#36 11/2/66

Memorandum 66-69

Subject: Study 36(L) - Condemnation Law and Procedure (Discovery)

At the October meeting the Commission decided to consider submitting a recommendation relating to discovery in eminent domain proceedings to the 1967 legislative session. Attached are two copies of a draft of a recommendation on this subject.

We must approve this at the November meeting if we are to submit the recommendation to the 1967 session. Hence, we suggest that you mark your suggested revisions on one copy to return to the staff at or before the November meeting.

The attached draft is substantially the same as the 1963 recommendation (1963 pamphlet attached).

Also attached are two sets of materials. The attached Exhibits consist of the letters commenting on Senate Bill No. 71 (1963)(which was introduced to effectuate our earlier recommendation on this subject) and some additional materials. The second set of materials consists of the letter of transmittal and attached material that was distributed to interested persons for comment in 1965. We suggest that you read these materials prior to the meeting.

General comment on desirability of legislation in this field

It is the unanimous opinion of the State Bar Committee that legislation along the lines of the attached recommendation is needed and desirable. See Exhibit I (pink) attached. The State Department of Public Works also takes the view that such legislation is needed and desirable. Exhibit II (white pages). Our consultant believes that such legislation is needed. See Exhibit XI (yellow). The County Counsel, County of Orange, believes

that the legislation would serve a useful purpose--would encourage earlier preparation of the condemnee with the attendant opportunity for settlement of the case. Exhibit V (blue).

Mr. Newton (Exhibit VI) wrote us to suggest that we carefully review the operation of Department 60 of the Los Angeles Superior Court, which is the eminent domain law and motion and pre-trial department. In this one department many procedural changes have occurred which have greatly assisted in the orderly processing of eminent domain actions. It is my view that there would be considerable state-wide benefit in the general implementation of the procedures utilized in this department." The recommendation would adopt the substance of one practice in Department 60--the pretrial exchange of statements of valuation data.

As noted in our 1963 report, the Los Angeles Bar Association, Committee on Condemnation, voted in 1959 eight to two in favor of the substance of our recommendation. See 1963 Recommendation at page 742, n. 100.

The legislation designed to effectuate our 1963 recommendation passed the Senate but died in the Assembly Judiciary Committee. The Assembly Committee killed the measure because property owners objected that they did not know what their appraisers would testify to until the day of the trial. The motivating factor in their objections, however, was that they thought that discovery would be a one-way street; they would be able to discover the condemnor's appraisals but would be able to resist discovery of their appraisals by stating that they had not yet completed them. The courts have now foreclosed such one-sided discovery. See Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964)(extract included in attached material which was distributed for comment)(also quoted in recommendation) and Scotsman Mfg. Co. v. Superior Court, 242

A.C.A. 592 (1966)(attached as Exhibit X--green). It is also significant that one of the two witnesses who appeared in opposition to the bill is now deceased.

Mr. Gerald B. Hansen (Exhibit III--green) states that in his opinion the legislation is not needed nor is it desirable. "I have no great objection to it, however, if the actual practical experience of others has to them shown some need for it."

Mr. James E. Cox (Exhibit VII--white) objects to the proposed,legislation. He states:

> It is our experience, and I expect that we have as active an eminent domain practice as any office in Northern California which represents landowners, that the attorneys for the condemning agencies are salaried, "eager beaver" young gentlemen who virtually inundate landowners with ponderous interrogatories, etc.
>
> It is our further experience that we have had to make any number of motions at every state of the proceedings, particularly in dealing with the Division of Highways of the State of California which are essentially absurd. I believe that this view is shared by the people who represent and try owners' cases in eminent domain. The State frequently advances absurd legal theories, both in discovery and at trial, and the resources available to them are economically overwhelming when compared to those that even qualified offices can afford to bring to bear on the average owner's case.
>
> In short, we request that this matter be left alone. The new eminent domain statute is bad law and is considered foolish by anyone who has had any experience with property valuation. For example, the notion that listings are not important flies in the face of the concept that you are trying to make these hypothetical proceedings comport as closely as possible to a real world transaction.

Mr. Cox's objection is in part to the evidence in eminent domain statute. As far as his objections to being inundated with ponderous interrogatories is concerned, the recommended legislation would minimize this since it would serve in place of usual discovery procedures. We do not believe that he has made a case against the recommended legislation.

One final point should be considered in connection with this general analysis. The County Counsel of Orange County (Exhibit V--blue) objects to the recommended legislation insofar as it does not "insure that the exchange of information will be simultaneous." He refers to the procedure formerly used in the United States District Court of California where the information was lodged with the Clerk and when all such statements had been so lodged, they were then served on the appropriate party by the Clerk. The Southern District has since abandoned this aspect of the former procedure and now requires an exchange of a Statement of Comparable Transactions and a Statement as to Just Compensation within a specified time prior to the pretrial conference (comparable transactions) or trial (just compensation) by service and filing. Hence, the Southern District now follows substantially the same procedure as is provided in the recommended legislation. It is of interest to note also that substantially the same procedure is followed in the Superior Court of Los Angeles County. Hence, we believe that the basic approach of the recommended legislation is sound.

Placement of recommended legislation in Code

In our 1963 recommendation, we proposed to renumber Section 1246.1 and to insert the new provisions in a logical place in the eminent domain title. Both the Department of Public Works and the State Bar Committee object to the renumbering of Section 1246.1 and suggest that the new provisions be added to the discovery statute. In view of the fact that we will be preparing a comprehensive statute on eminent domain, the staff agrees that Section 1246.1 should not be renumbered now and renumbered again two years from now. However, we would prefer to include the new statute in the eminent domain title as a separate chapter because we believe that we should ultimately include it in the new comprehensive statute on eminent domain that we will

draft for the 1969 session. We doubt that either the Department of Public Works or the State Bar Committee will object to codifying the new statute in the eminent domain title so long as we do not renumber Section 1246.1.

Revisions of 1963 Recommended Legislation

We have made all of the revisions suggested by the Department of Public Works. With two exceptions, noted below, these consist of revisions designed to conform the recommended legislation to the 1965 evidence in eminent domain statute.

Likewise, we have made all of the revisions suggested by the State Bar Committee. With three exceptions, noted below, these consist of revisions designed to conform the recommended legislation to the 1965 evidence in eminent domain statute and are the same as the revisions suggested by the Department of Public Works.

Section 1 (page 8 of Recommendation). This section is needed so that we can add the new legislation as chapter 2 of title 7.

Section 2 (Code of Civil Procedure Section 1247b--amended). This is substantially the same as the 1963 legislation except that we have added subdivision (a) to cover the case where the request is given the condemnor a short time before the pretrial conference or after the pretrial conference. This revision meets the problem identified by Mr. Huxtable (Exhibit IV--buff, page 3).

Section 1272.01. This is the same in substance as the 1963 legislation except that subdivision (e) has been deleted and a new subdivision (e) added. Both the State Bar Committee and the Department of Public Works suggested that subdivision (e) be deleted.

It should be noted that subdivision (d) requires service of the statements of valuation data 20 days prior to the day set for trial. Presently in Los

Angeles County, the trial usually is held within 30 days from the final pretrial conference. Hence, the statements will not necessarily be exchanged prior to the final pretrial conference as is now the practice in Los Angeles County. The problem could be minimized by fixing a time schedule that would provide for exchange not later than 30 days prior to the day set for trial. Neither the State Bar Committee nor the Department of Public Works expressed concern about this problem. Mr. Huxtable (Exhibit IV--buff, pages 1-2) suggests a new provision to permit the exchange prior to the pretrial conference.

New subdivision (e) has been added to insure that both attorneys will receive the statements at substantially the same time. The provision is probably unnecessary, since the service should be made on the attorney as a matter of legal ethics. However, it has been included to make the matter clear, and its inclusion does no harm.

Section 1272.02. The revisions, with one exception, are designed to conform this section to the 1965 evidence in eminent domain statute.

The phrase "statements or" has been deleted from subdivision (b) in response to a suggestion from the State Bar Committee and the Department of Public Works. A somewhat different revision of this section is suggested by Mr. Huxtable (Exhibit IV--buff, page 2). In connection with this problem, consideration should be given to the suggestion of Mr. McLaurin (Exhibit XI--yellow) that subdivision (d) should also include the name of the party to the transaction with whom it was verified. This is a direct method of obtaining the information that caused us to include the phrase "statement or" in the section.

Perhaps the comment to this section should indicate that subdivision (b) does not require the listing of the name and address of publishers of data which appraisers very often use in their reasons to substantiate their opinions, i.e., general market data, trend data, general cost data, or general appraisal data. See McLaurin memorandum (Exhibit XI--yellow, page 6) and Mr. Huxtable's discussion of this provision. Mr. Huxtable has a comment concerning subdivision (d)(5). See Exhibit IV--buff, item 7, pages 2-3.

Section 1272.03. No change in substance of 1963 recommendation.

Section 1272.04. No change in substance of 1963 recommendation.

Section 1272.05. This is the same in substance as the 1963 recommendation except that subdivision (c) has been added in response to a suggestion from Mr. Huxtable (Exhibit IV--buff, page 3) and is an addition that was suggested for consideration by the State Bar Committee (Exhibit I--pink).

Section 1272.06. No change in substance from 1963 recommendation.

Section 1272.07. No change in substance from 1963 recommendation.

Additional suggestion. Mr. Huxtable has an additional suggestion. See item 10, pages 3-4, Exhibit IV--buff.

Approval for Printing

We suggest that this recommendation be printed as an appendix to our Annual Report. Since we have already published a recommendation and study on this topic, printing the new recommendation in our Annual Report seems appropriate. We have followed this practice in the past.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

STATE OF CALIFORNIA—HIGHWAY TRANSPORTATION AGENCY EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
360 PINE STREET, SAN FRANCISCO 94104

May 16, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Pursuant to your invitation herewith are the comments of the State Bar Committee on Condemnation Law and Procedure on discovery in eminent domain proceedings.

Specifically you inquired whether legislation along the line of (1963) Senate Bill No. 71 is needed and desirable. It is the unanimous agreement of the Committee that it is.

The Committee generally agreed with the reasons advanced by the Law Revision Commission in support of the bill. It felt that in eminent domain actions a simple, inexpensive method of exchanging information should be provided as a supplement to existing discovery proceedings.

You also inquired what changes, if any, in the bill should be made. The Committee suggests certain changes.

1. The Committee unanimously agreed that Section 1 of the bill should be deleted.

The Commission, in drafting this legislation has renumbered, without change, Code of Civil Procedure section 1246.1 as 1246.9. The Committee feels that there is no need for relocating and renumbering this section. It would create confusion in our statutes and the judicial decisions construing this section. 1246.1 is not the appropriate section to be renumbered to accommodate the new sections pertaining to the mechanics on the exchange of valuation data. These sections should be placed in the discovery portion of the Code of Civil Procedure with possibly a cross-reference to appropriate eminent domain sections of the Code. This suggested placement is compatible with the specialized discovery provided in section 2032 pertaining to the exchange of medical reports in personal injury litigation.

2. Section 1246.1(2) should be deleted.

This subsection authorizes the Judicial Council to prescribe different times than those specified in the proposed statute for serving and filing demands and cross-demands and for serving and filing statements of valuation data. The Committee feels that the statute itself should prescribe and specify these times. A rule of court prescribing different times would be confusing and a trap for the inexperienced practitioner in eminent domain.

3. The wording of section 1246.2 (c) 4 should be changed to conform with the language used in Evidence Code 820 (Civil Code of Procedure section 1272) to read as follows:

"(4) The cost of reproduction or replacement of existing improvements on the property less whatever depreciation or obsolescence the improvements have suffered and the rate of depreciation used."

4. Section 1246.2 (d) 5 should be changed to conform with the language used in Evidence Code sections 815, 816 and 817 (Code of Civil Procedure sections 1271, 1271.2 and 1271.4). The first sentence should be deleted and redrafted to read as follows:

"(5) The price and other terms and circumstances of the transaction."

The foregoing are the comments and recommendations of the Committee.

Although no position was taken by the Committee as such, some members have raised the following considerations:

(a) The words "statements or" should be deleted from line 46, page 2 of the bill as amended May 7, 1963. The bill as presently worded could be construed as requiring the attorney to list in the statement of valuation the name and business and residence address of each and every person to whom the appraiser has talked, including the owner of the property being valued, the parties to all of the sales otherwise disclosed, the authors of text books, political figures whose latest pronouncements may influence the market, and even the attorney for the condemnor or the property owner. It is felt that there would be a sufficient disclosure if only the name and business or residence address of persons upon whose opinion the opinion of the appraiser is based in whole or in part, since such would require disclosure of engineering, geological, accountancy, and other similar types of consulting experts' opinions.

(b) Section 1246.2 (c) (5), which now requires a disclosure of "the gross and net income from the property, its

reasonable net rental value, its capitalized value and the rate of capitalization used" is ambiguous in its meaning. This ambiguity is apparently introduced by an effort to paraphrase the language of C.C.P. §1271.8. The required disclosure would be more meaningful if the language were "the reasonable net rental value and the gross income and expenses upon which it is based, the depreciation factors and rate of capitalization used, and the value indicated by such capitalization."

(c) There are no provisions for sanctions where under proposed C.C.P. §1246.5 the Court may "upon such terms as may be just" permit evidence to be introduced which is not disclosed by the statement of valuation data. The following language to be added as a sub-section is suggested:

> "(c) In making any determination under this section, respecting the terms upon which such permission may be granted, the Court may take into consideration the additional expense to which the opposing party may reasonably be subjected in investigating, confirming and preparing rebutal of such new evidence."

Presumably the Commission assumed that the court's power in this matter is implied as the relief sought is of the nature of that allowed in C.C.P. 437.

In connection with the foregoing, I quote the following resolution of the Board of Governors of the State Bar:

> "RESOLVED that the Committee on Condemnation Law and Procedure is authorized to express to the California Law Revision Commission the views of the Committee on the tentative recommendations of the Commission re revision of the law relating to eminent domain, the Commission to be advised that such views are those of the Committee only and not necessarily those of the Board of Governors."

Please advise if we can be of further assistance.

Very truly yours,

Holloway James

Chairman, State Bar Committee on Condemnation Law and Procedure.

HJ:sa

Exhibit II

STATE OF CALIFORNIA—TRANSPORTATION AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
1120 N STREET, SACRAMENTO

April 25, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Re: Discovery in Eminent Domain Proceedings

The Law Revision Commission recently requested the Department of Public Works to comment on the 1963 recommendation of the Law Revision Commission relating to discovery in eminent domain proceedings and Senate Bill No. 71 as amended in the Senate on May 7, 1963. The Department has previously commented in detail on the recommendation of the Law Revision Commission by letter to the Commission dated October 11, 1962. In general, the comments and suggestions made in that letter still represent the Department's position on the 1963 recommendation. The original bill that was recommended by the Law Revision Commission was amended in the Senate and the enactment of the new eminent domain evidence statute (Stats. 1965 Ch. 1151) at the last session of the legislature necessitates further comment on several of the sections in Senate Bill 71 as last amended.

Section One: Section 1 of the bill should be deleted. The Commission, in drafting this legislation, has renumbered without change Code of Civil Procedure, Section 1246.1, as 1246.9. Apparently the Commission believes that the subject matter of Section 1246.1 is out of place in its present location in the Code of Civil Procedure. We see no need for relocating this section which would add confusion in our statutes and the judicial decisions construing this section by renumbering it. Section 1246.1 is not the section that should be renumbered in order to accommodate the new sections pertaining to the mechanics on the exchange of valuation data. The sections for exchange of valuation data can easily be placed in the discovery portion of the Code of Civil Procedure with possibly a cross-reference section in the eminent domain

portion of the Code of Civil Procedure. This suggested placement is compatible with the specialized discovery provided in Section 2032 of the Code of Civil Procedure pertaining to the exchange of medical reports in personal injury litigation.

The northern section of the State Bar Committee on Condemnation Law and Procedure has also recommended that Section One of the bill be deleted.

Section 1246.1(e). This subsection authorizes the Judicial Council to prescribe different times than those specified in the proposed statute for serving and filing demands and cross-demands as well as serving and filing statements of valuation data. We believe that the statute itself should prescribe and specify these times. A rule of court prescribing different times would be redundant, promote confusion and may not be fully known to the inexperienced practitioner in eminent domain law. We therefore see no need for subsection (e).

Section 1246.2(b). This section as presently proposed would require the name and business or residence address of each person upon whose statements or opinions the opinion of the witness is based in whole or in substantial part. The Department believes that this information (name and address) should only be supplied in situations where the opinion of the witness is based in whole or substantial part on the opinion of others as differentiated from factual statements of other persons. Where the statement relied upon is a factual statement, whether written or oral, the data will be exchanged under the appropriate section requiring the exchange of such factual data. It would be burdensome and redundant for both parties to have to list all of the many persons whose hearsay statements, whether written or oral, are relied upon by the expert valuation witness.

It is suggested that the words "statements or" be deleted from line 46 of Senate Bill 71 as amended on May 7, 1963.

