#36 4/10/67

Memorandum 67-27

Subject: Senate Bill No. 253 (Discovery in Eminent Domain Proceedings)

Attached as Exhibit I (pink) is a copy of a letter from Mr. Richard Barry, a Commissioner of the Central District of the Los Angeles Superior Court. Mr. Barry's letter responds to our request for his suggestions concerning Senate Bill No. 253, as amended in the Senate March 9, 1967. A copy of the bill in its latest amended form is attached.

At the outset, it should be noted that there is substantial opposition to this bill, primarily from public agencies. The bill has passed the Senate and we suggest that it not be further amended unless absolutely necessary. We can, however, revise the comments in an Assembly report without having to have the bill again approved by the Senate.

Mr. Barry speaks, of course, from a working familiarity with the procedure in eminent domain cases of the Los Angeles Central District and, as he notes, his letter raises basic questions as to the respective merits of a supplementary statutory discovery procedure (such as would be provided by Senate Bill No. 253) and some other form of disclosure (such as that effectuated by the Los Angeles procedure). His letter also raises several points worthy of the Commission's consideration even assuming that a supplementary discovery statute is to be enacted.

Impact of the bill upon the Los Angeles procedure

On pages 6 and 7 of his letter, Mr. Barry expresses his view that, if the legislation is adopted, it "should be a minimum requirement which would not necessarily limit the adoption of rules or policy as may be required." His specific suggestion is that "it would seem well to preserve the right of the court to supplement the legislation" and he observes that this

"might be most difficult if Senate Bill No. 253 were enacted" (page 7). On the other hand, one argument advanced by the Commission in support of the bill is that uniformity in all counties is desirable at least insofar as the exchange of valuation opinions and data is concerned. It also appears to have been the assumption of the Commission, as well as of those attorneys particularly concerned with the Los Angeles procedure, that the scheme of Senate Bill No. 253 would supplant that portion of existing Los Angeles procedure that provides for an exchange of appraisal reports.

In view of Mr. Barry's comments, it is necessary to consider the precise impact that enactment of the legislation would have upon the procedure of the Los Angeles Central District. The Commissioners will recall that the existing Los Angeles system is based upon, and geared to, the holding of two pretrial conferences. A copy of the Los Angeles policy memorandum is attached as Exhibit II (yellow) for your convenience. Indeed, the policy memorandum recites that it implements California Rules of Court, Rules 206 to 222, which deal with pretrial. (See paragraph 1 of the memorandum.) Although the policy memorandum does not set forth the requirement, the practice is for the first pretrial order to require the filing of appraisal reports prior to the final pretrial conference. (The summary of the opinions of appraisers required by paragraph 22 of the memorandum is distinguishable and apparently is calculated to facilitate settlement efforts at the final pretrial conference.) A copy of the usual order included in the first pretrial conference order is included as Exhibit III (green). The marked similarities between the content of the order and the provisions of Senate Bill No. 253 should be noted. The essential differences between the Los Angeles practice and that envisioned by Senate Bill No. 253 therefore reduce to these:

(1) The Los Angeles order is made in every case; valuation statements would be exchanged under Senate Bill No. 253 only if a party initiates the procedure.

(2) In Los Angeles appraisal reports are exchanged only "if the court determines said reports to be comparable, and that it appears just and proper to do so"; the valuation statements under Senate Bill No. 253 are always exchanged.

(3) The Los Angeles exchange is in camera and therefore exactly simultaneous; the exchange under Senate Bill No. 253 is accomplished by filing and service and is required to be simultaneous only insofar as that result is accomplished by the requirement that the reports be served not later than 20 days prior to the day set for trial.

(4) Under the Los Angeles procedure the party receives the adverse appraisers' reports; under Senate Bill No. 253, he receives a "statement of valuation data" prepared by adverse counsel.

In all other respects, and having in mind the total procedure before trial and the sequence and timing involved, the differences between the two procedures would appear to be insignificant.

