the complaint. The demand shall include a statement that the party on whom the demand is served is required to serve and file a statement of valuation evidence in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and that failure to do so will constitute a waiver of the right to introduce any of the evidence required to be set forth in the statement of valuation evidence. The demand may be served on any party to the eminent domain proceeding.

(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 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.

(b) The opinion of each witness listed as required in subdivision (a) 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 offers, contracts, sales of property, transactions and other [~~transaetiens~~] facts and data 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 reasonable net rental value, 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.

(c) A list of the offers, contracts, sales of property, transactions and other [~~transactions~~] facts and data upon which the party intends to examine any witness at the trial.

(d) With respect to each offer, contract, sale or other transaction listed under subdivision (b) and (c) of this section:

(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 and circumstances of the [~~sale-or~~] transaction. The statement in lieu of stating the terms of any contract or other document may state the place where it is available for inspection by the party on whom the statement is served.

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

1246.3. If a demand to exchange valuation evidence and a statement of valuation evidence [is] are served and filed pursuant to Section 1246.1:

(a) No witness may [~~be-called-by-the-party-serving-the demand-or-the-party-on-when-the-demand-is-served~~] 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 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 any party required to serve and file such a statement concerning any offer, contract, sale, transaction or other [~~transaetien~~] facts and data if such [~~sale-or-transaetien-was~~] facts and data were 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-ether-transaetiens~~] facts and data not listed in any statement of valuation evidence on file if such party, prior to the date of the service of such party's statement of valuation evidence;

(a) Would not in the exercise of reasonable diligence have determined to call such witnesses [~~;-evidenece-or-transaetiens--were-~~

~~not discovered prior to the date of the service of the demand]~~  
or discovered such evidence, facts or data; or

(b) Failed to determine to call such witnesses or to discover such evidence, facts or data through [such party's] mistake, inadvertence, surprise or excusable neglect.

SEC. 6. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in a condemnation proceeding only a portion of a parcel of property is sought to be taken and upon a request of a defendant to the plaintiff made at least [30] 40 days prior to the time of trial, the plaintiff shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney at least [~~fifteen-(15)] 20 days prior to the time of trial.~~

SEC. 7. Section 1248.5 is added to the Code of Civil Procedure, to read:

1248.5. If a witness testifies to his opinion of the value of the property to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statements of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his statements or opinion.

EXHIBIT I

Honorable Phil S. Gibson  
Chairman of the Judicial Council

Dear Chief Justice Gibson:

The Law Revision Commission was directed by the Legislature in 1956 to undertake a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens. Pursuant to this directive, the Commission is now considering the problems involved in connection with pretrial conferences and discovery in eminent domain proceedings.

The Commission's study of these problems has indicated that the pretrial conference now serves little useful purpose in an eminent domain case. This is due in part to the failure of the parties to complete their appraisals prior to the pretrial conference and to the inability of the parties to discover appraisal data under the existing discovery statutes. The Commission has tentatively determined to recommend that a statutory procedure be established to require the parties to an eminent domain proceeding to exchange valuation evidence upon demand prior to trial. To obtain the utmost benefit from this exchange, it would be desirable if the exchange were accomplished prior to the pretrial conference. The Commission has been advised that appraisers delay the preparation of their final appraisals for as long as possible because the appraisal is subject to change as more recent data are accumulated. Therefore, if appraisal information is to be exchanged prior to the pretrial conference, it would be desirable to hold the pretrial conference in eminent domain proceedings as close to



the trial as possible.

The Commission has prepared a tentative statute (enclosed herewith) requiring the exchange of appraisal information prior to the trial. The proposed statute requires that a demand be served at least 40 days prior to trial and that the statement of valuation evidence be served at least 20 days prior to trial. Under existing pretrial procedures, these time limits do not provide assurance that the statements will be exchanged prior to the pretrial conference. As valuation opinions are subject to change as more data are acquired, it is desirable to keep the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible. The Commission is hopeful that the Judicial Council will modify the pretrial rules to permit the holding of the pretrial conference in eminent domain cases after the completion of the procedures required in the proposed statute, i.e., within 20 days of the time set for the trial. If the Judicial Council believes a different time schedule for the pretrial conference in eminent domain cases is necessary, the Commission desires to work with the Judicial Council to establish some other time schedule so that the exchange of valuation evidence may be accomplished prior to the pretrial conference and so that the pretrial conference may be held fairly near the actual trial of the case.

The staff of the Commission, located at Stanford University School of Law, will be available from time to time to work with the staff of the Judicial Council in whatever manner may be convenient to assist in working out these problems. We are hopeful that our work in this area will make the pretrial conference a more meaningful proceeding in condemnation cases.

We also enclose a preliminary draft of our consultant's study relating to pretrial and discovery.

Sincerely,

Herman F. Selvin  
Chairman