Section 1246.2(c)(4). The wording of this subsection should be amended to conform with the language used in Evidence Code Section 820 (Code of Civil Procedure Section 1272) to read as follows:

"(4) The cost of reproduction or replacement

> of existing improvements on the property less whatever depreciation or obsolescence the improvements have suffered and the rate of depreciation used."

Section 1246.2(d)(5). This section should be amended to conform with the language used in Evidence Code Sections 815, 816 and 817 (Code of Civil Procedure Sections 1271, 1271.2 and 1271.4). The first sentence should be deleted and redrafted to read as follows:

> "(5) The price and other terms and circumstances of the transaction."

The Department believes that legislation along the line of Senate Bill No. 71 as last amended on May 7, 1963, incorporating the suggestions and comments made in this letter would be a desirable adjunct to the present discovery devices now authorized by the Code of Civil Procedure. The simultaneous exchange of valuation data with appropriate sanctions should reduce the cost of discovery and trial expense for all parties in condemnation proceedings. It would provide an inexpensive means whereby the parties can obtain valuation data and thus reduce or eliminate the use of other more expensive forms of discovery, such as the taking of depositions of the owner or expert valuation witnesses.

As recent Appellate Court decisions have indicated e.g. Swartzman v. Superior Court, (41 Cal. 721), and Mowry v. Superior Court, (202 Cal. App. 2d 229), discovery of this type of information should not be a "one-way street" and neither party should be able to obtain a "free ride" from the other party's diligent preparation for trial. Sanctions are necessary to fully carry out this new type of discovery, otherwise, the parties will be relegated to the tactics of "gamesmanship" which were in vogue prior to the adoption in California of the new discovery statute.

We appreciate the opportunity of again commenting on this matter of discovery in eminent domain proceedings. For your information and ready reference, we are enclosing copies of our previous letter to the Commission dated October 11, 1962.

Yours very truly,

Robert F. Carlson

ROBERT F. CARLSON
Assistant Chief Counsel

ROBERT E. REED
CHIEF OF DIVISION

GOVERNOR OF CALIFORNIA

ROBERT B. BRADFORD
DIRECTOR

STATE OF CALIFORNIA
Department of Public Works
DIVISION OF CONTRACTS AND RIGHTS OF WAY
(LEGAL)

PUBLIC WORKS BUILDING
1120 N STREET
(P. O. BOX 1499)
SACRAMENTO 7, CALIFORNIA

PLEASE REFER TO
FILE No.

October 11, 1962

Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention Mr. John H. DeMoully, Executive Secretary

Gentlemen:

Re: Pretrial and Discovery in Eminent Domain Proceedings

Your letters of January 25 and August 14, 1962, requested this Department to comment on the October 11, 1961, draft of the tentative recommendation and proposed legislation relating to pretrial conferences and discovery in eminent domain proceedings.

In view of the uncertainty of the law at that time, we refrained from specific comment. Since our last letter to the Commission, the Supreme Court has decided the Greyhound and companion cases pertaining to discovery. The Supreme Court has recently decided the case of People v. Donovan, 57 A. C. 374, and the Third District Court of Appeal decided the case of Mowry v. Superior Court, 202 A.C.A. 263. In the interim we have had the benefit of the reports of the State Bar Committees on Condemnation Law and Procedure and Administration of Justice.

At the outset, we wish to advise you that the official position of the Department of Public Works concerning any proposed legislation to be introduced at the 1963 Session of the Legislature is subject to the approval of the administration. However, we would like at this time to present to the Commission our present thoughts and comments on this matter for whatever aid they may be to the Commission.

PRETRIAL

As we indicated in our letter of October 25, 1960, to the Commission, the conclusion and recommendation of the consultants concerning pretrial procedure in eminent domain cases came as no surprise. We certainly agree with the consultants that pretrial conferences have a "tendency to prolong

and make more expensive a condemnation action" and "has not fulfilled the goals that were envisioned by its proponents" (Study, page 26). We note that the Commission in its tentative recommendation of October 11, 1961 has refrained from making a specific recommendation to the next Legislature concerning pretrial conferences in eminent domain proceedings. We believe that the Legislature should be given the benefit of the Commission's consideration, as well as the consultants' recommendation on this matter.

It is our thought that there should be legislation in the general area of pretrials providing that pretrials should only be had in the cases where a party to the action, or the court, so requests. This is similar to legislation which was introduced at the 1961 Session of the Legislature. In addition, the State Bar Committee on Condemnation Law and Procedure, in its comments concerning pretrial conferences, had this to say:

> "Pretrial conferences in eminent domain actions have caused duplication of work and an increase in costs in an area already overburdened with costs. Commensurate benefits have not been realized. The need, if any, for a pretrial conference will be minimized if the Committee's recommendations respecting discovery are adopted."

The Committee recommended as follows:

> "Pretrial conferences should be held in eminent domain proceedings only if requested by a party or requested by the presiding judge or judge before whom the action will be tried."

The growing dissatisfaction with the present pretrial practice is evidenced by the action of the recent Council of State Bar Delegates, which voted almost unanimously to make pretrial discretionary.

DISCOVERY

It has been consistently our opinion, based on the experience of our office, and discussion with attorneys who usually represent property owners, that the discovery procedure provided in the act of 1959 is not an effective or efficient instrument for the promotion and administration of justice for either the property owner or the condemnor in the average condemnation proceeding. Moreover, the appellate courts have felt constrained to hold, contrary to what we believe to be the expressed legislative policy set out in the act of 1959,

that discovery be applied to cases involving expert opinion evidence and work product. Accordingly, we are faced with a situation which we feel is unfortunate. However, it is our feeling that some of the recommendations of the Law Revision Commission for a simpler and less costly simultaneous exchange of certain factual information would be preferable to the indiscriminate and costly application of usual discovery devices to the general condemnation action and particularly to matters of opinion and work product. Accordingly, we offer the following suggestions to the Commission for its consideration.

To the end of simplifying the proposed statute, we believe that there are certain items that should be left out of the exchange of valuation data. This thought is in accordance with the recommendation of the State Bar Committee. We will comment more specifically on these suggested deletions in each section of the proposed statute.

The District Court of Appeal in the Mowry decision (supra) held that the Discovery Act of 1959 contemplated the exchange of information between condemnor and condemnee (page 277). However, neither the Discovery Act of 1959 nor the Superior Court Rules specifically outline the procedure for such an exchange. The mechanics of such an exchange should be specifically spelled out by statute in a simple manner, providing an expedient method and workable sanctions. Inasmuch as it would be difficult for a court to "legislate" on the mechanics of such an exchange, this would be an appropriate subject for legislation. We strongly endorse the recommendation of the Bar Committee that these mechanics must avoid "double preparation". With these general comments and suggestions in mind, we make the following specific comments on each section in the proposed statute.

Code of Civil Procedure Section 1246.9

We note that the Commission in drafting this legislation has renumbered Code of Civil Procedure Section 1246.1 as 1246.9. We do not believe that the subject matter of 1246.1 is out of place in its present position in the Code of Civil Procedure. In fact, we believe that it is now located in the most appropriate part of the Code of Civil Procedure pertaining to eminent domain. There is no need for relocating this section and adding to the confusion in our law by renumbering the section. In addition, this does not appear to be the section that should be renumbered in order to accommodate the code sections pertaining to the mechanics on the exchange of valuation data. We respectfully suggest that the provision of this tentative statute be placed in the Code of Civil Procedure in the discovery portion, with possibly a cross-reference section in the eminent domain portion of the Code of Civil Procedure referring to the

discovery sections. This placement is compatible with the specialized discovery provided for in Section 2032 of the Code of Civil Procedure pertaining to the medical reports in personal injury litigation. The specialized procedure for exchange of information in eminent domain proceedings should be treated in the same manner and placed in the same part of the Code of Civil Procedure.

Our comments on each of these sections will, however, use the Commission's present numbering.

Code of Civil Procedure Section 1246.1(a)

The problem of the timing, both for the time of the demand and the time that the answers must be served, is an exceedingly complex one. We believe that this problem of timing should be resolved after it is determined how much information is to be exchanged. The more information that is contained in the exchange the more time is needed, both to prepare the material and to study and review the opposing party's material. At the same time the problem of costs for "double preparation" should be considered. Consequently, we reserve comment on how much time is needed until a determination is made as to how much material is to be included in the valuation data. In addition, the pretrial rules concerning the date of pretrial and date of trial must be taken into consideration. Superior Court Rule 8.12 should be considered in allowing for sufficient time to serve and answer the demand for the exchange of valuation data. Rule 8.12 provides that the time for trial shall not be within ten days after the pretrial conference and as nearly as possible not later than five weeks after the pretrial conference. At the time of the pretrial conference it is the duty of counsel for all parties to be prepared for trial as required by Superior Court Rule 8.2.

In many eminent domain actions there are several parties defendant who either have little or no interest in the case and who undertake none of the burden of preparing for trial, e. g., lessees and trust deed holders. Any party could, in collaboration with the principal defendant, serve a demand upon the plaintiff for an exchange. The information which this defendant would exchange would be of no use to the plaintiff and yet the plaintiff's information would give the principal defendant a "free ride" because the principal defendant does not simultaneously exchange any data with the plaintiff. Consequently, we would recommend that Section 1246.1(a) read as follows:

"1246.1(a) Any party to an eminent domain proceeding may, not later than 40 days prior to the day set for trial, file and serve upon any adverse all party parties to the eminent domain proceeding and file a demand to exchange valuation data."

In lieu of the above amendments, a provision could be added to this section to the effect that service of the demand must be made on all parties.

Code of Civil Procedure Section 1246.1(b)

We recommend that similar changes be made in Code of Civil Procedure Section 1246.1(b)(2). The first part of this section should read as follows:

"(2) Include a statement in substantially the following form: 'You are required to serve and file a statement of valuation data upon all other parties 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, subject to Section 1246.6 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of valuation data.'"

Code of Civil Procedure Section 1246.1(c)

We recommend that the same change be made in this section so that it will read as follows:

"(c) Not later than 20 days prior to the day set for trial, the party who served the demand and each party upon whom the demand was served shall serve and file a statement of valuation data. The party who served the demand shall serve his statement of valuation data upon each all other party parties on whom the demand was served. Each party on whom a demand was served shall serve his statement of valuation data upon the party who served the demand all other parties."

Code of Civil Procedure Section 1246.2(b)

As we suggested at the beginning of our letter, we believe that the information and valuation data to be exchanged should be simplified in order to reduce the cost of preparation and prevent "double preparation". This is in accordance with the general comments of the State Bar Committee. In subsection (2) the information indicating the probable change of zoning would seem to encompass much detail, with little corresponding benefit. An examination of the other party's compensable sales data will reveal the highest and best use and any contention as to a probable change of zoning. In any event, a simple statement of the contention of the party as to a probable change of zone would be sufficient to alert the other side that there was an issue which should be investigated. Any surprise as to such issue would be eliminated by this exchange. If the Commission desires this information in the statute the subsection should be amended to read as follows:

> "(2) The applicable zoning and any ~~information indicating~~ contention as to a probable change thereof."

We agree with the report of the State Bar Committee concerning subsection (4) on cost data. This element of market value has minor significance and ordinarily the opinion of the witness as to value will encompass this method of valuation where applicable. Our thought is to eliminate the statement of detail, particularly where items of building costs are involved as this is often quite voluminous.

In subsection (5) the information as to the gross and net income from the property and the capitalization thereof is not required in the ordinary case as recommended by the State Bar Committee. In the unusual case such information can be obtained by other discovery devices. Consequently, if this section is included in the proposed statute, it should be limited to a statement of the actual income and actual expenses, thus referring to the basic facts rather than getting into the vagaries of opinion. This provides factual information and leaves the evaluation of the data to the expert witness.

We agree with the Committee of the State Bar that subsection (7) should be eliminated. Basically, it is a time consuming detail which will produce no benefit to the opposing side.

Code of Civil Procedure Section 1246.2(c).

The reference in this subsection to the previous subsection (b) should be more explicit and should be referred to as follows: "Subdivision (b)(3)".

Code of Civil Procedure Section 1246.3.

If Section 1246.2(b)(6) is eliminated there would be no need for this section, particularly in view of the fact that the 1959 Discovery Act already provides in Code of Civil Procedure Section 2031 for the production and inspection of documents and other tangible things.

Code of Civil Procedure Section 1246.4.

The amendments to proposed Section 1246.4 that have been prepared by the State Bar Committee are generally in accord with our view of this section. We believe the code section can be simplified and also specifically state that not only must the notice be given but that the notice must include the information specified in Section 1246.2. This notice should be in writing except that during the actual trial on the issue of market value the statement need not be in writing and may be made orally to the satisfaction of the court. With these thoughts in mind this section should be recast to read as follows:

> "1246.4 (a) A party who has served and filed a statement of data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of data, he:
>
> "(1) Determines to call a witness not listed on his statement of valuation data;
>
> "(2) Determines to have a witness called by him testify upon direct examination during his case in chief to any data required to be listed on the statement of valuation data but which was not so listed; or
>
> "(3) Discovers any data required to be listed on his statement of data but which was not so listed.
>
> "(b) The notice required by subdivision (a) of this section shall include the information specified in Section 1246.2. However, the notice need not be

in writing where it is given during the trial on the issue of valuation if the court is satisfied that it meets the requirements of subdivision (a) of the section."

Code of Civil Procedure Section 1246.5.

We are satisfied with the wording of this section as drafted by the Commission but do not agree with the suggestion made by the Bar Committee to change the term "witness" to the term "expert witness".

Code of Civil Procedure Section 1247(b).

The Department is concerned with the Commission's proposed statute providing for delivery of a map within fifteen days after the request is made by the defendant property owner. This may lead to the preparation of maps in many cases which would normally be settled in the course of negotiations. We believe that the timing of the demand for maps and preparation of maps should be tied to the time of trial. We are not aware of any problems with respect to the present 30-day requirement and see no need for a change.

In conclusion, we note that the Report of the State Bar Committee on Administration of Justice "felt there were numerous objections to the tentative form" of this statute.

We would appreciate being advised when the Commission will finally consider this matter.

Very truly yours,

Robert E. Reed

ROBERT E. REED
Chief of Division

EXHIBIT III

RICHARD V. BRESSANI
(1894-1959)

LAW OFFICES OF
BRESSANI AND HANSEN
1205 BANK OF AMERICA BLDG.
TELEPHONE 294-0888
SAN JOSE 13, CALIFORNIA

GERALD B. HANSEN
CLARENCE J. SHUH
RICHARD B. KLOS

November 15, 1965

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

In answer to the Commission's seeking comments on whether legislation along the line of Senate Bill No. 71 is needed and desirable, I would advise as follows:

It is my opinion that it is not needed nor is it desirable. I have no great objection to it, however, if the actual practical experience of others has to them shown some need for it.

I have tried half a hundred condemnation cases, and settled as many more in the last fifteen years, and these are usually most substantial in nature, and we have never indulged in any discovery procedure.

We, however, prepare cases minutely, and in so doing practically know what the other sides experts are going to say. I have never been really materially surprised by the opposition in trial of these condemnation cases.

Any degree of discovery tends to make for a scattered trial followed by a court trial. I believe that the general discovery procedures are adequate for condemnation purposes. At the present time, we always seem to represent property owners, who can by the very existence of the general discovery procedure, usually obtain from the condemnors' Counsel a statement of their highest Appraiser's position. For instance, in a recent condemnation case involving some 44 acres near Stanford, on the freeway going through a school, we gave the State our take value from our main Appraiser, they gave us their first appraisal at $225,000.00, later corrected it to $470,000.00 for take and severance, and we made our severance claim, and the case was settled pretty close to our terms for $947,000.00. The general discovery procedures facilitate if not compel this. Incidently, we had worked on the case for well over a year, and in fact were not interested in hearing what they had to say about it.

I commend you and the Commission in its fine work. Incidently I have a shorter version of a moving cost and incidental loss amendment, agreeable to your earlier recommendations, now put through the State Bar procedure and part of the Bar's legislative program for next year. The Commission's position on this was helpful in my getting this as part of the Bar's program.

Very truly yours,

Gerald B. Hansen

GBH:SA

EXHIBIT IV

FRANCIS H. O'NEILL
AND
RICHARD L. HUXTABLE
ATTORNEYS AT LAW
458 SOUTH SPRING STREET · SUITE 535
LOS ANGELES 13, CALIFORNIA
MADISON 7-2131

FRANCIS H. O'NEILL
RICHARD L. HUXTABLE
WILLIAM G. COSKRAN

May 19, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California, 94305

Attention: John H. DeMoully

Re: Discovery in Eminent Domain Procedures, 1963 Senate Bill 71

Gentlemen:

It is my understanding that your Commission is investigating and considering the possibility of reintroduction of 1963 Senate Bill 71, relating to voluntary exchange of valuation data in eminent domain proceedings.