The question, therefore, of the effect of enactment of Senate Bill No. 253 upon the existing Los Angeles rules is one that should be clarified by an appropriate revision of the official comments. Incidentally, this problem is limited to Los Angeles. The staff has checked other counties (particularly San Diego and Alameda) and even though they may order, at the time of pretrial, an exchange of comparable transactions prior to trial, these procedures would present no conflict with Senate Bill No. 253. Leaving the Los Angeles rules in effect after enactment of Senate Bill

No. 253 conceivably could be justified as a method of achieving reciprocity in discovery (quite apart from the simplified exchange envisioned by Senate Bill No. 253) and as a further implementation of pretrial. It could also be said that the Los Angeles procedure fully encompasses, and therefore is not inconsistent with, the procedure of Senate Bill No. 253. A more plausible view would be that Los Angeles may retain its dual pretrials and all other features of its procedure, but that the rules have been supplanted by Senate Bill No. 253 insofar as the compulsory exchange of valuation opinions and data is concerned. Although there are matters other than the exchange of appraisal reports accomplished at the second Los Angeles pretrial (see paragraphs 20 through 24 of the Los Angeles policy memorandum), it would probably be found that those matters could be dealt with by the trial department and that the need for a second pretrial conference would be eliminated by Senate Bill No. 253. It seems clear that members of Mr. Huxtable's committee and other attorneys particularly concerned with the Los Angeles procedure have expected that enactment of Senate Bill No. 253 would result in a change in Los Angeles procedure and, specifically, in elimination of any need for the second pretrial conference.

The staff therefore suggests that a comment be added to Section 1272.01 to state, in effect, that addition of the chapter is not intended to prevent the adoption or continuation of court rules or policies concerning pretrial conferences, the calendaring of such conferences, reciprocity of discovery, or the compulsory exchange of appraisal reports, including an in camera exchange, but that the chapter is intended to entitle all parties to eminent domain proceedings to avail themselves of the procedures of that chapter notwithstanding local rules or procedures. In short, the comment would

express the intention that counties such as Los Angeles may adopt other or additional procedures, but that such procedures could not preclude resort by a party to the precise provisions of Senate Bill No. 253. That disposition of the matter will leave the Los Angeles court and bar free to make whatever adaptation may seem necessary to them. A suggested revised comment is included in a draft of a report for the Assembly Judiciary Committee (attached as Exhibit IV--buff).

Relation and resemblance to other discovery procedures

On pages 2 and 3 of his letter, Mr. Barry raises several questions as to the approach of Senate Bill No. 253 as a discovery procedure. Specifically he asks whether a party could compel compliance with the demand or cross-demand for an exchange of valuation data on the thought that the procedure provided by Senate Bill No. 253 is not distinguishable from any other discovery device. The simple answer is that the only sanction or enforcement envisioned by Senate Bill No. 253 is the exclusion of evidence at the trial. See Section 1272.04. Although this seems clear enough from the provisions of the bill itself, it would be appropriate to expand the comment to Section 1272.04 to indicate that the sanction of that section is the only one envisioned by the chapter and that application of the other sanctions provided principally by Code of Civil Procedure Section 2034 is not contemplated. A suggested revision is included in Exhibit IV.

Mr. Barry further questions whether or not the bill will have a tendency to defer preparation for trial until 20 days before trial and then, at that time, give rise to a flurry of further discovery and possible postponement of the trial date. It is true that the timing specified by

Senate Bill No. 253 contemplates that the party may use the exchange of valuation data in preparing for trial, but not as the initiation of discovery. It would not seem, however, that the exchange of data would typically give rise to extensive further discovery. Initially the party and his attorney should be aware of any peculiar factual problems or contentions in the case, and would reach those by other discovery devices. Secondly, the party can anticipate rather precisely the sort of information that will be obtained in the exchange under Senate Bill No. 253. Specifically, he will receive opinions and the definite items of supporting data listed in the bill. Actually it is rather difficult to imagine a case in which competent counsel will be genuinely surprised by the opinions and data in such a way as to make further discovery essential. He may well be displeased by the figures, or even the valuation theories disclosed, but those are not the sort of matters that can be overcome by further discovery. The Commissioners will recall that the bill has been amended to require that the statement be exchanged 20, rather than 10, days before trial. This change will permit more time for verification of the data received, and will allow time for such a motion as one under Code of Civil Procedure Section 2031 to compel the production of documents or other things for inspection or copying. It seems plain from the very scheme of Senate Bill No. 253, however, that a party is not to be permitted to use his "surprise" at the information received as an excuse to launch an original and extensive program of discovery.

