

Meeting

8/2/61

Memorandum No. 25(1961)

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

Attached on the gold sheets is a revised tentative recommendation relating to pretrial conferences and discovery in eminent domain proceedings.

The recommendation has been reorganized and rewritten in view of the discussion at the July meeting concerning the effect the proposed legislation would have on pretrial conferences. Various suggestions made by individual members of the Commission have also been incorporated into the revised recommendation.

The proposed statute has been revised to conform to the decisions made at the July meeting. Note, however, the following:

(1) Sections 1, 2 and 3 (Sections 1246.8, 1246.1 and 1246.2) of the statute are set out in the form approved by the Commission at the July meeting with changes proposed by the staff shown in strike out and underline.

(2) Section 4 (Section 1246.3) has been revised to conform to the decisions made at the July meeting. The section has been substantially revised and has not been approved by the Commission. The revised section is phrased to conform to the scheme set up by Section 1246.2.

(3) Sections 5 and 6 (Section 1246.4 and the amendment of Section 1247b) are set out in the form previously approved by the Commission.

The Commission may want to add the following at the end of Section

1246.3(a):

"; but nothing in this subdivision prevents a party from calling as a witness a person upon whose statements or opinion the opinion of a witness listed by another party is based in whole or in part."

The above provision would make it clear, for example, that a party may call as a witness an oil expert upon whose opinion a witness for an adverse party has based his opinion. The name of the oil expert is required to be listed as a person upon whose statements or opinion an expert witness will base his opinion. The provision makes it clear that the opposing party can call the oil expert and cross examine him if he is not called by the party who listed his name. The objection to adding the above provision is, of course, that the court will permit the witness to be called under Section 1246.4 and that the provision merely introduces complexity into the statute.

The staff wishes to call attention of the Commission to paragraph (7) of subdivision (b) of Section 1246.2. This paragraph provides that the statement include "the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part." The inclusion of the word "statements" in the above paragraph will, in the opinion of the staff, require the statement to include, for example, a list of all persons who made a statement to the appraiser concerning a particular comparable sale.

The Commission may want to add the following sentence to Section 1246.4:

"In determining under this section whether it is just to permit a party to call a witness or introduce on direct examination evidence required to be but not listed in such party's statement of valuation evidence, the court shall consider whether the party exercised reasonable diligence to inform the other parties that he planned to call such witness or to introduce such evidence on direct examination."

Respectfully submitted,

John H. DeMouly
Executive Secretary

8/1/61

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA LAW REVISION
COMMISSION

Relating to Pretrial Conferences and Discovery in Eminent Domain
Proceedings

One of the major improvements in the procedural law of this State has been the enactment of adequate discovery legislation. Effective discovery techniques serve two desirable purposes: First, they permit the parties to learn and to determine the reliability of the evidence that will be presented against them at the trial; and, second, they permit the pretrial conference to serve a more useful function because the parties approach the conference with greater knowledge of what they can expect to prove and what the adverse parties can expect to prove.

The use of discovery in eminent domain proceedings has not kept pace with its use in other civil proceedings. This is in part attributable to judicial decisions that have severely limited the extent to which the opinion of an expert may be discovered in an eminent domain case. These decisions make discovery ineffective because the principal issue involved in eminent domain litigation (the value of the property taken or damaged) is a matter of expert opinion. Another major obstacle to the use of discovery in eminent domain proceedings is the problem of the compensation of the expert for his time in preparing for and giving his deposition. It seems unfair for one party to impose this expense upon the adverse party against his will. Even if the problem of the allocation of this 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. A third major obstacle to discovery in eminent domain proceedings is that the pertinent valuation data frequently are not accumulated until after the normal time for completion of discovery -- the time of the pretrial conference. The parties usually are unwilling to incur the expense of having the expert complete his appraisal until shortly before the actual trial, for they seek to avoid this expense until it is clear that the case can not be settled. Moreover, an appraisal completed a considerable time before the trial must be brought up to date just before the trial and this involves additional expense. Also, an appraiser who completes his appraisal a considerable time before the trial may find that he has forgotten many of the details by the time of the trial and may need to devote a substantial amount of time to reviewing his appraisal just before trial in order to refresh his memory.