As an individual attorney practicing in the field, speaking only for myself and not as a member of any group or committee, I would like to make the following suggestions relating to possible modification of that bill. These suggestions relate to the text of that bill as it was amended in the Senate, May 7, 1963. Particular attention is invited to items 3, 7, 9 and 10 which relate to matters which I do not believe are otherwise being called to your attention.:

1. Section 1 of the Bill, renumbering existing section 1246.1 C.C.P., should be deleted. Renumbering of a frequently citved, long standing Section is likely to lead to great confusion.

2. Proposed C.C.P. §1246.1 (e) [page 2, lines 26-34] should be deleted. The time periods involved should be clearly stated in one place to avoid confusion.

3. New C.C.P. §1246.1 (e) [page 2, line 26 et seq.] should be added (and should bear a different section designation if present C.C.P. §1246.1 is not renumbered). The time periods prescribed in proposed §1246.1 all relate to the day set for trial, which could result in such procedures not being complete at the time of pre-trial conference, if there is one. This would result in confusion and "loose" pre-trial orders. I suggest a new subsection (e) providing:

"(e) Were pre-trial conference is set, the periods prescribed by this section shall be applied prior to

the date set for such pre-trial conference, however, where notice of such pre-trial is served less than 55 days prior to the date set, any party may, not later that 10 days after service of such notice, serve and file demand to exchange of valuation data; and, upon motion of either party, the date theretofore set for the pre-trial conference shall be postponed for such period as shall be necessary to permit filing of cross-demands and statements of valuation data as provided in sub-sections (a) through (d) of this section."

4. Proposed Section 1246.2 (b) [page 2, lines 40-47] should be Modified to read as follows:

"(b) The name and address 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 cross-demand, or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken, and the name and business or residence address of each person other than the owner of the property or property interest being valued, other than those persons disclosed in compliance with sub-section (a) hereof, and other than parties to transactions disclosed under sub-section (c) (3) hereof, upon whose ~~statements or~~ opinion, gathering of statistical data or other specialized study or analysis, the opinion is based in whole or in substantial part."

The section as proposed by the Bill, if strictly applied, could require disclosure of the names and addresses of an almost interminable number of persons, including the owner, the parties to all of the sales, the authors of textbooks, political figures whose latest pronouncements may influence market values at the moment, the attorneys for the parties, counter clerks in governmental offices, etc.

5. Proposed Section 1246.2 (c)(4) [page 3, lines 9-11] should be amended to relate to existing improvements on the property.

6. Proposed Section 1246.2 (c)(5) [page 3, lines 12-14] is ambiguous, and should be modified to read:

"(5) The reasonable net rental value and the gross income and expenses upon which it is based, the depreciation factors and rate of capitalization used, and the value indicated by such capitalization."

7. Proposed Section 1246.2 (d)(5) [page 3, lines 27-31] should be modified to provide that the privilege conferred by the

second sentence of that sub-section may be used "only where a complete statement of the consideration and other circumstances of the transaction would be so lengthy as to place an undue burden upon the answering party, or are so complex or uncertain as to require legal interpretation."

8. Proposed Section 1246.5 [page 4, lines 31-51] should be amended to add sub-section (c) which would read as follows:

"(c) In making any determination under this section, respecting the terms upon which such permission may be granted, the Court may take into consideration the additional expense to which the opposing party may reasonably be subjected in investigating, confirming and preparing rebuttal of such new evidence, and may order that the party seeking such permission reimburse said opposing party for such additional expense."

9. Proposed Section 1247b [page 5, lines 13-23] as amended by the Bill would permit a request for map to be filed not later than 45 days prior to the day set for trial, but would require the condemnor to comply not later than 15 days prior to the day set for pre-trial conference. These specifications in time would make it possible to file a demand for the map after the due date is already past or so so shortly prior to the due date as to make compliance impossible. I would suggest that the compliance in all cases be required not later than 30 days prior to the date set for trial, but that the entire section be amended by the addition of the following:

"If the case is set for pre-trial conference, the periods prescribed hereby shall be applicable prior to the date set for such pre-trial conference, however, such application shall not require defendant to request such map earlier than 10 days following receipt of notice of the date set for such pre-trial conference."

10. An accompanying omission in present procedures should be corrected by inclusion in this enactment. The condemnor should be required at a time substantially in advance of pre-trial conference, to notify all persons who have appeared asserting any claim or defense relating to the property being taken, of the appearance of all other parties claiming an interest in that parcel. Under present procedures, it is possible for a person believeing he is the owner of the property in question to spend substantial sums of money in preparation for trial only to learn that his interest is subordinate to the claim of some other person who is entitled to defend the action. Although such conflicting claims would be revealed at pre-trial conference, if there is one had in the case, even then it is too late to avoid expense.

It is difficult to fix a time at which such notice would required unless it would relate to the filing of a request to have the matter set for trial, or to a request for preference in calendar setting. I would suggest that §1264 of the Code of Civil Procedure to amended to add:

"No preference shall be allowed hereunder until such time as the condemnor has given written notice to all persons appearing in the action asserting any claim, defense or interest in the parcel being taken or in the larger parcel of which it is a part, which notice shall state (a) the name of each other party who has appeared claiming interest in the designated parcel or parcels, and, as to each party so appearing, (b) the nature of such claim of interest and of any other defense asserted, (c) the amount of just compensation claimed as the value of the parcel taken and (d) as damages to the remainder, if any, and (e) the name and address of said party's attorney of record."

Very truly yours,

RICHARD L. HUXTABLE

RLH:s

EXHIBIT V

AD[illegible] PIPER
COUNTY COUNSEL

CLAYTON H. PARKER
CHIEF ASSISTANT

SEYMOUR S. PIZER
JOHN M. PATTERSON
ASSISTANTS

ARTHUR C. WAHLSTEDT, JR.
LOUIS[illegible] COLBY
ROBERT [illegible]. NUTTMAN
RONALD STEELMAN
WILLIAM J. McCOURT
JOSEPH W. BLOCKER
JOHN W. ANDERSON
JAMES S. OKAZAKI
DEPUTIES

OFFICES OF
THE COUNTY COUNSEL
County Of Orange

COUNTY ADMINISTRATION BUILDING • P. O. BOX 1863 • SANTA ANA, CALIFORNIA 92

December 22, 1965

Mr. John H. DeMoully
Executive Secretary
California Law Revision
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Recommendation and Study Relating to Condemnation Law and Procedure

Dear Mr. DeMoully:

Pursuant to your request, this office has reviewed the tentative recommendations of the California Law Revision Commission relating to condemnation law and procedure and Senate Bill No. 71 which passed in 1963 but which died in the Assembly Judiciary Committee.

Generally, we are of the opinion that the proposed legislation would encourage earlier preparation by the condemnee with the attendant opportunity for settlement of the case.

There is, however, in our opinion an essential feature missing from the proposed legislation. While the proposal provides for the exchange of information, it does not insure that the exchange of information will be simultaneous. To this extent, it would encourage last-minute service of the information. Reference is made to Page 721 of the above referred to recommendation and study which sets forth the procedures of the United States District Court for the Southern District of California where the information is lodged with the Clerk and when all such statements have been so lodged, they are then served on the appropriate party by the Clerk.

A similar provision appears in the New York Court of Claims Rules for the exchange of Appraisal Reports through the office of the Clerk.

Very truly yours,

ADRIAN KUYPER, COUNTY COUNSEL

By
Seymour S. Pizer, Assistant

SSP:ft

EXHIBIT VI

36

MARTIN J. BURKE
HARRY C. WILLIAMS
ROYAL M. SORENSEN
DWIGHT A. NEWELL
JAMES T. BRADSHAW, JR.

RICHARD R. TERZIAN
MARTIN L. BURKE
CARL K. NEWTON

LAW OFFICES
BURKE, WILLIAMS & SORENSEN
SUITE 720 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIF. 90013

TELEPHONE
623-4136

September 15, 1965

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

Re: Proposed Eminent Domain Law Revisions

Gentlemen:

I would be interested in receiving any proposed revisions of the law of eminent domain made by the Law Revision Commission.

In preparing the revisions of law in the eminent domain field, it would be my suggestion that the Commission carefully review the operation of Department 60 of the Los Angeles Superior Court, which is the eminent domain law and motion and pre-trial department. In this one department many procedural changes have occurred which have greatly assisted in the orderly processing of eminent domain actions. It is my view that there would be considerable state-wide benefit in the general implementation of the procedures utilized in this department.

Although I am a member of the Los Angeles County Bar Association Condemnation Procedures Committee, I am writing this letter individually and not on behalf of the Committee.

I will look forward to receiving any materials which are developed by the Commission in the eminent domain field.

Sincerely,

Carl K. Newton

CKN:hw

EXHIBIT VII

TINNING & DELAP
ATTORNEYS AT LAW
COURT AND MELLUS STREETS
MARTINEZ, CALIFORNIA 94554
228-5440

T. H. DELAP
A. B. TINNING, RETIRED
DANA MURDOCK
ROBERT T. ESHLEMAN
MAX WILCOX, JR.
JAMES E. COX
J. H. FILICE

ROBERT N. SANFORD, JR.
BERNARD F. CUMMINS
AUSTIN R. GIBBONS

November 24, 1965

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention John R. McDonough, Jr., Chairman

Gentlemen:

Re: Your No. 4 - Discovery in Eminent Domain Proceedings

I have read with interest your recommendation and study and particularly your summary at page 753 of same.

It is my opinion that adequate discovery procedures are now available. It is my further opinion that legislative and court-created rules attempting to codify discovery impose virtually prohibitive cost upon landowners. This practical aspect of economic idiocy is generally lost sight of by those who would promulgate rules.

It is our experience, and I expect that we have as active an eminent domain practice as any office in Northern California which represents landowners, that the attorneys for the condemning agencies are salaried, "eager beaver"young gentlemen who virtually inundate landowners with ponderous interrogatories, etc.

It is our further experience that we have had to make any number of motions at every stage of the proceedings, particularly in dealing with the Division of Highways of the State of California which are essentially absurd. I believe that this view is shared by the people who represent and try owners' cases in eminent domain. The state frequently advances absurd legal theories, both in discovery and at trial, and the resources available to them are

economically overwhelming when compared to those that even qualified offices can afford to bring to bear on the average owner's case.

In short, we request that this matter be left alone. The new eminent domain statute is bad law and is considered foolish by anyone who has had any experience with property valuation. For example, the notion that listings are not important flies in the face of the concept that you are trying to make these hypothetical proceedings comport as closely as possible to a real world transaction.

I hope that the rather cholericnature of this letter does not detract too greatly from the sincerity of the recommendation contained. The landowner does not have the protection afforded him by our courts that they afford the other rights of equal dignity set forth in the due process clause. In fact the trend is in the contrary direction.

Yours sincerely,

James E. Cox

JEC:vb

EXHIBIT VIII

EXTRACT FROM RULE 9 OF UNITED STATES DISTRICT COURT IN LOS ANGELES
(Effective June 1, 1966)

RULE 9. PRE-TRIAL PROCEEDINGS

ALL CASES SHALL BE PRE-TRIED UNLESS WAIVED BY ORDER OF THE COURT.

(a) Notice: After a civil action or proceeding, including admiralty, is at issue, unless the court or the judge in charge of the case otherwise directs, the clerk will place the cause on calendar for pre-trial conference on the Monday nearest 60 days thereafter and will thereupon serve all parties appearing in the case by United States mail a "Notice of Pre-Trial Conference" in the form prescribed by the judge to whom the case is assigned or in the form substantially as follows:

"[Title of Court and Cause]

No.: _____

Notice of Pre-Trial Conference

"This case has been placed on calendar for pre-trial conference in Courtroom No. _____ of this court at _____ o'clock on _____, 19____, pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this court; and unless excused for good cause, each party appearing in the action shall be represented at pre-trial conference and at all pre-trial meetings of counsel, by the attorney who is to have charge of the conduct of the trial on behalf of such party.

"The proposed pre-trial conference order must be lodged with the clerk not later than 5:00 p.m. on the Wednesday preceding the conference date.

_____, 19____

JOHN A. CHILDRESS, Clerk

By_____Deputy."

(b) Procedure: Upon receiving notice of a pre-trial conference:

1. It shall be the duty of each party and counsel appearing to comply with all requirements of this rule, unless the court otherwise directs;

2. Applications to be relieved of compliance may be made in the manner hereinafter provided in subdivisions (h) and (i) of this rule;

3. All documents, other than exhibits, called for by this rule shall be filed in duplicate and in the form required by local rule 4.

(c) Discovery Procedures: As soon as issue is joined, discovery proceedings, including requests for admissions, should begin and all discovery proceedings shall be completed, if possible, prior to the pre-trial conference.

(d) Meetings of Counsel: Not later than 40 days in advance of pre-trial conference, the attorneys for the parties shall meet together at a convenient time and place for the purpose of arriving at stipulations and agreements all for the purpose of simplifying the issues to be tried. At this conference between counsel, all exhibits other than those to be used for impeachment shall be exchanged and examined and counsel shall also exchange a list of the names and addresses of witnesses to be called at the trial including expert witnesses; each photograph, map, drawing and the like shall bear, upon the face or the reverse side thereof, a concise legend stating the relevant matters of fact as to what is claimed to be fairly depicted thereby, and as of what date. Each attorney shall also then make known to opposing counsel his contentions regarding the applicable facts and law.

FAILURE TO DISPLAY EXHIBITS TO OPPOSING COUNSEL AS REQUIRED BY THESE RULES SHALL AUTHORIZE THE COURT TO REFUSE TO ADMIT THE SAME INTO EVIDENCE.

(e) Memorandum of Contentions of Fact and Law: Not later than 15 days in advance of pre-trial conference, each party appearing shall serve and file with the clerk a "MEMORANDUM OF CONTENTIONS OF FACT AND LAW", containing a concise statement of the material facts involved as claimed by such party, including:

* * * * * * * * *

4. **In eminent domain proceedings,** additional pre-trial disclosure shall be made as follows:

a. Not later than 30 days in advance of pretrial conference, each party appearing shall serve and file a summary "STATEMENT OF COMPARABLE TRANSACTIONS" containing the relevant facts as to each sale or other transaction to be relied upon as comparable to the taking, including the alleged date of such transaction, the names of the parties thereto, and the consideration therefor; together with the date of recordation and the book and page or other identification of any record of such transaction; and such statements shall be in form and content suitable to be presented to the jury as a summary of evidence on the subject;

b. At least 20 days prior to trial each party appearing shall serve and file a "STATEMENT AS TO JUST COMPENSATION" setting forth a brief schedule of contentions as to the following: (1) the fair market value in cash, at the time of taking, of the estate or interest taken; (2) the maximum amount of any benefit proximately resulting from the taking; and (3) the amount of any claimed damage proximately resulting from severance.

* * * * * * * * *

6. Each party shall set forth a brief statement of the points of law and a citation of the authorities in support of each point upon which such party intends to rely at the trial, which will serve to satisfy the requirements of local rule 12.

7. Each party shall set forth a statement of any issues in the pleadings which have been abandoned.

8. Each party shall set forth a list of all exhibits such party expects to offer at the trial other than those to be used for impeachment with a description of each exhibit sufficient for identification, the list being substantially in the following form:

Case Title:_____ Case No. _____

LIST OF _____ EXHIBITS

NUMBER	DATE MARKED	DATE ADMITTED	DESCRIPTION

INSTRUCTIONS:

Place case caption at the top as shown, and show "Plaintiff's" or "Defendant's" before the word "Exhibits," and, below that, only the spaces labeled "Number" and "Description" are required to be filled in prior to trial.

Plaintiff shall number exhibits numerically and defendant by alphabetic letters, as follows: A to Z; then AA to AZ; then BA to BZ, etc.

Consult the judge's clerk concerning problems as to the numbering of exhibits.

9. Each party shall set forth the names and addresses of all prospective witnesses and, in the case of expert witnesses, a narrative statement of the qualifications of such witness and the substance of the testimony which such witness is expected to give. Only witnesses so listed will be permitted to testify at the trial except for good cause shown.

(f) Conduct of Conference: At pre-trial conference, the court will consider:

1. the pleadings, papers and exhibits then on file, including the stipulations, statements, and memorandums filed pursuant to this order and all matters referred to in F. R. Civ. P., Rule 16;

2. all motions and other proceedings then pending, including a motion to dismiss pursuant to F. R. Civ. P., Rule 41(b), or Admiralty Rule 38, "for failure . . . to comply with these rules or any order of court"; or to impose attorneys' fees and costs or other penalties pursuant to F. R. Civ. P., Rule 37, or Admiralty Rule 32C, for failure of a party to comply with the rules as to discovery; or to impose personal liability upon counsel for excessive costs pursuant to 28 U.S.C. § 1927 or Local Rule 28;

3. any other matters which may be presented relative to parties, process, pleading or proof, with a view to simplifying the issues and bringing about a just, speedy, and inexpensive determination of the case; and

4. upon conclusion of pre-trial conference, the court will set the case for trial and enter such further orders as the status of the case may require.