In the first full paragraph on page 5, Mr. Barry questions the wisdom of the sentence beginning on line 51 of page 3 of the bill. That provision permits reference to a document representing an allegedly comparable transaction in lieu of a statement of "the price and other terms and circumstances of the transaction." The provision obviously would be of some sense and

benefit with respect to such documents as 200-page shopping center leases. It also seems fair to expect the party advised of an allegedly comparable transaction to do a modicum of "leg work" for himself. In any event, the provision should not "open the door for a lot of additional discovery." The document either is or is not available for inspection, and that question and any related difficulties should be resolvable. The staff therefore recommends retention of the sentence.

With further respect to the timing set forth in Senate Bill No. 253, Mr. Barry refers to the Orange County Municipal Water District decision and other possible "motivations to delay." The Orange County decision merely applies the 40-day proviso in Code of Civil Procedure Section 1255a, which deals with the recovery of expenses on abandonment. The Commissioners will recall the recommendation to delete that proviso in the Commission's recommendation on possession in eminent domain proceedings. In any event, Senate Bill No. 253 should have no appreciable effect upon the recovery of expenses in the event of abandonment. Under Code of Civil Procedure Section 1255a expenses are recoverable unless the proceeding is dismissed 40 or more days prior to pretrial. Therefore under either the procedure of Senate Bill No. 253 or of the existing Los Angeles policy the expense of preparing data for purposes of the required exchange would always be recoverable in the event of abandonment.

The in camera exchange and good faith preparation of the statement of valuation data

At the bottom of page 3, Mr. Barry refers to the fact that Senate Bill No. 253 does not provide for an exchange of appraisal reports, but rather for an exchange of valuation statements prepared by attorneys. He notes that "the bill, however, provides that the statements are those of

the parties." It would not appear to be of any substantial consequence whether the requirements of Senate Bill No. 253 are addressed to the parties or to their attorneys, but conformity to other provisions of the Code of Civil Procedure would dictate that all such requirements be directed to the parties.

On page 4 and on page 6, Mr. Barry refers to various problems that might arise in preparation of the valuation statements and to the fact that such statements are not verified. It is true that California has had only limited experience with the sort of statement required by Senate Bill No. 253 and with the sanction of exclusion from evidence. It would appear, however, that an attorney could, without too great a hazard of mistake or distortion, prepare and file the specific opinions and supporting data listed in Section 1272.02. In an appropriate case the attorney could ask for relief from "mistake, inadvertence, surprise, or excusable neglect," under Section 1272.05. Further, "explanation or elaboration of data so listed" is not made inadmissible in any event. See Section 1272.04(c). It should also be noted that certain of these problems are not unique to Senate Bill No. 253 but are also raised by the Los Angeles procedure and appear not to have lead to inordinate difficulty under that procedure.

Relation of the valuation statement to pleadings and pretrial statement

On page 5, Mr. Barry states that "with reference to the requirement that the statement of valuation set forth the value of the property, the damages, etc., I should expect that this would have to be amended to require that these matters be set forth *if* and to the extent that they are different than as set forth in the pleadings or the joint pretrial statements of the parties or the pretrial order." With respect to this point (and

related ones mentioned on pages 5-7), it does not seem that enactment of Senate Bill No. 253 would introduce any new problems in the relationship of the valuation evidence to the contentions of the parties as set forth in the pleadings and pretrial order. Basically, the operation of Senate Bill No. 253 has nothing to do with the pleadings, pretrial, interim trials, or other steps in the entire eminent domain proceeding.. Senate Bill No. 253 deals entirely with evidence (i.e., opinions and supporting data). Its only effect is to require that the specifics of this evidence be disclosed to the other side or not introduced at the trial. In other words, Senate Bill No. 253 provides a simplified form of discovery and nothing more. Enactment of the bill would have no bearing upon such oddities of eminent domain procedure as the requirement that the condemnee allege the value of his property in his answer, presumably before he has had an opportunity to have the property appraised (and which alleged value may differ from the evidence which he subsequently produces at the trial).

In summary, it would appear that most of the searching questions raised by Mr. Barry are directed to the novelty and untried nature of the disclosure procedure provided by Senate Bill No. 253 and cannot be allayed by anything other than experience under the bill.

The problem of multiple defendants

The last problem raised by Mr. Barry relates to those cases in which there are multiple defendants with divergent interests (see the last paragraph, page 7). It is true that a lessor, for example, could not resort to the procedure to obtain the valuation data of a lessee without having that data filed and thereby made available to the condemnor. That result, however, is also a characteristic of existing discovery procedures.