The Commission believes that these obstacles to effective discovery in eminent domain cases may be overcome by legislation providing for a pretrial exchange of written statements containing pertinent valuation data. 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.

The Commission recognizes that pretrial exchange of valuation data will require the parties to prepare a substantial portion of their case somewhat earlier than is now the practice -- i.e., by the time the information is required to be exchanged rather than by the time of the trial. But the recommended procedure has several offsetting advantages. First, it 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. Such 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, it will permit the pretrial conference to serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data prior to the pretrial conference, may be able to stipulate at the pretrial conference to the highest and best use, to the admissibility of certain evidence and, perhaps, even to the amount of certain items of damage. Of course, this desirable objective can be fully achieved only if the Judicial Council develops pretrial rules to provide for the holding of pretrial conferences in eminent domain cases subsequent to the time for exchange of the

valuation data.¹

To effectuate this recommendation, the statute hereinafter recommended includes the following provisions:

1. At least 40 days prior to the trial, any party to an eminent domain proceeding may serve on any other party a demand to exchange valuation data. Thereafter, at least 20 days prior to the trial, both the party serving the demand and the party on whom the demand is served are required to serve on each other statements setting forth specified valuation data, such as the names of the witnesses who will testify as to the value of the property, the opinions of these witnesses and certain of the data upon which the opinions are based. In lieu of reporting the contents of documentary material, the documents may be listed and be made available for inspection. Compliance with these requirements will not be onerous or expensive. Appraisal reports ordinarily contain all the valuation data required to be listed in the statement and copies of the reports can be made a part of the statement.

¹The 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 have the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible. The Commission is hopeful that if the proposed statute is enacted 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 trial. If the Judicial Council believes a different time schedule for the pretrial conference in eminent domain cases is necessary, the Commission will reconsider its recommendation to determine whether the procedures here required can be completed before the pretrial conference.

2. If a demand and a statement of valuation evidence are served, a party is not permitted to call a witness to testify on direct examination to any valuation evidence required to be listed upon a statement of valuation evidence unless he has listed the witness and the evidence upon the statement he served on the other party. This sanction is needed to enforce the required exchange of valuation statements. The same procedural technique is 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.

3. The court is authorized to permit a party to call a witness or to introduce evidence not listed upon his statement of valuation evidence upon a showing (1) that he could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) that he failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect. 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. 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, is amended so that the

service of the map will be accomplished prior to the time for the service of the remainder of the valuation data. This will enable the parties to prepare their statements of valuation evidence with an accurate idea of the amount of property to be taken by the condemner.

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 and 1246.4 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 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, subject to Section 1246.4 of the Code of Civil Procedure, failure to do so will constitute a waiver of the right to introduce on direct examination 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.

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 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 as to the amount 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 as to the amount of the damage or benefit, if any, which will accrue 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 any information indicating a probable change thereof.

(3) A list of the offers, contracts, sales of property, leases 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 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 evidenced]~~ upon which the opinion is based and the place where such evidence is and the times when it will be made 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) With respect to each offer, contract, sale, lease or other transaction listed under subdivision (b) 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 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

transaction. The statement in lieu of stating the terms of any contract, lease or other document may state the place where it is and the times when it will be made 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 one or more statements of valuation evidence are served and filed pursuant to Section 1246.1:

(a) No party required to serve and file a statement of valuation evidence may call a witness to testify to his opinion of the value of the property described in the demandor the amount 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 witness called by any party required to serve and file a statement of valuation evidence may testify on direct examination to any evidence required to be listed on a statement of valuation evidence unless such evidence is listed on the statement of valuation evidence of the party who calls the witness, except that testimony that is merely an explanation or elaboration of evidence so listed is not inadmissible under this section.

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 or introduce on direct examination evidence required to be but not listed in such party's statement of valuation evidence if such party by the

date of the service of his statement of valuation evidence:

(a) Would not in the exercise of reasonable diligence have determined to call such witnesses or discovered or listed such evidence; or

(b) Failed to determine to call such witnesses or to discover or list such evidence through 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 [39] 60 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)~~] 50 days prior to the time of trial.