(g) Pre-Trial Conference Order. Not later than 5:00 p.m., on the Wednesday prior to the pre-trial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order, approved as to form and substance by the attorneys for all parties appearing in the case, and in form substantially as follows:

"(Title of Court and Cause)

No._____ PRE-TRIAL CONFERENCE ORDER

"Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this court, IT IS ORDERED:

1. This is an action for: (Here state nature of action, designate the parties and list the pleadings which raise the issues);

II Federal jurisdiction and venue are invoked upon the ground: (Here list a concise statement of the facts requisite to confer federal jurisdiction and venue);

III The following facts are admitted and require no proof: (Here list each admitted fact, including jurisdictional facts);

IV The reservations as to the facts recited in paragraph III above are as follows: (Here set forth any objection reserved by any party as to the admissibility in evidence of any admitted fact and, if desired by any party, limiting the effect of any issue of fact as provided by F. R. Civ. P., Rule 36(b), or Admiralty Rule 32B(b), as the case may be);

V The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: (Here list each);

VI The following issues of fact, and no others, remain to be litigated upon the trial: (Here specify each; a mere general statement will not suffice);

VII The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows: (Here list all documents and things intended to be offered at the trial by each party, other than those to be used for impeachment, in the sequence proposed to be offered, with a description of each sufficient for identification, and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, the due execution thereof, and the truth of relevant matters of fact set forth therein or in any legend affixed thereto, together with a statement of any objections reserved as to the admissibility in evidence thereof);

VIII The following issues of law, and no others, remain to be litigated upon the trial: (Here set forth a concise statement of each);

IX The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

_____, 19____

_____
United States District Judge

Approved as to form and content:

_____
Attorney for Plaintiff

_____
Attorney for Defendant

(h) Postponement of Hearing: If additional time is required to comply with this rule, the parties may submit a timely stipulation signed by all counsel, setting forth the reasons and requesting an order of court for continuance to a stated Monday calendar. Pre-trial conference will usually be postponed (1) to await completion of all intended discovery procedures, if such procedures have been pursued with due diligence; (2) to await determination of a motion for a summary judgment pursuant to F. R. Civ. P., Rule 56; (3) to await determination of a motion to dismiss for lack of jurisdiction pursuant to F. R. Civ. P., Rule 12; or (4) to permit the parties time to exhaust the possibilities of settlement. Entry of an order postponing the date for pre-trial conference shall operate **ipso facto** to extend the various time periods fixed by this rule, so that compliance shall be sufficient if made within the periods of time specified when computed from the later date so fixed for pre-trial conference.

(i) Motions Prior to Conference: In the event of inability to obtain the stipulation of counsel as provided in subdivision **(h)**, motions to postpone, or to be relieved from compliance with, any of the requirements of this rule may be presented at the call of any Monday calendar of the court upon giving five-days' written notice.

EXHIBIT # IX

EMINENT DOMAIN POLICY MEMORANDUM 132K

POLICY MEMORANDUM

PRETRIAL, DISCOVERY and CALENDARING in EMINENT DOMAIN CASES

ADOPTED BY THE SUPERIOR COURT
OF THE STATE OF
CALIFORNIA,
COUNTY OF LOS ANGELES

JANUARY 1, 1964

LOS ANGELES DAILY JOURNAL
220 W. 1st St. -:- Los Angeles 12, Calif. -:- Phone MA. 5-2141
PROMPT AND CAREFUL ATTENTION GIVEN LEGAL NOTICES

1. Contested eminent domain cases are governed by California Rules of Court, Rules 206 to 222, inclusive, with respect to setting for pretrial and with respect to pretrial and settlement conferences.

This Policy Memorandum is intended to implement the Rules, and with respect to the final pretrial conference is supplemental to the Manual of Pretrial Procedures, published in February, 1963, so far as applicable.

2. Experience has shown that in order to make discovery and pretrial procedures effective and to properly control the calendaring of eminent domain cases for pretrial conferences and for trial, the court must insist on compliance with the California Rules of Court and with the provisions of this Policy Memorandum, provided that in the exercise of the court's discretion and for good cause, compliance with the provisions of this Policy Memorandum may be waived in any particular case.

3. It is the policy of the court in setting such cases for pretrial and trial to give them the priority to which they are entitled by law. (C.C.P., sec. 1264.) All such cases should be brought to trial if possible within twelve months after the filing of the complaint.

Counsel are expected to assist the court in carrying out this policy by compliance with the Rules and with the following procedures with respect to calendaring, pretrial, and discovery.

4. This Policy Memorandum shall apply to eminent domain cases in the Central District, and to all such cases in any other Districts when so ordered by the judge presiding in the Master Calendar Department in any such District.

PRETRIAL CONFERENCES, DISCOVERY AND OTHER PROCEEDINGS BEFORE TRIAL

5. The purpose of this Policy Memorandum is to expedite all proceedings before trial in contested eminent domain cases, including law and motion matters, discovery proceedings, pretrial conferences and settlement conferences, to the end that all such matters may be brought to trial within twelve months after they are commenced.

6. It is the policy of the court to require that all law and motion matters and all discovery proceedings shall be completed before the final pretrial conference, as provided in Rule 210, subdivision (d). Any request for an extension of time to complete such matters or proceedings after the final pretrial conference may be granted only on a showing of good cause by affidavit.

ANSWERS

7. "No case shall be set for a pretrial conference or for trial until it is at issue and unless a party thereto has served and filed a memorandum to set." Rule 206.

8. In order to expedite the setting of a contested eminent domain case for pretrial and trial, the summons should be served promptly on all defendants, and answers should be filed promptly

after the service of summons. While reasonable extensions of time to answer may properly be agreed to by counsel, the court considers that in the ordinary case an extension of time for more than sixty days is not reasonable where the sole reason for such delay is to give to a defendant's counsel time to secure professional appraisals of the property taken or damaged.

In most cases an answer can and should be filed within sixty days based on the information as to the value of the property taken or damaged then available, having in mind the owner's right to file an amended answer on stipulation or by order of the court on motion after he has obtained an adequate appraisal. The early filing of an answer will enable the court, upon the filing of a memorandum to set, to set the case for pretrial and for trial within twelve months after the commencement of the action, on dates which are agreeable to all counsel.

9. In preparing answers to complaints in eminent domain cases, counsel are expected to comply with the requirement of section 1246, Code of Civil Procedure, that "[e]ach defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248."

FIRST PRETRIAL CONFERENCE

10. When the memorandum to set a contested eminent domain case has been filed, the clerk will set a date for a first pretrial conference in the Pretrial Department not later than 60 days after the filing of the memorandum.

11. Where all parties appearing in the action agree in writing, by letter or stipulation filed with the Pretrial Setting Clerk concurrently with the memorandum to set, the first pretrial conference will be set on any one of three dates within said period of 60 days as requested by the parties. If the parties do not agree, counsel for the party filing the memorandum to set, by letter to the Pretrial Setting Clerk with copy to each other party appearing in the action in propria persona or by counsel, filed with the memorandum to set, may request that the case be set for the first pretrial conference on any one of three dates, in which event the case will be set for such conference on one of those dates unless within five days from the date of such request, any party appearing in the action, by letter to the Pretrial Setting Clerk with a copy to all other parties appearing in the action, objects to all such dates and requests that such conference be set on any one of three other dates. If within five days thereafter the parties do not advise the Pretrial Setting Clerk in writing that they have agreed on a mutually convenient date, the case will be set for a first pretrial conference by direction of the judge assigned for that purpose by the Presiding Judge on a date within said period of 60 days convenient to the court, which date will be changed only on a motion on an affirmative showing of good

cause. Notice of the date set for the first pretrial conference will be sent by the Pretrial Setting Clerk to all parties appearing in the action as required by Rule 209.

12. The first pretrial conference will be held for the purpose of discussing and securing agreement on all matters set forth in the joint statement to be filed as provided in paragraph 15 of this Policy Memorandum, and such other matters as may be suggested by the judge presiding at such conference or by the parties then present. When necessary, a reasonable continuance may be granted in order that the parties can all agree on all such matters before securing their appraisals and engaging in discovery proceedings. At such conference the court will also discuss the possibility of settlement.

13. At the first pretrial conference the court will also fix the date for the trial and a date for the final pretrial conference not more than 30 days before the date so fixed for the trial, having in mind the calendars of counsel and the calendar of the court. When such dates are fixed, counsel will be expected to avoid conflicting engagements.

The dates set for the final pretrial conference or for the trial may be changed by the court on motion on notice to all interested parties, on an affirmative showing of good cause. The court expects counsel to give notice of any such motion promptly on discovering good cause therefor.

14. Unless the first pretrial conference is waived as hereinafter provided, each party appearing in the case shall attend the first pretrial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case and be prepared to discuss it and make stipulations or admissions where appropriate, and be prepared to agree on a date for the final pretrial conference and for the trial.

15. It is the policy of the court to require the filing of a joint statement at or before the time set for the first pretrial conference evidencing the extent to which counsel are agreed on matters which should be agreed on at the first pretrial conference, including a date for the final pretrial conference and for the trial. The court has prepared a check list of all such matters, which should be used by counsel as a guide in preparing the required joint statement. Copies of the check list are available at the main or any branch office of the County Clerk.

16. It is the policy of the court to waive the first pretrial conference when the joint statement evidences the agreement of counsel on all matters set forth in the check list which are applicable to the particular case, on condition that the joint statement, together with a request for such waiver, is filed not less than ten days before the time set for the first pretrial conference. In that event, counsel may call the clerk in the department of the judge assigned by the Presiding Judge to conduct pretrial conferences in eminent domain cases on the second court day before the day set for such conference, to determine whether appearance at the conference is necessary.

17. At the conclusion of the first pretrial conference, or upon the waiver of such conference if the joint statement is approved, the court will prepare a partial pretrial conference order setting forth all matters agreed on except the several parties' estimates of value (see Rule 211, subd. (d)), including the date set for the final pretrial conference and for the trial, and serve and file such order as provided in Rule 215.

INTERIM PROCEEDINGS

18. During the period between the conclusion of the first pretrial conference and the time then set for the final pretrial conference, the parties are expected to complete all law and motion matters and all depositions and discovery proceedings, including the exchange of all valuation data as may be agreed on by the parties or as may be ordered by the court. During such period the parties are also expected to confer in person or by correspondence to reach agreement upon as many additional matters as possible, and to prepare the joint or separate written statements required by Rule 210 and by this Policy Memorandum to be filed at or before the time set for the final pretrial conference.

19. Counsel are reminded that at any preliminary pretrial conference or at any time before or at the final pretrial conference, the parties may by stipulation also submit to the judge assigned for that purpose, and such judge may determine, any other matter which will aid in the disposition of the case. [See Rule 212, subdivision (b)].

FINAL PRETRIAL CONFERENCE

20. At or before the final pretrial conference, unless such conference is waived pursuant to Rule 222, the parties will submit to the pretrial conference judge a joint written statement of all matters agreed on subsequent to the first pretrial conference and a joint written statement or separate written statements of the factual and legal contentions to be made as to the issues remaining in dispute, to the extent that such matters have not previously been incorporated in any partial pretrial conference order or amendment thereto. (See Rule 210.)

21. At such conference the parties will submit to the court a descriptive list of all maps, photographs and other documentary exhibits which either party then intends to offer in evidence, except documents either party may intend to use for impeachment, with a statement indicating which ones may be marked in evidence at the beginning of the trial and which ones are to be marked for identification. In the discretion of the court said list may be included, in whole or in part, as a part of the joint written statement required to be filed at or before such conference. To the extent that such exhibits are then available, they should be produced at the time of the final pretrial conference and marked by the clerk as exhibits in evi-

dence or for identification. The provisions of this paragraph do not preclude the production of other exhibits at the time of trial.

22. At the time of such conference each party will submit to the court in camera in writing a memorandum setting forth in summary form a statement of the opinions of each of their respective appraisers as to (1) the value of each parcel to be taken, (2) severance damages, if any, and (3) the value of the benefits resulting from the construction of the proposed public work. Such memoranda shall not be filed and may be returned to the respective parties when the final pretrial conference order is filed and shall not be referred to in the final pretrial conference order or at the trial.

23. At the conclusion of the final pretrial conference the judge as required by Rule 214 will prepare a final pretrial conference order, which shall incorporate by reference any partial pretrial conference order and a statement of any amendments thereto and of the matters then agreed on, the list of proposed exhibits submitted by the parties with their stipulation with respect thereto, a statement of any factual and legal contentions made by each party as to the issues remaining in dispute, which have not been set forth in any partial pretrial order or amendment thereto, and a concise and descriptive statement of every ruling and order of the judge at the final pretrial conference on any matter which will aid the court in the disposition of the case.

24. The final pretrial conference order will be served and filed as provided in Rule 215.

CHECK LIST FOR COMPLETION OF JOINT STATEMENTS FOR FIRST PRETRIAL CONFERENCE IN EMINENT DOMAIN PROCEEDINGS

1. A joint written statement setting forth the position of the parties as to all matters listed in paragraph 2 of this check list must be filed at or before the time set for the first pretrial conference in contested eminent domain cases.

Each such statement should indicate in the caption the number of the parcel or parcels to which it refers. Paragraph numbers and headings herein should be used by counsel in preparing such statements.

2. As to each of the items referred to in this paragraph, state one of the following: (1) the facts agreed to, (2) that the item is "disputed", or (3) that the particular item is not applicable. When the parties cannot agree on any matter, each party shall state his contentions with respect thereto.

All of the following items are to be included as to each parcel in preparing the joint statement:

(a) **Date of Filing Complaint and of Issuance of Summons.** (See C.C.P sec. 1249.)

(b) Names and capacities of all parties served and of parties not served.

(c) **Immediate Possession:** Effective date of order of immediate possession.

(d) **Description of Property:** Address, legal description of land or property to be taken and of remaining property, if any; area of property; existing structures and improvements, if any; existing encumbrances; existing leases; and existing zoning.

(e) **Nature, Extent or Character and Ownership** of the several estates or interests to be taken.

(f) **Purpose of Acquisition** and a brief general description of the proposed public work.

(g) **Condemner's Estimated Valuation.** Plaintiff may include here a statement as to its source, such as a staff or other preliminary appraisal.

(h) **Condemnee's Estimated Valuation.** The party may include here a statement as to its source, such as the owner's opinion of value or a preliminary appraisal.

(i) Whether severance damages are claimed, and if so, by whom?

(j) Whether benefits are claimed by the construction of the proposed public work, and if so, what benefits?

(k) **Dates** for Valuation Data Exchange.

(l) **Issues.** Whether there are any other issues to be determined in addition to the issue of value.

(m) **Available Trial Dates** - fill in not less than two dates at least 30 days prior to expiration of one year from the date the action was commenced.

(n) **Available Final Pretrial Conference Dates** - fill in at least two dates not less than 60 days prior to expiration of one year after the date the summons was issued.

(o) Other matters agreed on or admitted.

(p) Whether any party contemplates making a motion to transfer the trial to another Superior Court District for trial, if so, which party.

Note: The information required by the foregoing check list should be based on all information available as of the date of the required joint statement. If the parties so desire, the information required by items (g) and (h) may be furnished in a separate supplemental statement. When the parties can not agree on the dates required under items (l) and (m), the statement should include two dates in each instance which are available to counsel for each of the parties.

3. If the parties so desire, the statement may conclude with a joint request for a waiver of the first pretrial conference. In that event, the statement must be filed not less than ten days before the date set for such conference.

PROPOSED
CLERK'S DUTIES AND PROCEDURE
IN EMINENT DOMAIN CASES

"No case shall be set for a pretrial conference or for trial until it is at issue and unless a party thereto has served and filed a memo to set." Rule 206. The clerk enters the memo on the register of actions and checks the memo as to the provisions of said rule.

1. When the memo to set a contested eminent domain case is ready for setting, the clerk will set a date for a first pretrial conference in the designated pretrial department (Department 60), not later than 60 days after the filing of the memo, pursuant to paragraphs 2 and 3 as follows, and give notice thereof as required by rule 209 (b), together with rule 207.5.

2. Where counsel for all parties agree in writing, by letter or stipulation filed with the clerk concurrently with the memo to set, the first pretrial conference will be set on any one of three dates within said period of 60 days as requested by counsel.

3. If counsel do not agree, counsel for any party appearing in the action, by letter to the clerk with copy to all other parties appearing in the action, filed with the memo to set, may request that the case be set for the first pretrial conference on any one of three dates, within the 60 day period, in which event the case will be set for such conference on one of those dates, unless within 5 days from the date of such request, counsel for any other party appearing in the action, by letter to the clerk, with copy to counsel for all other parties appearing in the action, objects to all such dates and requests that such conference be set on any of three other dates. If within 5 days thereafter counsel do not advise the clerk in writing that they have agreed on a mutually convenient date, the case will be set for a first pretrial conference by direction of the judge assigned to handle the pretrial eminent domain cases, or, if he is not available, by the pretrial Master Calendar Judge.

4. At such conference the Court will also fix the date for the trial and a date for the final pretrial conference not more than 30 days before the date so fixed for the trial.

The dates set for the final pretrial conference or for the trial may be changed by the Court on motion on notice to all interested parties, on an affirmative showing of good cause.