If, for example, the lessor notices a deposition of the lessee's appraiser, the condemnor thereby reaps a similar windfall of information. Even under the Los Angeles system of in camera exchange, it would seem that in a triangular dispute the condemnor would receive information which the two defendants might desire to conceal.

The second related point raised by Mr. Barry (see the first paragraph on page 8) is entirely valid. The plaintiff must, as a practical matter, serve its demand or cross-demand upon every defendant entitled to present valuation testimony. It would seem unnecessary for the plaintiff to serve such parties as the tax collector, lien holders, and others whose claims are unaffected by the ultimate determination of the value of the property. This would not appear to be an unduly burdensome practical requirement, however. Ordinarily the plaintiff would want to obtain any valuation data accumulated by any such party as a lessor, lessee, vendor, or purchaser. Even though the plaintiff is entitled to a unitary assessment of the value of the property (under Code of Civil Procedure Section 1246.1), it can never be entirely certain which of two substantially interested parties is going to carry the burden of the valuation trial. The single objection to the operation of the bill in this respect would seem to be that there is at least the possibility that an unwary plaintiff might neglect to serve a party entitled to present valuation testimony and thereby be wholly surprised by the testimony presented at the trial. The well-known expertise and thoroughness of counsel for condemning agencies should obviate any substantial objection to the bill on this score.

Incidentally, Mr. Barry questions the purpose of providing for a cross-demand (see pages 4-5). As pointed out in the recommendation, this

provision is included to permit a party upon whom a demand is served to serve a cross-demand on other parties who may offer valuation data, but the cross-demand need not be served on the party who served the demand. The revised comment to Section 1272.01 makes this clear.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

67-27

EXHIBIT I

The Superior Court

111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

March 27, 1967

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

The purpose of this letter is to respond further to your letter of March 10, 1967 with reference to the revised draft of Senate Bill No. 253 relating to discovery in eminent domain proceedings. I hope you will receive it in time and that my thoughts on the subject will be of some assistance to you.

You will understand, I am sure, that the questic[illegible] raised are mine and I am not speaking for the court. While mindful of the benefits of our existing policy, I would not want to question any revision, should better procedures be offered. Further, I appreciate that there has been consider-able study and, for all I know, the questions I raise may have heretofore been considered.

The questions that presently occur to me are sub-mitted with the thought that if they are valid questions they should be raised now and studied legislatively to avoid, as much as possible, any problems of interpretation for our trial and appellate courts.

The more basic questions I am attempting to raise have to do with the distinctions I would make between a statutory discovery procedure and other forms of disclosures. These distinctions may appear at first to be academic but I think they should be considered to avoid some practical problems.

You have stated that Senate Bill 253 in substance adopts the United States District Courts' procedure (by rule) of exchange of valuation information. I believe there may be a significant difference. While it appears that eac[illegible] procedure provides for the filing of a statement of valua-tion data twenty days before the date of trial, the Federa[illegible]

procedure seems to be more characteristic of a trial brief than the usual statutory discovery procedure. Although the Federal rule requires certain contentions and assertions with respect to prospective valuation evidence, it appears to me that it may be more of a last-ditch housekeeping requirement for effective trial after discovery and pretrial is complete. As I construe it, (although the narrative statement of evidence required by the Federal rule does limit the admissibility of evidence, as does Senate Bill No. 253) the Federal rule requires a completion of all discovery before pretrial and, therefore, before the filing of the narrative statements.

Does not Senate Bill 253 initiate the exchange procedure as a discovery procedure and make that procedure subject to all other discovery procedures? Particularly, would that not be so by reason of the new Section 1272.06 which provides that the use of other discovery procedures is not prevented or limited under the proposed legislation? Would there not be a tendency to defer preparation for trial until twenty days before trial? I do not suppose it was intended that the exchange of valuation data invite other discovery procedures right up to time of trial. However, a contrary intent is not expressed.

(Of incidental interest, see Orange County Municipal Water District v. Anaheim Union Water Co. (1967), 248 A.C.A. 374 as an example of the consequence of delay in a particular situation which might provide further motivation to delay.)

I realize that it is apparently intended that any controversy arising from this demand and cross-demand procedure (as provided in Senate Bill No. 253) will be settled at time of trial by rulings on the admissibility of evidence. Nevertheless, will there not be room for argument: that since it is also a discovery procedure (independent of and commencing after pretrial) that it contemplates an exercise of all rights set forth in Sections 2016 C.C.P., et seq., even though it may be necessary to continue, adjourn or vacate trials so that such rights may be exercised?