5. It is the policy of the Court to require the filing of a joint statement at or before the time set for the first pretrial conference, including a date for the final pretrial conference and for the trial.

6. It is the policy of the Court to waive the first pretrial conference when the joint statement is sufficient to the particular case, on condition that the joint statement is filed not less than 10 days before the time set for the first pretrial conference, together with a request for such waiver. In that event, counsel may call the clerk in the assigned eminent domain department (Department 60) on the

second court day before the day set for such conference, to determine whether appearance at the conference is necessary.

7. At the conclusion of the first pretrial conference, or upon the waiver, the Court will prepare a partial pretrial conference order, which will include the date set for the final pretrial conference and for the trial. The clerk shall serve and file such order as provided in rule 215, together with a notice of such dates.

8. At or before the final pretrial conference, the parties will submit to the designated pretrial eminent domain judge a joint written statement of all matters agreed on subsequent to the first pretrial conference and a joint or separate written statement of the factual and legal contentions to be made as to the issues remaining in dispute. To the extent that certain exhibits are available at the final pretrial conference, they should be produced and are to be marked by the clerk as exhibits in evidence or for identification.

9. At the conclusion of the final pretrial conference the pretrial judge will prepare a final pretrial conference order, which order shall be served and filed as provided in rule 215.

10. When an invitation to attend the settlement conference in an eminent domain case has been accepted, the clerk in Department 60, under the direction of the Judge, will set a date for such conference and notify all the parties.

11. The clerk in the assigned pretrial eminent domain department, under the direction of the Judge, will have to keep a complete calendar of all dates assigned for the first pretrial conference; all continuances or additional hearings of same; all dates assigned for the final pretrial conference, all continuances or additional hearings of same; all dates or additional hearings assigned for the settlement calendar; and any other dates assigned or continued for whatever purpose necessary as to said assigned pretrial eminent domain department.

12. The clerk will also file and serve, or cause to be served, any notices, or other papers, in connection with the above procedures in eminent domain actions.

NOTICE OF FIRST PRETRIAL CONFERENCE
RIGHT TO REQUEST ELIMINATION OF
FIRST PRETRIAL CONFERENCE AND ORDER
and
INVITATION TO SETTLEMENT CONFERENCE
EMINENT DOMAIN ACTIONS
(Rules 207.5, 209 and 222
Calif. Rules of Court)

(Parcel No. .....)

No. .....

Superior Court of the State of California for the County of Los Angeles.

.....Plaintiff(s) vs. .....

.....Defendant(s).

To the above named parties and to their attorneys of record:
You are hereby notified:

1. FIRST PRETRIAL CONFERENCE

The Court has set the above entitled case for a first pretrial conference on ....., 19....., at .....m., in Department ..... located at .....

Said conference will be held in accordance with Rules 207.5-222, inclusive and Policy Memorandum for Pretrial, Discovery and calendaring in Eminent Domain Cases.

2. WAIVER OF FIRST PRETRIAL CONFERENCE

If counsel for all parties intend to request the Court to eliminate first pretrial conference, the procedure set forth in paragraphs 15 and 16 of the Policy Memorandum above referred to must be followed. (See paragraph 4, below.)

Request for such waivers to be filed not later than 10 days prior to the above date assigned for pretrial conference, or 10 days prior to the date to which such conference may be ordered continued. In the Central District such requests should be filed with the clerk of Dept. 60. In other districts, they should be filed with the pretrial clerk of such district.

3. INVITATION TO ATTEND SETTLEMENT CONFERENCE

Pursuant to Rule 207.5, you are invited to attend a settlement conference. This case will be placed on the settlement calendar IF ONE OR MORE OF THE PARTIES advises the pretrial setting clerk in Dept. 60 in the central district or in other districts, the pretrial setting clerk of such district, in writing, that he accepts the invitation NOT LATER THAN 20 DAYS PRIOR TO THE DATE ASSIGNED FOR THE FIRST PRETRIAL CONFERENCE OR 20 DAYS PRIOR TO THE DATE TO WHICH SUCH CONFERENCE MAY BE ORDERED CONTINUED. If one or more of the parties accepts, all parties will be notified thereof and of the time and place of the settlement conference. Rule 207.5 further provides that the Court may, and upon the joint request of all parties shall, order a particular case on the settlement calendar at any time.

Settlement conferences are conducted in accordance with Rule 207.5 and special pretrial settlement calendar policy memorandum enclosed herewith to the extent that it is applicable. All parties will be required to comply therewith.

4. PRETRIAL POLICY MEMORANDUM AND CHECK LIST FOR PREPARING PRETRIAL WAIVER STATEMENTS AND PRETRIAL STATEMENTS.

Compliance with the applicable procedures set forth in the Pretrial Policy Memorandum and in the Policy Memorandum for Pretrial, Discovery and Calendaring in Eminent Domain Cases will be required with respect to preparation of pretrial waiver statements and regular pretrial statements.

The Court has prepared check lists to assist counsel in preparing such statements. These check lists are available in the County Clerk's

office. While not mandatory, the use of the check list is strongly recommended, as it will facilitate the work of counsel and the court.

5. ASSIGNMENT OF FINAL PRETRIAL CONFERENCE AND OF TRIAL DATE

At the first pretrial conference the case will be assigned a date for the final pretrial conference and a trial date as provided in the Rules and applicable Policy Memorandum.

WILLIAM G. SHARP,
County Clerk and Clerk of the Superior Court for the County of Los Angeles, State of California.

By ....., Deputy.

NOTICE OF FINAL PRETRIAL CONFERENCE
RIGHT TO REQUEST ELIMINATION OF
PRETRIAL CONFERENCE AND ORDER
and
NOTICE OF TRIAL DATE
EMINENT DOMAIN ACTIONS
(Rules 207.5, 209 and 222
Calif. Rules of Court)

(Parcel No. .....)
No. .....

Superior Court of the State of California for the County of Los Angeles.

.....Plaintiff(s) vs. .....
.....Defendant(s).

To the above named parties and to their attorneys of record:
You are hereby notified:

1. FINAL PRETRIAL CONFERENCE

The Court, on its own motion, has set the above entitled case for final pretrial conference on ....., 196...., at .....m., in Department ....., located at .....

Said conference will be held in accordance with Rules 207.5-222, inclusive and Pretrial Policy Memorandum and Policy Memorandum for Pretrial, Discovery and Calendaring in Eminent Domain Cases.

2. WAIVER OF FINAL PRETRIAL CONFERENCE

If counsel for all parties intend to request the Court to eliminate the final pretrial conference and order the procedure set forth in Rule 222 and Pretrial Policy Memorandum must be followed.

Rule 222 requires such request to be filed not later than 20 days prior to the above date assigned for the final pretrial conference, or 20 days prior to the date to which such conference may be ordered continued. In the Central District such requests should be filed with the clerk of Dept. 60. In other districts, they should be filed with the pretrial clerk of such district.

3. PRETRIAL POLICY MEMORANDUM AND CHECK LIST FOR PREPARING PRETRIAL WAIVER STATEMENTS AND REGULAR PRETRIAL STATEMENTS.

Compliance with the applicable procedures set forth in the

Pretrial Policy Memorandum and Policy Memorandum for Pretrial, Discovery and Calendaring in Eminent Domain Cases will be required with respect to preparation of pretrial waiver statements and regular pretrial statements.

The court has prepared check lists to assist counsel in preparing such statements. These check lists are available in the County Clerk's office. While not mandatory, the use of the check lists is strongly recommended, as it will facilitate the work of counsel and the court.

4. ASSIGNMENT OF TRIAL DATE

At the final pretrial conference the court will determine whether the date previously assigned for trial is to be changed, and, if so, will assign a new date.

Dated: .....196.....

WILLIAM G. SHARP,
County Clerk and Clerk of the Superior Court for the County of Los Angeles, State of California.

By ....., Deputy.

EXHIBIT X

[Civ. No. 8421. Fourth Dist., Div. One. May 26, 1966.]

SCOTSMAN MANUFACTURING CO., INC., Petitioner, v. SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE ROBERTS BRASS MANUFACTURING COMPANY, Real Party in Interest.

[1a, 1b] Discovery — Under Statutory Procedures — Discretion of Court—Where Limitations on Discovery Are Involved.—It was an abuse of discretion to grant an application by one defendant for discovery of a report made to a codefendant by an expert employed by its attorney to assist in the preparation of the case where such report was a work product subject to discovery limitations (Code Civ. Proc., § 2016), where the basis for defendant's discovery motion (shortness of time to prepare its defense) did not constitute that prejudice or injustice which would provide an exception to the work product rule, and where, though codefendant refused to declare its intention respecting the expert's prospective status as a witness at the trial in order to allow discovery as to the subject matter of his potential testimony, the trial court, in an appropriate proceeding, could permit discovery by interrogation or deposition.

[2] Id.—Under Statutory Procedures—Right to Discovery.—In a personal injury action based on the explosion of a butane lamp, where one defendant's attorney had employed an expert to examine and report on the lamp to assist in the presentation of its case, and a codefendant's motion for discovery of the report was based primarily on the short time left for preparing its defense, such grounds did not constitute prejudice or injustice within the meaning of Code Civ. Proc., § 2016, subd. (b), providing an exception to the "work product rule."

[3] Id.—Under Statutory Procedures—Matters Discoverable.—If and when an expert, employed by a party's attorney to make an examination and report to assist in the presentation of his case, becomes a potential witness on behalf of his client, the information and opinion of the expert, to the extent that they relate to the subject matter about which he is a prospective witness, are subject to discovery by interrogation or deposition procedures, and by the production of any report confined to such matter.

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[2] See Cal.Jur.2d, Discovery, Inspection, Mental and Physical Examination, § 5; Am.Jur.2d, Deposition and Discovery, § 171.

McK. Dig. References: [1] Discovery, § 27(4); [2, 4, 5] Discovery, § 7; [3] Discovery, § 6.

[4] Id.—Under Statutory Procedures—Right to Discovery.—The policy objective of the work product rule (Code Civ. Proc., § 2016) is to encourage the thorough preparation of a case, including an investigation not only of its favorable but also its unfavorable aspects.

[5] Id.—Under Statutory Procedures—Right to Discovery.—Where an expert, employed by a party's attorney to make an examination, submits a report in both an advisory and a prospective witness capacity, its exemption from discovery does not depend on a preliminary showing that it contains advisory or unfavorable information.

PROCEEDING in prohibition to restrain the Superior Court of Orange County from enforcing a discovery order requiring petitioner to produce an expert's report. Writ granted.

Welsh, Cummins & White and W. F. Rylaarsdam for Petitioner.

No appearance for Respondent.

Betts & Loomis and John K. Trotter, Jr., for Real Party in Interest.

COUGHLIN, J.—Petitioner, Scotsman Manufacturing Co., Inc., seeks a writ of prohibition to restrain enforcement of a discovery order obtained upon motion of real party in interest, The Roberts Brass Manufacturing Company. The order was made in an action against petitioner, real party in interest, and others, to recover damages on account of injuries which the complaint alleges resulted from the explosion of a butane lamp installed in a trailer by petitioner, and containing a valve manufactured by real party in interest. The action was filed December 8, 1964. Service upon all defendants, except real party in interest, was effected in January 1965. In June of that year, petitioner's attorney employed Dr. D. A. Morelli to examine the butane lamp and report to him respecting such examination for the purpose of assisting him in the preparation of petitioner's case. In the same month Dr. Morelli examined the lamp and delivered to the attorney his report in the premises. On September 3, 1965, real party in interest was served with a cross-complaint filed in the action by one of the defendants; on October 1, 1965, was served with the original complaint; and on December 24, 1965, was served with a cross-

complaint filed by petitioner. Thereafter, real party in interest discovered that experts employed by three of the parties to the action, including petitioner, had examined the lamp and made reports respecting their examinations; received copies of two of these reports; was refused a copy of the report by petitioner's expert; and on March 2, 1966, obtained the subject order directing petitioner to produce this report. Thereupon petitioner brought the instant proceeding to restrain enforcement of this order upon the ground, among others, the report of Dr. Morelli is a work product; there was no showing that denial of discovery thereof would unfairly prejudice real party in interest in preparing its defense or would result in an injustice; and granting the application for discovery of this report was an abuse of discretion. We have concluded these contentions are well taken.

[1a] The report in question followed employment of Dr. Morelli by petitioner's attorney to assist in the preparation of its case and constituted a work product subject to the discovery limitations prescribed by section 2016 of the Code of Civil Procedure. (*San Diego Professional Assn.* v. *Superior Court*, 58 Cal.2d 194, 204 [23 Cal.Rptr. 384, 373 P.2d 448, 97 A.L.R.2d 761]; *Suezaki* v. *Superior Court*, 58 Cal.2d 166, 177 [23 Cal.Rptr. 368, 373 P.2d 432, 95 A.L.R.2d 1073]; *Brown* v. *Superior Court*, 218 Cal.App.2d 430, 437, 439-443 [32 Cal.Rptr. 527]; Generally see *Swartzman* v. *Superior Court*, 231 Cal.App.2d 195, 202-206 [41 Cal.Rptr. 721].) Subdivisions (b) and (g) of that section were added in 1963. They provide respectively: "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice . . .", and "It is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."

[2] In a declaration filed in support of the motion for discovery the attorney for real party in interest asserted it would be greatly prejudiced in preparing its defense of the action and an injustice would result unless discovery of the subject report were allowed because it had not been brought into the action until eight months after the other parties were

served, and there was very little time remaining for preparation of its defense, as the case had been set for pretrial on May 13, 1966, and for trial on June 6, 1966. This is the only legal showing before the trial court tending to support the claim of real party in interest that denial of the requested discovery would unfairly prejudice it in the preparation of its defense or result in an injustice. This claim of prejudice or injustice, obviously, is premised upon the need to obtain information contained in the report within the allegedly limited time allowed for preparation of a defense. Thus, any prejudice or injustice in the premises is attributable primarily to the fact that the court set the case for hearing on June 6, 1966, with its consequent limitation upon the time for preparation of a defense, rather than upon any denial of discovery of Dr. Morelli's report. If prejudice or injustice to real party in interest results from an alleged restriction upon the time for preparation of a defense, its remedy lies in an order fixing another trial date.

Before this court, real party in interest asserts in its "Points and Authorities", which are a part of its response to the petition for writ of prohibition, that during oral argument before the trial court its attorney, advised petitioner's attorney if the latter would indicate his intention not to use Dr. Morelli nor his report "in any manner in the trial of this case," real party in interest would dismiss its motion for discovery, but petitioner's attorney refused to indicate his intention in the premises. Relying upon this asserted fact, real party in interest contends that, under the decision in *Swartzman* v. *Superior Court, supra*, 231 Cal.App.2d 195, 202-204, the report of Dr. Morelli no longer is a work product subject to the limitations upon discovery prescribed by section 2016 of the Code of Civil Procedure.

In *Swartzman* v. *Superior Court, supra*, 231 Cal.App.2d 195, 200-204, the appellate court approved a trial court policy requiring the exchange of appraisal reports between parties to an eminent domain proceeding, and also approved an order prohibiting the taking of the deposition of an appraiser employed by the condemning agency based upon a refusal by the landowner, implied from his conduct, to exchange appraisal data. In the course of its opinion the appellate court cogently analyzed the different statuses of an expert, employed by a litigant's attorney to examine a subject of litigation and to assist in the preparation of his client's case, as each relates to the discoverability of the results of the expert's examination,

his information in the premises, his opinions, and reports by him to the attorney. As noted therein, insofar as the product of this employment relates to the preparation by the attorney of his client's case, it is a work product not subject to discovery, except as provided in subdivision (b) of Code of Civil Procedure, section 2016; but if and when the expert becomes a potential witness on behalf of the client the product of his employment is subject to discovery. However, the mere fact the expert may have the dual status of a prospective witness and of adviser to the attorney, does not remove the product of his services rendered exclusively in an advisory capacity, as distinguished from the product of services which qualify him as an expert witness, from the work product limitation upon discovery. **[3]** Under the ruling in *Swartzman*, the information and opinion of the expert respecting the subject matter about which he is a prospective witness are subjects of discovery by interrogation or deposition procedures and, if submitted in a report confined thereto by production of such a report. On this basis the valuation reports of appraisers in eminent domain proceedings are subject to discovery under the generally applicable rules. However, wherever the report may include the information and opinions of the expert given to the attorney not only in his capacity as a prospective witness but also as an adviser in the preparation of the client's defense, it is subject to the work product limitation prescribed by statute. **[4]** The report may contain information and opinions respecting unfavorable aspects of a client's case as well as those favorable thereto and to require its production would violate the policy declared in section 2016 to encourage the thorough preparation of a case including an investigation, not only of its favorable but also its unfavorable aspects. **[5]** Furthermore, where the expert has submitted a report pursuant to his employment in both an advisory and prospective witness capacity, it would defeat the policy objective of the work product rule to require a showing, as a condition to assertion of the work product limitation, that his report actually contained advisory or unfavorable information, and such a requirement should not be imposed. On the other hand, the information and opinions of the expert relevant to his status as a witness may be discovered through interrogation and deposition procedures. **[1b]** If, as asserted in the instant case, petitioner is unwilling to declare its intention respecting the prospective status of Dr. Morelli as an expert witness, the trial court, in an appropriate proceeding, would be authorized to permit dis-

covery by interrogation or deposition. (*Swartzman* v. *Superior Court, supra,* 231 Cal.App.2d 195, 204-205.)