With respect to the above, numerous possibilities might be detailed making this letter unduly long (more so, that is). Just as an illustration, assume a party is not satisfied to object to the admissibility of evidence and elects instead to move to compel further response, to

subpoena the production of records, to take depositions, submit interrogatories, etc., contending a denial thereof will prejudice his presentation of his case. Is this not invited by the Legislation in its present form?

On page 21 of the 1966 Annual Report of the California Law Revision Commission, the final sentence reads: "Of course, this objective can be fully achieved only if the pretrial rules provide for the holding of the pretrial conference subsequent to the time for exchange of valuation data." While I do not see the necessity for a conference subsequent to the exchange (and, judging from the recommendations made, neither does the Commission), I am unable to ascertain the reasons for initiating an exchange, as discovery, so close to time of trial that would seem to invite other discovery proceedings and a collapse of trial settings. Although some aspect of your study must support an apparent departure from earlier conclusions, it is difficult to comment on something that is not apparent to me.

I also note on page 21 of the said report that the Commission had concluded "that the obstacles to effective discovery in eminent domain may be overcome by providing for an exchange before trial of written statements of valuation data." It is then stated that "[T]his technique is not novel; it is an eminent domain proceeding in the Los Angeles Superior Court and the United States District Court in Los Angeles." Cited in support of these statements are Schwartzman vs. Superior Court, 231 C.A. 2d, 195, and Judge McCoy's article on pretrial and eminent domain, 38, Los Angeles Bar Bulletin 439. The cited authority supports the existing procedures in this court. I do not believe the cited authorities offer any inspiration for the substitution of a post-pretrial discovery procedure as a means for initiating an exchange of valuation data.

You asked whether I believe that the procedures as proposed would result in a good faith exchange of statements of valuation data. Also, whether it is essential that there be an in camera procedure. In the latter connection you have noted that the statements will be prepared by attorneys. The bill, however, provides that the statements are those of the parties.

As we all know, the dual duty an attorney has to his client and to the court presents many problems for each attorney. Assuming the utmost good faith on the part of any attorney, I would have to say that if there is to be an initial exchange that is to be deferred until twenty days before trial then there will be a great deal of testing of good faith.

I should anticipate, as you do, that attorneys will be preparing the statements for their clients with reference to the testimony of their expert witnesses. However, I would also anticipate some misunderstandings as the information is passed along (sometimes orally and through secretaries, perhaps) and that an expert witness may be inadvertently committed (without his written report) to testify contrary to his true beliefs.

I believe as you do that our trial judges can be relied upon to administer the statute in a manner that will result in good faith exchange but to the extent it is possible to do so. I am not so sure this will be easy. It is one thing to bind a party by reason of his pleadings (or by his admissions or contentions) and may be something quite different and more difficult to bind witnesses to testimony supposedly "discovered" through intermediaries.

The draft of your report for the Senate Committee on Judiciary refers to proposed Sections 1272.1 as a provision for simultaneous exchange of valuation data. I believe I am correct in assuming that the exchange is contemplated as "simultaneous" solely on expectation of delay of each attorney to serve and file his statements until the deadline so that his opponent will have no advantage.

It is also stated that the procedure is not mandatory and that it applies only if invoked by a party. My comment on this would be that under our present procedure (and also those indicated by the Federal rule) the procedures are mandatory because efficient administration of justice seems to require it.

However, if the exchange is to be invoked by a party, then I should assume that the legislation might be designed so that a demand by one party would be sufficient; that upon making the demand he has committed himself to the mutuality of the exchange. Accordingly, the necessity for directing

a cross-demand to the demander is not apparent (to me) on the face of the legislation, although I must assume your studies have indicated a need for this complicating feature.

The last paragraph of Section 1272.02 provides for a statement of the price and other terms of a transaction or in lieu thereof a statement of the place where, and the times when, a document will be available for inspection to reveal the terms, etc. My comment on this would be that such a provision would seem to be opening the door for a lot of additional discovery and that it might be unrealistic to expect the court to afford an opportunity for such discovery within such a limited period.

With reference to the requirement that the statement of valuation set forth the value of the property, the damages, etc., I should expect this would have to be amended to require that these matters be set forth if and to the extent they are different than as set forth in the pleadings or the joint pretrial statement of the parties or the pretrial order; that good cause be established for such amendments. Otherwise it might be argued that this new legislation contemplates that such information may be deferred until post-pretrial discovery.