Under the circumstances heretofore noted denial of production of the subject report would not unfairly prejudice real party in interest in preparing its defense nor result in an injustice.

Let a writ of prohibition issue as prayed.

Brown (Gerald), P. J., concurred.

EXHIBIT XI

MEMORANDUM

October 12, 1965

TO: The California Law Revision Commission

FROM: John N. McLaurin

SUBJECT: Law Revision Commission Memorandum 65-52: Study No. 36(L) -- Discovery in Condemnation Proceedings

The subject of the memorandum is directed to Senate Bill 71 and the recommendation of the Law Revision Commission in Volume No. 4 -- Discovery in Eminent Domain Proceedings dated January 1963. Hereafter we will refer to the statute and recommendations of the Law Revision Commission as the statute.

The provisions of the statute are highly desirable in that it will obviate the necessity of depositions with the attendant expense thereof. Further, it provides for uniform rules as to data to be exchange, sanctions to be imposed for failure to exchange and relief therefrom on specified grounds.

The statute should be viewed in the over-all perspective of pre-trial procedures and discovery in this

particular field, including any recommendations in the latter two areas. Consideration of this statute in connection with pre-trial procedures is necessary because of the complete lack of uniformity of pre-trial rules throughout the various counties in the State of California. Pre-trial procedures vary from county to county, as well as within the counties themselves. For example, some counties permit waiver of pre-trial upon filing a joint pre-trial statement; other counties merely have a pre-trial hearing without any required exchange of data. In Los Angeles, the Central Division of the Superior Court requires an exchange of data; however, the branch court or most of the branch courts in Los Angeles County do not. Attached hereto is a copy of the exchange requirements. These requirements parallel the statute.

The statute does not do away with the necessity of a pre-trial hearing in eminent domain proceedings, as it does not cover certain areas of law or mixed questions of law and fact which require a determination by the court as distinguished from the ultimate determination of just compensation by the jury. Under these circumstances, it may well be that this statute should be keyed to uniform pre-trial procedures which could be set forth either by statute

or by judicial council rulings. The provisions for exchange of information or waiver of ability to introduce evidence thereon during the case in chief, together with the basis for excuse thereform, could be a part of pre-trial procedure in a manner similar to that which is exercised in the Central Division of the Los Angeles Superior Court. Such provisions would do away with the confusion which has resulted in eminent domain practice to date where the trial court has varied from strict compliance with the pre-trial provisions and imposition of sanctions to a complete non-observance of any sanction and permitting testimony upon matters which were not revealed by the exchange of appraisals.

It may well be that the statute should be broadened to include and require the exchange of legal contentions concerning just compensation, as well as the reasons of the appraiser or appraisers for their opinion of value, damages, special benefits, or lack of damage and lack of special benefit. This is a highly controversial area of pre-trial and discovery. However, it may well be that such type of an exchange would aid in eliminating any unfairness between the professional public agency attorney, highly specialized in this field, as compared with the general practitioner who handles few cases. In addition,

it could eliminate elements of surprise not now eliminated by the exchange practice in Los Angeles County, and perhaps aid, assist in the settlement of condemnation cases, and further reduce the necessity of interrogatories or depositions. As compared to the exchange of factual data, the reasons of the respective appraisers for their opinions of just compensation are the guts of the appraisal.

The extension of the area of information to be exchanged may easily place one in the area of the attorney's work product. However, some of the information which is required to be exchanged by the statute in an appropriate case may fall within the area of attorney's work product, e.g. highest and best use, reasonable probability of zone change, and determination of the larger parcel. These three areas of appraisal information sometimes involve the work product of the attorney because they call for conclusions of law concerning the matter of use, zoning or area of larger parcel upon which the appraiser then bases his final and ultimate determination of just compensation. For example, the determination of the larger parcel is a mixed question of law and fact for the court's determination and requires the attorney's determination of the law and its application. Another example is found with reference to

highest and best use of the property being condemned where it is capable of joinder with property owned by others for the purpose of determining its highest and best use, where such joinder may be accomplished without the use of condemnation; again an area involving the attorney's thoughts.

The exchange of information concerning highest and best use, reasonable probability of zoning, and what constitutes the larger parcel at least indirectly could invade the work product of the attorney, as the appraiser's conclusion in appropriate cases involves the attorney's thoughts and conclusions as to the law and its application to the facts. The statute appears to be an "in lieu of discovery" type of statute. Consequently, it should expressly provide that none of the privilege defenses against discovery are abrogated.

Turning to the statute itself, it seems that the sections relating to cross demand could be eliminated by a provision that not later than 20 days prior to trial, any party serving and filing a demand for exchange of valuation data and the party so served shall serve and file their respective statements of valuation data.

Section 1246.2 of the statute which requires the name and address of witnesses is broad enough to cover

those witnesses anticipated for rebuttal. It would seem that this provision should be limited to those witnesses who will be called by a party during their case in chief.

The provision of Section 1246.2(b) which requires the exchange of the name and address of each person upon whose statements or opinion the opinion is based in whole or in substantial part, may need further definition. As it now stands, this provision would require the attorney and his appraiser to make an extra judicial determination as to what is a substantial matter relied upon by the appraiser. The court during the course of trial could disagree with the attorney's decision that a statement or opinion was an insubstantial matter upon which his appraiser relied, and because of failure to state the name and address of such person refused to admit the evidence or strike it from the record. Reduced to absurdity, it could call for the name and address of publishers of data which appraisers very often use in their reasons to substantiate their opinions, e.g. market data, trend data, cost data, or appraisal data.

Section 1246.2(d) should also include the name of the party to the transaction with whom it was verified.

Section 1246.2 of the statute is restricted to giving the name and address of the expert witness who will

express an opinion of value or the name and address of a witness who will express an opinion of value. It may well be that this provision should be broadened to include the name and address of witnesses who are expert witnesses in other areas, e.g. engineers, geologists, etc. or to even include the name and address of all witnesses which a party expects to call in his case in chief.

JNM:oim

#36(L)

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DISCOVERY IN EMINENT DOMAIN PROCEEDINGS

November 2, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

DISCOVERY IN EMINENT DOMAIN PROCEEDINGS[1]

BACKGROUND

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 make the pretrial conference more effective because each party has greater knowledge of what he can expect to prove and what the adverse party can be expected to prove against him. Second, they enable a party to learn and determine the reliability of the evidence that will be presented against him at the trial. That opinions of experts and pertinent valuation data are subject to discovery in an eminent domain case is well established in California.[2]

Nevertheless, the use of ordinary procedures in an eminent domain case to discover an expert's opinion and the data on which it is based presents special problems that do not exist when discovery is sought from an ordinary witness. These problems and the method of achieving discovery in eminent domain proceedings "with a minimum of waste motion and with fairness it all concerned" are discussed in Swartzman v. Superior Court, 231 Cal. App.2d 195, 202, 38 Cal. Rptr. 255, (1964):

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[1] The Law Revision Commission was first directed to study condemnation law and procedure in 1957. See Cal. Stats. 1957, Res. Ch. 202, p. 4589. In 1965, the Legislature again directed the Commission to study this topic. Cal. Stats. 1965, Res. Ch. 130, p. 5289.

[2] San Diego Professional Ass'n v. Superior Court, 58 Cal.2d 194, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); Oceanside Union School Dist. v. Superior Court, 58 Cal.2d 180, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); People v. Donovan, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962); Mowry v. Superior Court, 202 Cal. App.2d 229, 20 Cal. Rptr. 698 (1962). See also Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964); Scotsman Mfg. Co. v. Superior Court, 242 A.C.A. 592, ___ Cal. Rptr. ___ (1966).

The problem of fairness and mutuality in discovery proceedings involving an expert in advance of trial presents considerations absent from the case of the usual fact witness. The expert normally has no relevant information about the case but has been employed, usually by counsel, in the hope he can develop favorable relevant opinions on specific matters. The expert may examine specific items of evidence, such as questioned documents, anatomy in a personal injury, books and accounts in an accounting, specific machinery in a breach of warranty, or, as here, real property in a condemnation proceeding. If the expert forms an opinion on the subject, he has created potential relevant evidence, and if he later qualified as an expert and testifies to his opinion, he has given relevant evidence.

To complicate his position, the expert normally wears two hats. He is employed by counsel to form an opinion which he may later present as a witness in court. He is also engaged as an adviser on trial preparation and tactics for the case and in this latter capacity serves as a professional consultant to counsel on the technical and forensic aspects of his specialty. From the point of view of counsel, the expert's freedom to advise counsel, to educate counsel on the technical problems of his case, to prepare him to handle unfamiliar data in court, to analyze the availability of expert opinion and the need for its use, all without hindrance from the opposing side, are important elements of counsel's privacy of preparation. ' Consultation between expert and counsel may appropriately be given broad immunity from discovery, both as to expert and as to counsel, because none of the expert's opinion, professional though it may be, is relevant evidence in the case. To the contrary, his opinion is and will remain wholly irrelevant and immaterial as evidence until the expert is called as a witness on the trial and shown to be qualified to give competent opinion testimony on a matter in which he is versed and which is material to the case. (*United States v Certain Parcels of Land,* 15 FRD 224, 233 (DC Cal 1953).)

Under the general name of fairness the courts have continued to respect privacy of preparation for trial, even under the modern expansion of the machinery of discovery. This policy was made explicit in California by the addition in 1963 of Code of Civil Procedure, section 2016, subdivision (g): "It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts." Under such a policy a party cannot substitute the wits of his adversary's expert for wits of his own in analyzing the case. (*Hickman v Taylor,* 329 US 495, 516 [67 S Ct 385, 91 L ed 451].)

* * * * *

Nevertheless the initial status of the expert, as consultant and possible witness, changes its character at that point in the suit when it has become known he will actually testify as a witness. When it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute, then his opinion has become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery. (*San Diego Prof. Assn. v Superior Court*, 58 Cal 2d 194, 23 Cal Rptr 384, 373 P2d 448 (1962); *Brown v Superior Court*, 218 Cal App 2d 430, 32 Cal Rptr 527 (1963); *Grand Lake Drive In, Inc. v Superior Court*, 179 Cal App 2d 122, 3 Cal Rptr 621, 86 ALR2d 129 (1960).)

With recognition of these problems the courts have attempted to work out methods of mutual disclosure of the opinions of potential witnesses which will achieve desired results with minimum waste motion and with fairness to all concerned. In condemnation proceedings this has taken the form of an exchange of reports of experts during the final pretrial proceedings immediately in advance of trial. The key element is mutuality. Were the courts not rigorous in insisting on mutuality of disclosure and were they to adopt a soft and wishy-washy attitude toward recalcitrant litigants reluctant to comply with their orders, they would quickly inhibit any opinion witnesses, for parties could merely claim, as petitioners did here, they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial.

The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the party seeking discovery must be ready and willing to make an equitable exchange. (*Hickman v Taylor*, 329 US 495, 67 S Ct 385, 91 L ed 451 (1962); *Oceanside Union School Dist. v Superior Court*, 58 Cal 2d 180, 192, 23 Cal Rptr 375, 373 P2d 439 (1962); Ryan v. Superior Court, 186 Cal App 2d 813, 9 Cal Rptr 147 (1960).

A number of attorneys representing both condemnors and condemnees have advised the Commission that there is a need for legislation providing for a pretrial exchange of valuation information. Although some trial courts now require such an exchange, there is need for legislation that would establish a uniform procedure for exchange of valuation data throughout the state. Such legislation, by clearly specifying the consequences of failure to make a good faith exchange of valuation data, would do away with the uncertainty that now exists in eminent domain practice where some trial courts have imposed strict sanctions for failure to comply with the requirement of a pretrial exchange while others have not imposed any sanction for such failure. The statute would also reduce the necessity for interrogatories and depositions in those areas of the state where the superior courts have not established policies governing the pretrial exchange of valuation data. Finally, the statute would eliminate the difficulties that now arise with respect to the work product of the attorney when usual discovery techniques are used in an eminent domain case.

The Commission has concluded that the 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; it is now used in eminent domain proceedings in the Los Angeles Superior Court[3] and in the United States District Court in Los Angeles.[4] Similar procedures are provided by court rule or by statute in other states.[5]

It is true (a) that pretrial exchange of valuation data will require a party to prepare a substantial portion of his case somewhat earlier than is now the practice in some areas of the state, for the valuation data must be prepared by the time the information is required to be exchanged rather than by the time of the trial. But the pretrial exchange 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 had 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, the conference will serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data in advance, may be able to stipulate at the pretrial conference to highest and best use, to what sales are comparable, to the admissibility of certain other evidence and, perhaps, even to the amounts of certain items of damage.

Of course, this desirable objective can be fully achieved only if the pretrial rules provide for the holding of pretrial conferences in eminent domain cases subsequent to the time for exchange of the valuation data.[6]

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[3] See Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964), hearing denied by Supreme Court. See also McCoy, Pretrial in Eminent Domain Actions 38 L.A. Bar Bull. 439 (1963), reprinted in 1 MODERN PRACTICE COMMENTATOR 514 (1964).

[4] See RULE 9, UNITED STATES DISTRICT COURT IN LOS ANGELES (effective June 1, 1966).

[5] E.g., NEW YORK COURT OF CLAIMS, Rule 25a (effective March 1, 1965); MARYLAND COURT RULE U12 (effective June 1, 1963). See also PENN. EMINENT DOMAIN CODE § 703(2).

[6] The proposed statute provides for the exchange of valuation data not less than 20 days prior to trial. Under existing pretrial procedures, this time limit does not provide assurance that the data 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.

RECOMMENDATIONS

To provide for a pretrial exchange of valuation data, the Commission makes the following recommendations:[7]

1. At least 45 days prior to the trial, any party to an eminent domain proceeding should be permitted to serve on any adverse 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 should be required to serve on each other statements setting forth specified valuation data, such as the names of expert witnesses, the names of the witnesses who will testify as to the value of the property, the opinions of the valuation witnesses and certain of the data upon which the opinions are based.

A person served with a demand, within ~~five~~ 10 days from such service, should be able to serve another demand—a cross-demand—on any other party interested in the same parcel of property. This right will protect a party from being required to reveal his valuation data to a person with but a nominal interest in the proceeding while receiving no important information in return.

Compliance with these requirements will be relatively inexpensive. 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. Of course, the required listing of data is not intended to enlarge the extent to which such data may be admissible as evidence in the actual trial of an eminent domain case.

2. If a demand and a statement of valuation data are served, a party should not be permitted to call a witness to testify on direct examination during his case in chief to any information required to be listed upon a statement of valuation data unless he has listed the witness and the information in the statement he served on the adverse party. Nor should the party be permitted to call an expert witness to testify on direct examination during his case in chief unless he has listed the witness in such statement.

This sanction is needed to enforce the required exchange of the statements of valuation data. 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 a copy of the account under Code of Civil Procedure Section 454. The

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[7] These recommendations are based on the Commission's 1963 Recommendation on the same subject. See Recommendation and Study Relating to Condemnation Law and Procedure: Number 4--Discovery in Eminent Domain Proceedings, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1963). The Recommendation and an abridged version of the related study were reprinted in 1 MODERN PRACTICE COMMENTATOR 459 (1964). The legislation introduced to effectuate the 1963 Recommendation passed the Senate but died in the Assembly Judiciary Committee. See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 213 (1963). In preparing this Recommendation, the Commission has considered the objections that were made to the 1963 Recommendation.

sanction, however, should be limited to a party's case in chief so that cross-examination and rebuttal are unaffected by the required exchange of valuation data, for it is often difficult to anticipate the evidence required for proper rebuttal or cross-examination.

3. The court should be authorized to permit a party to call a witness or to introduce evidence not listed in his statement of valuation data upon a showing that such party made a good faith effort to comply with the statute, that he diligently gave notice to the adverse party of his intention to call such witness or to introduce such evidence, and that prior to serving the statement he (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect. These are similar to 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 for the court to apply the standards here.

4. The procedure recommended above for the pretrial exchange of valuation data should be supplemental to other discovery procedures. Nevertheless, the Commission anticipates that the procedure herein recommended would provide all the information that is necessary in the ordinary case and that other methods of discovery would be used only in unusual cases.

5. 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 to provide a time schedule that will permit the condemnee to obtain the map prior to the pretrial conference and prior to the time for the service of his statement of valuation data.

PROPOSED LEGISLATION

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

An act to add a chapter heading immediately preceding Section 1237 of, to amend Section 1247b of, and to add Chapter 2 (commencing with Section 1272.01) to Title 7 of Part 3 of, the Code of Civil Procedure, relating to eminent domain proceedings.