The above would also be true of the provision with respect to setting forth a description of the larger parcel if the property that is being condemned is a portion of a larger parcel. Ordinarily, if material, it is expected that this will be set forth in the Answer. If not (and if there is no Demurrer), then it should be set forth at time of first pretrial and particularly if there is any controversy with respect thereto; the respective contentions of the parties should be revealed in the early stages. This is one of many examples of a controversy that should be resolved (at time of first pretrial or during an interim trial, in accord with our practice) before any attempt is made to appraise the property. As the bill is presently worded, it may be argued that a party's contention with reference to the larger parcel and any description thereof may be deferred until the exchange of valuation data. This might place the parties at cross purposes at time of trial and unnecessarily complicate the trial.

Are there not inherent problems in a "discovery" that produces relayed information? Will it not be difficult

for the court to deny motions that seek further discovery from a party's informant? Can the court overlook the best evidence principle in ruling on such discovery motions?

If the procedure contemplated by Senate Bill No. 253 is thought to be analogous to the provisions of C.C.P. Section 2033 (Requests for Admissions), it would seem necessary to recognize that as to such Requests for Admissions, there is the oath requirement. Like Interrogatories, the party is responding to matters he can swear to and it would seem that a party cannot be expected to take an oath as to the accuracy of that which is not within his expertise and that which will be the subject of testimony of another; nor would it seem that this should be expected of an attorney as "discovery", without ethical considerations should the attorney be called as a witness, if there be questions as to the accuracy or completeness of the information furnished by the attorney. The problems that might arise, it seems to me, would not be limited to good faith by any means. Of course, there are many problems that may be effectively resolved by Requests for Admissions if the procedure is used in the early stages of litigation.

I am not setting forth any suggested amendments because I do not feel that the proposed legislation in its present form lends itself to amendatory suggestions to overcome the problems dealt with in this letter. If such legislation or anything like it is adopted, I believe that the state-wide application should be a minimum requirement which would not necessarily limit the adoption of rules or policy as may be required where the volume of cases and the expedition of these matters require special considerations.

It would appear from your letter that the proposed legislation is being considered with the idea that procedures would be simplified to an extent that pretrial could be waived in many cases. My comment here is that many problems arise in eminent domain procedures because of the fact that pleadings are necessarily simplified and general, so that the proceedings may be brought to issue without undue delay. Nevertheless, it may be well to recognize that there are numerous issues revealed at time of pretrial and therefore pretrial in eminent domain proceedings is peculiarly desirable. Many issues affect valuation but are for the court and not the jury to decide.

I might supplement this letter with a long list of such issues if you think that will be helpful. Suffice it to say at the present time that many problems are recognized at time of first pretrial, particularly because adversity of interests are revealed for the first time. Such problems can be effectively resolved by interim trials or motions (between first and final pretrial). Senate Bill No. 253 would tend to defer many issues. If it is recognized that there are such problems, then it would seem that deferring them is not the best solution. If deferred and trial is delayed, then date of valuation will be an issue in more cases and may be an increasingly difficult issue.

I am sure it must be appreciated that rules and policy may be amended (even by orders in particular cases where good cause is shown) based on a developing experience; that if there is to be a legislative attempt to adopt the objectives of our policy, it would seem well to preserve the right of the court to supplement the legislation by policy, so as to meet such responsibilities that are peculiar to volume, (e.g., in the Central District of our court). Of course, that might be most difficult if there is to be legislation as now proposed by Senate Bill No. 253.

I believe that it should be recognized that our policy has been successful to the extent that a very significant majority of cases are settled either during pretrial or as a direct result thereof, and that it is extremely rare that a waiver of pretrial is ever requested. Also, the interim trials are generally on request of one party or the other and it is by stipulation of all counsel that certain issues are resolved before appraisals are attempted. Sometimes these issues may be submitted on points and authorities. Sometimes an attorney concedes a point when he has done the necessary research and is satisfied that his point is not well taken. When there is an interim trial, there are frequently factual as well as legal issues to be determined. The policy provides the machinery but it is the attorneys who generally initiate the procedures toward interim solutions.

Other problems I see in your proposed legislation arise out of the fact that there are often a multiple number of defendants in a case. Suppose one defendant feels obliged to make a demand upon another defendant, although recognizing that it may not be in the interests of either of said defendants to have the information disclosed to plaintiff?