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

Section 1. A chapter heading is added immediately preceding Section 1237 of the Code of Civil Procedure, in Title 7 of Part 3, to read:

CHAPTER 1. EMINENT DOMAIN GENERALLY

Code of Civil Procedure Section 1247b (amended)

Sec. 2. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in ~~a condemnation~~ an eminent domain 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 days prior to the time of trial~~ , the plaintiff , upon request of a defendant made not later than 45 days prior to the day set for trial, shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken , and the part remaining, and shall serve an exact copy of such map on the defendant or his attorney ~~at least fifteen (15) days prior to the time of trial~~ .

At the option of the plaintiff, service shall be made either:

(a) Not later than 15 days after the plaintiff receives the request from the defendant; or

(b) Not later than 15 days prior to the day set for the pretrial conference, or, if no pretrial conference is held, not later than 30 days prior to the day set for trial.

Comment. Section 1247b is amended so that the condemnee may obtain the map prior to the pretrial conference and prior to the time for service of his statement of valuation data under Title 7.2 (commencing with Section 1272.01) of Part 3 of the Code of Civil Procedure.

Sec. 3. Chapter 2 (commencing with Section 1272.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 2. DISCOVERY IN EMINENT DOMAIN PROCEEDINGS

1272.01.

~~1246.1.~~ (a) Any party to an eminent domain proceeding may, not later than 45 days prior to the day set for trial, serve upon any adverse party to the eminent domain proceeding and file a demand to exchange valuation data.

(b) A party on whom a demand is served may, not later than ~~five~~ 10 days after the service of the demand, serve upon any adverse party to the eminent domain proceeding and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is sought to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data 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, subject to Section ~~1246.5~~ of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination during your case in chief any matter required to be set forth in your statement of valuation data."

1272.01 and 1272.02

1272.05

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement of valuation data upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement of valuation data upon the party who served the demand or cross-demand.

~~(e) The Judicial Council, by rule, may prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the times specified in this section, but only if such rules provide assurance that the trial will be held within 20 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rules may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).~~

subdivision (e) deleted

(e) If a party is represented by an attorney, service under this section shall be made on his attorney.

Comment. Section 1272.01 provides a procedure that will permit the simultaneous exchange of valuation data in eminent domain cases. The procedure is not mandatory; it applies only if a party to the proceeding wishes to exchange valuation data prior to trial.

1272.02.

~~1262.~~ The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business 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 cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose ~~statements or~~ opinion the opinion is based in whole or in substantial part.

(c) The opinion of each witness listed as required in subdivision (b) of this section as to the value of the property described in the demand or cross-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 the opinion of the witness concerning probable change thereof.

(3) A list of the ~~offers, contracts, sales of property, leases and other transactions~~ *sales, contracts to sell and purchase, and leases* supporting the opinion.

(4) The cost of reproduction or replacement of the property less depreciation ~~and~~ *or* 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) Where the property is a portion of a larger parcel, a description of the larger parcel from which the property is taken.

(d) With respect to each ~~offer, contract, sale, lease or other transaction~~ *sale, contract or lease* listed under paragraph (3) of subdivision (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 subject to the transaction.

(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 of the transaction. The statement in lieu of stating the terms contained in any contract, lease or other document may, if such document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

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existing improvements on the

the improvements have suffered

reasonable net rental value of the property, the gross income and expenses upon which it is based, the depreciation factors and rate of capitalization used, and the value indicated by such capitalization.

price

and circumstances

Comment. Section 1272.02 states the information required to be contained in the statement of valuation data.

Subdivision (a). The expert witnesses required to be listed in the statement include not only those experts the party intends to call to testify concerning value, damages, or benefits, but also those experts who will testify concerning other matters that the trier of fact must know in order to understand and weigh the valuation testimony. See EVIDENCE CODE §§ 813(b), 814. For example, in a case involving a partial taking, if a party intends to present expert testimony concerning the character of the improvement proposed to be constructed by the plaintiff (see EVIDENCE CODE § 813(b)), the proposed witness' name must be listed. Similarly, a party would be required to list the name of a structural engineer who is to testify concerning the structural soundness of an existing building, or a geologist who is to testify concerning the existence of valuable minerals on the property.

Subdivision (b). This subdivision requires that the statement include the name and address of each witness the party intends to call to give opinion testimony concerning value, damages, or benefits. The requirement of subdivision (b) is overlapped to a considerable extent by the requirement of subdivision (a) that the names and addresses of all proposed expert witnesses be included in the statement. Subdivision (b) requires the identification of those experts listed in the statement who are to give opinion testimony concerning value, damages, or benefits, and requires the listing of the owner of the property if the owner is to testify concerning value, damages, or benefits. See EVIDENCE CODE § 813(a)(2)(owner may testify concerning value).

Subdivision (b) also requires that the valuation statement list the name and address of any expert who will not be called as a witness by the party but upon whose opinion the testimony of any valuation witness he plans to call will be based in whole or in part. This information is needed by the adverse party not only for ordinary discovery purposes but also to enable him to utilize his right under Section 804 of the Evidence Code to call the expert and examine him as if under cross-examination concerning his opinion.

Subdivisions (c) and (d). These subdivisions require that the statement contain the opinion of each witness as to value, damages, and benefits, and the basic data upon which that opinion is based. Cf. EVIDENCE CODE §§ 814-821. Ordinarily the appraisal report prepared by an expert witness will contain all of the valuation data required to be contained in the statement and a copy of the report can be made a part of the statement.

(1272.03.)

~~1246.8.~~ (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

(1) Determines to call an expert witness not listed on his statement of valuation data;

(2) Determines to call a witness not listed on his statement of valuation data for the purpose of having such witness testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken;

(3) Determines to have a witness called by him testify on direct examination during his case in chief to any data required to be listed on the statement of valuation data but which was not so listed; or

(4) Discovers any data required to be listed on his statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) of this section shall include the information specified in Section ~~1246.2~~ 1272.02 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

Comment. Section 1272.03 provides a means for promptly advising the adverse party of any changes after service of the statement of valuation data. Compliance with this section is required if the party intends to call a witness or use valuation data that was not listed on the statement of valuation data. Compliance with the section does not, however, insure that the party will be permitted to call the witness or use the valuation data. See Section 1272.05.

(1272.04.) (1272.05.)

~~1246.4.~~ Except as provided in Section ~~1246.5~~ if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to Section ~~1246.1~~ 1272.01:

(a) No party required to serve and file a statement of valuation data may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the name and address of such witness are listed on the statement of the party who calls the witness.

(b) No party required to serve and file a statement of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken unless the name and address of such witness are listed on the statement of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed on a statement of valuation data unless such data is listed on the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

Comment. The sanction provided by this section is needed to insure that the parties will make a good faith exchange of the statements of valuation data. Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the statement. See Section 1272.05.

1272.05.

~~1246.5.~~ (a) The court may, upon such terms as may be just, permit a party to call a witness or to introduce evidence on direct examination during his case in chief where such witness or evidence is required to be but is not listed in such party's statement of valuation data, if the court finds that such party has made a good faith effort to comply with Sections ~~1246.1 and 1246.3~~ 1272.01 and 1272.02, that he has complied with Section ~~1246.8~~, and that, by the date of the service of his statement of valuation data, he:

~~(a)~~

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such evidence; or 1272.03,

~~(b)~~

(2) Failed to determine to call such witness or to discover or list such evidence through mistake, inadvertence, surprise or excusable neglect.

(b) In making a determination under this section, the court shall take into account the fact that the opposing party may have relied upon the statement of valuation data and may be surprised or prejudiced if the witness is called or the evidence introduced.

(c) In making a determination under this section concerning the terms upon which a party may call a witness or introduce evidence, the court may take into consideration the additional expense to which the opposing party may reasonably be subjected in investigating, confirming, and preparing rebuttal of such new witness or evidence.

Comment. This section authorizes the court to permit a party who had made a good faith effort to comply with Sections 1272.01-1272.03 to call a witness or use valuation data that was not listed in his statement of valuation data. The standards set out in the section are similar to the standards 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 the court should apply the same standards in making determinations under this section. Subdivisions (b) and (c) are not the exclusive factors to be taken into account in making determinations under this section; these subdivisions are included to direct attention to two important factors in

making such determinations.

It should be noted that nothing in Section 1272.05 precludes a party from calling a witness or introducing evidence on rebuttal; the section limits only the calling of a witness or the introduction of evidence on direct examination during his case in chief. Thus, a party is free to call additional witnesses or to introduce additional evidence not listed in his valuation statement where it is necessary to do so in order to rebut the other party's case. A party is also free to bring out additional valuation data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness even though such valuation data was not listed in his statement.

The court should exercise some diligence in confining a party's rebuttal case and his redirect examination of his witnesses to their true purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. The court should not permit a party to defeat the purpose of this chapter by reserving witnesses and evidence for use in rebuttal where such witnesses should have been used during the case in chief and such evidence elicited during direct examination.

(1272.06.) (this chapter)

~~1246.6.~~ The procedure provided in ~~Sections 1246.1 to 1246.6, inclusive,~~ does not prevent the use of other discovery procedures in eminent domain proceedings.

Comment. The pretrial exchange of valuation data provided in this chapter is supplemental to other discovery procedures. Nevertheless, because the procedure provided in this chapter will provide all the valuation information that is necessary in the ordinary case, other methods for discovering such information should be permitted only in unusual cases. For example, it would be appropriate for a court to deny a party the right to take a deposition of an expert employed by an adverse party where the procedure provided in this chapter would disclose the same information that would be secured if a deposition were taken. Cf. Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).

1272.07. this chapter

~~1246.7.~~ Nothing in ~~Sections 1246.1 to 1246.6, inclusive,~~ makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

Comment. The rules governing the admission of evidence in eminent domain proceedings are set out in Evidence Code Sections 810-822. The exchange of information pursuant to this chapter has no effect on the rules set out in the Evidence Code.

STATE OF CALIFORNIA

EDMUND G. BROWN, Governor

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

To: Persons Commenting on Tentative Recommendations of the California Law Revision Commission Relating to Condemnation Law and Procedure

The California Law Revision Commission is planning to recommend a comprehensive eminent domain statute for enactment at the 1969 session of the Legislature. During the next three years, the Commission will be preparing and distributing tentative recommendations on various aspects of this subject to interested persons for comment. These comments will be taken into account when the statute to be recommended to the 1969 Legislature is prepared.

The enclosed materials relate to discovery in eminent domain proceedings. The materials consist of:

(1) Senate Bill No. 71 (which was introduced at the 1963 legislative session) as approved by the Senate.

(2) A pamphlet containing the Commission's Recommendation and Study relating to Discovery in Eminent Domain Proceedings.

(3) Legislation and court rules relating to discovery in eminent domain proceedings recently adopted by other states and by the Superior Court of Los Angeles.

Senate Bill No. 71 passed the Senate in 1963 but died in the Assembly Judiciary Committee. The bill is explained in some detail in the Recommendation contained in the enclosed pamphlet. The amendments which were made after the bill was introduced are primarily of a technic nature.

The Commission seeks comments on whether legislation along the line of Senate Bill No. 71 is needed and desirable. In other words, are special discovery provisions similar to those set out in Senate Bill No. 71 needed for condemnation proceedings? The Commission also seeks comments on whether any changes should be made in Senate Bill No. 71 as it passed the Senate in 1963. In order to maintain our schedule on this project, would like to receive any comments you may care to make not later than June 30, 1966.

Yours truly,

John H. DeMoully
Executive Secretary

AMENDED IN SENATE MAY 7, 1963

AMENDED IN SENATE MARCH 26, 1963

SENATE BILL No. 71

Introduced by Senator Cobey
(At request of California Law Revision Commission)

January 14, 1963

REFERRED TO COMMITTEE ON JUDICIARY

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, 1246.5, 1246.6 and 1246.7 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:

1245.9. 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 45 days prior to the day set for trial, serve upon adverse party to the eminent domain proceeding and file a demand to exchange valuation data.

(b) A party on whom a demand is served may, not later than ~~five~~ *10* days after the service of the demand, serve upon any adverse party to the eminent domain proceeding and file a

cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is sought to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data 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, subject to Section 1246.5 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination during your case in chief any matter required to be set forth in your statement of valuation data."

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement of valuation data upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement of valuation data upon the party who served the demand or cross-demand.

(e) The Judicial Council, by rule, may prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the times specified in this section, but only if such rules provide assurance that the trial will be held within 20 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rules may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).

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

1246.2. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business *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 cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in substantial part.

(c) The opinion of each witness listed as required in subdivision (b) of this section as to the value of the property described in the demand or cross-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 the opinion of the witness concerning probable change thereof.

(3) A list of the ~~offers, contracts, sales of property, leases and other transactions~~ *sales, contracts to sell and purchase, and leases* 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) Where the property is a portion of a larger parcel, a description of the larger parcel from which the property is taken.

(d) With respect to each ~~offer, contract, sale, lease or other transaction~~ *sale, contract or lease* listed under paragraph (3) of subdivision (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 subject to the transaction.

(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 of the transaction. The statement in lieu of stating the terms contained in any contract, lease or other document may, if such document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

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

1246.3. (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

(1) Determines to call an expert witness not listed on his statement of valuation data;

(2) Determines to call a witness not listed on his statement of valuation data for the purpose of having such witness testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken;

(3) Determines to have a witness called by him testify on direct examination during his case in chief to any data required to be listed on the statement of valuation data but which was not so listed; or

(4) Discovers any data required to be listed on his statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) of this section shall include the information specified in Section 1246.2 and

shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

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

1246.4. Except as provided in Section 1246.5, if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to Section 1246.1:

(a) No party required to serve and file a statement of valuation data may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the name and address of such witness are listed on the statement of the party who calls the witness.

(b) No party required to serve and file a statement of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken unless the name and address of such witness are listed on the statement of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed on a statement of valuation data unless such data is listed on the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

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

1246.5. *(a)* The court may, upon such terms as may be just, permit a party to call a witness or to introduce evidence on direct examination during his case in chief where such witness or evidence is required to be but is not listed in such party's statement of valuation data, if the court finds that such party has made a good faith effort to comply with Sections 1246.1 and 1246.2, that he has complied with Section 1246.3, and that, by the date of the service of his statement of valuation data, he:

~~(a)~~

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

~~(b)~~

(2) Failed to determine to call such witness or to discover or list such evidence through mistake, inadvertence, surprise or excusable neglect.

(b) In making a determination under this section, the court shall take into account the fact that the opposing party may have relied upon the statement of valuation data and may be surprised or prejudiced if the witness is called or the evidence introduced.

SEC. 7. Section 1246.6 is added to the Code of Civil Procedure, to read:

1246.6. The procedure provided in Sections 1246.1 to 1246.5, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 8. Section 1246.7 is added to the Code of Civil Procedure, to read:

1246.7. Nothing in Sections 1246.1 to 1246.6, inclusive, makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 9. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in an eminent domain proceeding only a portion of a parcel of property is sought to be taken, the plaintiff, ~~within 15 days after a request of a defendant to the plaintiff~~ *upon request of a defendant made not later than 45 days prior to the day set for trial*, 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 *not later than 15 days prior to the day set for the pretrial conference, or, if no pretrial conference is held, not later than 30 days prior to the day set for trial*.

STATUTES AND COURT RULES RECENTLY ADOPTED IN OTHER STATES
AND IN THE SUPERIOR COURT OF LOS ANGELES

Rules of the United States District Court for the Southern District of California

See pages 720-722 of Commission's 1963 Recommendation on Discovery in Eminent Domain Proceedings for text of Rule.

New York Court of Claims

See Exhibit I (pink) attached for Rule 25a (adopted 1965).

Pennsylvania

See Exhibit III (green) for Section 703(2)(enacted 1964).

Maryland

See Exhibit II (yellow) for Rule U12 (adopted 1962).

Wisconsin

See page 729 of Commission's 1963 Recommendation on Discovery in Eminent Domain Proceedings for Wisconsin Section 32.09(8), (9) (enacted 1961)(numbered as Section 32.09(7), (8) in Commission's 1963 Report).

Los Angeles Superior Court

See Exhibit IV (buff) for extract from Swartzman v. Superior Court, 41 Cal. Rptr. 721 (1964) regarding Policy Memorandum of the Los Angeles Superior Court in Eminent Domain Cases, dated July 1, 1963, which contemplates an exchange of valuation data at pretrial.

EXHIBIT I

NEW YORK - COURT OF CLAIMS
New Rule 25a

1. Within six (6) months from the date of the filing of a claim in an appropriation case the parties shall file with the Clerk of the Court four (4) copies of their appraisals which shall set forth separately as to vacant land and improvements the valuation and data upon which such evaluations are based, including but not limited to the before value of the property, the after value, direct, consequential and total damages and details of appropriations, comparable sales and other factors utilized. If all of the details required by Section 16 (3) of the Court of Claims Act relating to alleged comparable sales are included in the appraisal report prescribed herein, the same shall be deemed compliance with Section 16 (3) of the Court of Claims Act.

2. When the Clerk shall have received the appraisal reports of all parties he shall send to each attorney of record a copy of the appraisal report of all other parties to the claim.

3. Within thirty (30) days after the service upon a party of an appraisal report of any other party, any party to the proceeding may file and serve on all other parties an amended or supplemental appraisal report or reports.

4. Within sixty (60) days after the final filing and service of appraisal reports or amended or supplemental appraisal reports a party may because of unusual developments or circumstances, make a motion for permission to file and serve an additional appraisal report or amended or supplemental reports, the granting of which application shall rest in the sound discretion of the Court as the interests of justice may require.

5. A party confronted with unusual and special circumstances requiring more time than prescribed above for the filing of appraisal reports may make an application upon notice for an extension of time which extension, in the sound discretion of the Court, may be granted for such period and under such conditions as the Court deems proper.

6. (a) Upon the trial of a claim for the appropriation of property the parties shall be precluded from offering any proof on matters not contained in the appraisal reports or amended or supplemental appraisal reports as required by this Rule; however, a party may, notwithstanding his failure to comply with this Rule, offer proof on matters contained in Bills of Particulars and Examinations before Trial in accordance with the usual procedures and Rules of this Court.

(b) This Rule shall not apply to a party who files a statement within six (6) months of the filing of a claim to the effect that he will not introduce expert evidence of value and damages upon the trial.

7. Six (6) months after the filing of a claim for damages for the appropriation of property a Judge, designated by the Presiding Judge, may conduct a pre-trial conference to be attended by every party's trial counsel or lawyer with dispositive authority. At least eight (8) days notice thereof shall be given by the Clerk to each party or lawyer of record; this provision amends and supplements present Rule 5 (a).

8. The purposes and intent of this Rule are (a) to aid and encourage the early disposition and settlement of appropriation claims and (b) to compel a full and complete disclosure so as to enable all parties to more adequately and intelligently prepare for a trial of the issues.

9. This Rule shall apply to all claims filed on and after March 1, 1965.

EXHIBIT II

MARYLAND — COURT RULE U12

Rule U12. Discovery.

a. *Generally.*

In a proceeding for condemnation pre-trial discovery shall be permitted and shall be governed by Chapter 400 (Depositions and Discovery) of the Maryland Rules, except as herein otherwise provided.

b. *Additional Subjects of Discovery.*

In addition to the documents and matters which he may discover under Rules 410 (Scope of Examination) and 417 (Discovery by Interrogatory to Party), but subject to the provisions of Rule 406 (Order to Protect Party and Deponent), a party to a proceeding for condemnation may:

(1) By written interrogatory or by deposition require any other party to produce and submit for inspection, or to furnish a copy of, all written reports of experts pertaining to the value of the property sought to be condemned or any part thereof, whether or not such expert is to be called as a witness, and whether or not such report was obtained in anticipation of litigation or in preparation for trial.

(2) By written interrogatory or by deposition require any other party to disclose the identity and location of every expert whom such other party has caused to examine the property sought to be condemned or any part thereof for the purpose of determining its value, whether or not such expert is to be called as a witness, and whether or not such examination was procured in anticipation of litigation or in preparation for trial.

(3) By written interrogatory or by deposition require any other party to disclose the identity and location of every expert whom such other party proposes to call as a witness.

(4) By deposition on written questions or oral examination, examine any expert whose identity and location are obtainable under the provisions of this section, as to such expert's findings and opinions. An expert so examined shall be entitled to reasonable compensation therefor, to be paid him by the party examining him.

EXHIBIT III

PENNSYLVANIA -- SECTION 703

Section 703. Trial in the Court of Common Pleas on Appeal. —At the trial in court on appeal:

* * * * *

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after the condemnation and his opinion of the highest and best use of the property before the condemnation and of any part thereof remaining after the condemnation, on the opposing party at least ten days before the date when the case is listed for pre-trial or trial, whichever is earlier.

Comment:

This clause introduces a new concept in eminent domain cases. Existing law does not require disclosure of the names of valuation experts at any time. The purpose of this provision is to eliminate the surprise element in many cases when one expert is used before the viewers and another, with a different valuation and opinion of the highest and best use of the property, is called at the trial.

* * * * *

EXHIBIT IV

Los Angeles Superior Court

EXTRACT FROM SWARTZMAN V. SUPERIOR COURT

Cal. Rptr. 721 (D.C.A., 2d Dist., Dec. 14, 1964)

(Hearing Denied Feb. 10, 1965)

(3) *Pretrial Order*

[8-10] The pretrial order of August 19 provided for an exchange of appraisal reports. Petitioners contend there is no requirement that an owner whose property is being taken in eminent domain proceedings obtain the services of an appraiser and incur the expense of an appraisal report. This is correct. The defendant-owner himself may testify to the value of his property and submit valuation data. But the court may require him to disclose the facts and circumstances on which he intends to rely at the time of trial to support his valuation and to disclose this data in advance of trial pursuant to regular court procedures. The Policy Memorandum of the Los Angeles Superior Court in Eminent Domain Cases, dated July 1, 1963, contemplates an exchange of valuation data at pretrial. Such an exchange provides an appropriate and effective method for the dispatch of this type of litigation and is authorized by Code of Civil Procedure, sections 2031(a) and 2019(b) (1), which latter section provides:

"* * * upon motion seasonably made by any party * * * or *upon the court's own motion* and after giving counsel an opportunity to be heard, and in either case for good cause shown, the court in which the action is pending may make an order * * * *that the parties shall simultaneously file specified documents or information* * * * to be opened as directed by the court; or the court may make *any* other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." (Emphasis added.)

Exchange in advance of trial of data on which a party intends to rely to establish valuation has been approved by our Supreme Court and by the Federal courts (from which our discovery rules were derived) as an appropriate means of compelling mutual disclosure of relevant information sufficiently ahead of time to permit each party to study the contentions of the other and explore their validity outside the courtroom rather than at the trial itself. The beneficial effects of pretrial disclosure are too well known to require extended comment here. On the specific point it is sufficient to refer to Oceanside Union School District v. Superior Court, 58 Cal.2d 180, 192, 23 Cal.Rptr. 375, 383, 373 P.2d 439, 447, where the court said: "The trial court, in the exercise of its discretion, might have ordered the matter held in abeyance until such time as the parties were in a position to trade appraisals (as is done in the federal district courts)"; and to the case of Mowry v. Superior Court, 202 Cal.App.2d 229, 244, 20 Cal.Rptr. 698, 707, in which the court said: "To obviate the injustice of discovery in this respect being a 'one-way street' it seems to us proper to, and we do, rule that *an exchange* of 'comparable sales' information between condemnor and condemnee is contemplated by the Discovery Act, as interpreted by the Greyhound decision [Greyhound Corporation v. Superior Court, 56 Cal.2d 355, 15 Cal.Rptr. 90, 364 P.2d 266] * * *."

[11] We specifically approve the Los Angeles Superior Court policy of compulsory mutual exchange of full appraisal data in advance of trial.

(4) Protective Order

Petitioners attack the order prohibiting the taking of the deposition of the State's independent appraiser, contending that Code of Civil Procedure, section 2016, gives a party an absolute right to take the deposition of anyone at any time, and that a writ of mandate should issue to compel such discovery when denied by the trial court.

The State argues that Code of Civil Procedure, section 2019(b) (1), permits the trial court to control the exercise of discovery in order to make it mutual and reciprocal and fair; that it authorizes the court to enter protective orders to prevent abuses of discovery; and that justice in this case required the exercise of such control in order to preserve fairness and mutuality.

The problem of fairness and mutuality in discovery proceedings involving an expert in advance of trial presents considerations absent from the case of the usual fact witness. The expert normally has no relevant information about the case but has been employed, usually by counsel, in the hope he can develop favorable relevant opinions on specific matters. The expert may examine specific items of evidence, such as questioned documents, anatomy in a personal injury, books and accounts in an accounting, specific machinery in a breach of warranty, or, as here, real property in a condemnation proceeding. If the expert forms an opinion on the subject, he has created potential relevant evidence, and if he later qualifies as an expert and testifies to his opinion, he has given relevant evidence.

[12] To complicate his position, the expert normally wears two hats. He is employed by counsel to form an opinion which he may later present as a witness in court. He is also engaged as an adviser on trial preparation and tactics for the case and in this latter capacity serves as a professional consultant to counsel on the technical and forensic aspects of his specialty. From the point of view of counsel, the expert's free-

dom to advise counsel, to educate counsel on the technical problems of his case, to prepare him to handle unfamiliar data in court, to analyze the availability of expert opinion and the need for its use, all without hindrance from the opposing side, are important elements of counsel's privacy of preparation. Consultation between expert and counsel may appropriately be given broad immunity from discovery, both as to expert and as to counsel, because none of the expert's opinion, professional though it may be, is relevant evidence in the case. To the contrary, his opinion is and will remain wholly irrelevant and immaterial as evidence until the expert is called as a witness on the trial and shown to be qualified to give competent opinion testimony on a matter in which he is versed and which is material to the case. (United States v. Certain Parcels of Land, D. C., 15 F.R.D. 224, 233.)

[13] Under the general name of fairness the courts have continued to respect privacy of preparation for trial, even under the modern expansion of the machinery of discovery. This policy was made explicit in California by the addition in 1963 of Code of Civil Procedure, section 2016(g): "It is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts." Under such a policy a party cannot substitute the wits of his adversary's expert for wits of his own in analyzing the case. (Hickman v. Taylor, 329 U.S. 495, 516, 67 S.Ct. 385, 91 L.Ed. 451.)

Coincidentally in 1963, New York adopted a comparable policy restricting disclosure of material prepared for litigation, including opinions of experts prepared for litigation. (New York, C.P.L.R. § 3101(d).)

[14] Nevertheless the initial status of the expert, as consultant and possible witness, changes its character at that point in the suit when it has become known he will actually testify as a witness. When it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute, then his opinion has become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery. (San Diego Professional Assn. v. Superior Court, 58 Cal.2d 194, 23 Cal.Rptr. 384, 373 P.2d 448, 97 A.L.R.2d 761; Brown v. Superior Court, 218 Cal.App.2d 430, 32 Cal.Rptr. 527; Grand Lake Drive In v. Superior Court, 179 Cal.App.2d 122, 3 Cal.Rptr. 621; 86 A.L.R.2d 129.)

With recognition of these problems the courts have attempted to work out methods of mutual disclosure of the opinions of potential witnesses which will achieve desired results with minimum waste motion and with fairness to all concerned. In condemnation proceedings this has taken the form of an exchange of reports of experts during the final pretrial proceedings immediately in advance of trial. The key element is mutuality. Were the courts not rigorous in insisting on mutuality of disclosure and were they to adopt a soft and wishy-washy attitude toward recalcitrant litigants reluctant to comply with their orders, they would quickly inhibit any genuine disclosure in advance of trial in the case of opinion witnesses, for parties could merely claim, as petitioners did here, they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial.

[15] The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the party seeking discovery must be ready and willing to make an equitable exchange. (Hickman v. Taylor, 329 U.S.

495, 67 S.Ct. 385, 91 L.Ed. 451; Riverside Union School District v. Superior Court, 58 Cal.2d 190, 192, 23 Cal.Rptr. 375, 373 P.2d 439; Ryan v. Superior Court, 186 Cal.App.2d 813, 9 Cal.Rptr. 147.)

[16] In this case no good cause was shown for the taking of the deposition of the State's potential expert witness in advance of the exchange of appraisal data ordered by the court. In the case of expert opinion witnesses good cause normally must be shown to compel a deposition in advance of trial, and in the absence of good cause a motion to quash the deposition is justified. (Grand Lake Drive In v. Superior Court, 179 Cal.App.2d 122, 130–131, 3 Cal.Rptr. 621, 86 A.L.R.2d 129.) After an exchange of appraisal data has taken place, the deposition may become unnecessary, or depositions of experts on both sides may be appropriate, or depositions on limited aspects of the case may be in order. The principle of mutuality will continue to serve the court in whatever subsequent orders it makes.

[17] Here, petitioners refused offers of mutual exchange of data, petitioners refused an offer of simultaneous depositions of experts on both sides after the State's appraisal witness had finished his preparation. Petitioners, in open court, on July 21, August 11, August 19, September 4, and September 18, stated they had not obtained an appraiser, did not know whether they would obtain an appraiser, would not agree to commit themselves not to use an appraiser at the time of trial, and insisted on their absolute right to depose the opposing side's appraisal witness without any mutual simultaneous exchange of valuation data. Clearly, petitioners sought to play their hand with their cards close to their chest while demanding that their opponent play its cards face up from the table. Such one-way discovery, no give and all take, would quickly drive fairness and mutuality out of pretrial investigation.

We conclude that no good cause was shown for the taking of the expert's deposition prior to the exchange of appraisal data ordered by the trial court, that the protective order properly issued.

4

SEC. 7. Section 1954.5 is added to the Civil Code, to read:

1954.5. (a) Except as provided in subdivision (b), the legal consequences of the actions of the parties to a lease of real property as provided in Sections 1951, 1951.5, and 1952, and the legal remedies available upon breach of a lease of real property as provided in Sections 1953 and 1954, are not subject to modification by the prior agreement of the parties.

(b) The parties to a lease of real property may, by contract made at any time, waive any right of either or both parties to specific enforcement of the lease.

(c) This section does not affect any agreement for the arbitration of any dispute that has arisen or may arise under a lease of real property.

(d) This section applies only to leases that were executed or renewed on or after the effective date of this section.

Comment. Sections 1951, 1951.5, 1952, 1953, and 1954 are designed to make the ordinary rules of contract law applicable to leases of real property and thus relieve both lessors and lessees of the forfeitures to which they had been subjected by the application of feudal property concepts. Subdivision (a) of Section 1954.5 will secure to the parties the benefits of the preceding sections by prohibiting the restoration of the previous system of lease law by standard provisions in leases.

Subdivision (b) permits a waiver of the right to specific performance because such a waiver does not result in a forfeiture or an uncompensated loss. A lease containing such a waiver provides in substance for an alternati-

performance--actual performance or payment of damages in lieu thereof.

Subdivision (c) makes it clear that this section is not intended to limit the arbitrability of disputes arising under leases of real property, nor is it intended to limit the powers that may be exercised by the arbitrators of such disputes.

Under subdivision (d), a provision in a lease that specifies remedies at variance with those specified in Sections 1951-1954 may be enforced only if the lease containing the provision antedates the effective date of this section. Sections 1951-1954 prescribe the remedies that may be used to enforce a lease that does not contain any provisions governing the available remedies.

§ 1954.7. Mineral leases

SEC. 8. Section 1954.7 is added to the Civil Code, to read:

1954.7. An agreement [redacted] for exploration for the [redacted] removal of [redacted] natural resources [redacted] is not a lease of real property within the meaning of this chapter.

Comment. The so-called oil and gas lease has been characterized by the California Supreme Court as a profit a prendre in gross. Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935). Other mineral leases are also distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while the mineral lease contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

The sections in this chapter dealing with leases of real property are intended to deal with the ordinary lease of real property, not with mineral leases. Accordingly, Section 1954.7 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to mineral leases. Section 1954.7 does not prohibit application to mineral leases of any of the principles expressed in this chapter, it merely provides that the statutes found here do not require such application.

§ 3324. Attorney's fees

3324. (a) In addition to any other relief to which a lessor or lessee is entitled in enforcing or defending his rights under a lease of real property, he may recover reasonable attorney's fees incurred in obtaining such relief if the lease provides for the recovery of such fees.

(b) If a lease of real property provides that one party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. If a lease of real property provides that one party to the lease may recover attorney's fees incurred in successfully defending his rights under the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in successfully defending his rights under the lease. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

Comment. Leases, like other contracts, sometimes provide that a party is entitled to recover a reasonable attorney's fee incurred in successfully enforcing or defending his rights in litigation arising out of the lease. Section 3324 makes it clear that the remaining sections in the article do not impair a party's rights under such a provision.

Subdivision (b) is included in the section to equalize the operation of leases that provide for the recovery of an attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other seldom has sufficient bargaining power to require the inclusion of a provision

for attorney's fees that works in his favor. Under Section 3324, if either party is entitled by a provision in the lease to recover attorney's fees, the other may recover such fees under similar circumstances. To prevent the provisions of subdivision (b) from being nullified by standard waiver provisions in leases, the second sentence of subdivision (b) prohibits the waiver of a party's right to recover attorney's fees under the subdivision until the right actually accrues.

§ 3327. Mineral leases

3327. An agreement to permit the use of real property as an incident to the discovery and removal of oil and gas or other minerals in return for compensation for the minerals removed pursuant to the agreement is not a lease of real property within the meaning of this chapter.

Comment. The so-called oil and gas lease has been characterized by the California Supreme Court as a profit a prendre in gross. Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935). Other mineral leases are also distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while the mineral lease contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

The previous sections in this chapter are intended to deal with the ordinary lease of real property, not with mineral leases. Accordingly, Section 3327 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to mineral leases. Section 3327 does not prohibit application to mineral leases of any of the principles expressed in this chapter, it merely provides that the statutes found here do not require such application.