Also, supposing a plaintiff chooses to make a demand on a single defendant? Other defendants, it is assumed, would not be proscribed by the legislation as to the introduction of evidence unless they are parties to the demand and cross-demand exchange. A party would (since the disclosures are not mandatory except on demand) I suppose, as a matter of precaution, make the same demand on each and every other party lest an overlooked party be used at time of trial as a party who has not been limited as to the production of valuation data.

I expect to refer copies of this letter to Presiding Judge Lloyd S. Nix and Assistant Presiding Judge Donald R. Wright, but for information purposes only, not expecting study or comment, particularly in the limited time allowed. I am not presently sending a copy of this letter to any attorney because I should not know where to draw the line and it is not my purpose to elicit support for these views nor to provoke any controversy. As I have already pointed out, I am simply submitting these questions for such consideration as they may merit. If I have contributed something to the study of Senate Bill No. 253, I ask that you will keep me advised as to its development which I shall follow with great interest. I have the impression that the question I have raised may run counter to those heretofore expressed by Mr. Huxtable and his State Bar Committee. If so, Dick or others on his committee may wish to make further comment and the comment of other attorneys may also be helpful in your evaluation of the questions raised.

I have had an opportunity to submit this letter (and the material referred to) to Judge Robert S. Thompson (currently sitting in our Discovery Department) and I am authorized to express his personal concurrence.

With best regards.

Cordially yours,

Richard Barry
Commissioner

RB:bk

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

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 continuences 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 III

Memo 67-27

The parties are ordered to file appraisal reports upon which they intend to rely at the time of trial, if any, with the clerk in Department 64, on or before five days before the final pretrial. If any party intends to have an owner or any witness, other than the appraisers whose appraisal reports are to be submitted, testify in this case with respect to valuation, such party shall also file with the court on the same date the name of such person, his opinion as to valuation, and all factual data, not otherwise submitted, upon which such opinion is based, including market data, reproduction studies, and capitalization studies, in as much detail as practicable. If the court determines said reports to be comparable, and if it appears just and proper to do so, an exchange will be ordered. If the court does not order an exchange, the court will initial the documents for identification at the time of trial. Except as set forth herein, and except for the purpose of rebuttal, the parties will not be permitted to call any witness to testify on direct examination to an opinion of value, a sale, a reproduction study or capitalization study, unless submitted to the court as set forth above.

In the event a party subsequently discovers any information which should have been submitted as set forth in the preceding paragraph, and desires in good faith to use the information at time of trial, he must immediately notify the other party to this effect and provide the other party with the said information, and show good cause to the court, either in Department 64 or the trial department, that he should be permitted to use such information at the trial.

In the event a party intends to use an expert other than those who will testify with respect to valuation as set forth above, said party shall disclose, prior to the final pretrial in this case, if possible, or as soon thereafter as such information is available, the name and address of the said person, if known, and the nature of the testimony of said witness to be used at the trial of this case.

The appraisal report shall bear the title and number of the case, the parcel numbers involved, the names of the defendant owner of the parcels involved, and the date of final pretrial, on the outside cover of the appraisal report, and shall include, as a minimum, clear and concise statements of the following:

1. A description of the property including, as a minimum, a plot plan (not necessarily to scale) showing the size, shape, dimensions of the property being acquired and its location to street accesses. Additional information relating to terrain, utilities, principal street accesses, location of improvements upon the property, and the relationship of the property to and description of a larger parcel of which it is a part, when appropriate, if necessary for understanding of the appraisal problem.

2. Present zoning of property, and if the existing use is inconsistent with the present zoning, the authority for which such use is permitted.

3. A statement of the appraiser's opinion of the highest and best use of the property. If such use is inconsistent with the present zoning, a concise statement of factual matter upon which the opinion of probable zone change was predicated. The appraiser's opinion of the market value of the property being acquired and if the property is part of a larger parcel, his opinion of severance damage, if any, and special benefits, if any. If the appraiser is of the opinion that there is no severance damage or special benefit, a statement to this effect should be included.

4. The valuation approaches or methods utilized in the formation of the appraiser's opinion should be set forth in a brief statement. If any approach or method is not specified, it shall be presumed that the appraiser did not consider it in arriving at his opinion.

5. Where market data or sales are utilized the following information as to each sale: legal description and address, if available, or other sufficient designation for identification; size and shape of property; zoning; date of sale or transaction; names of buyer and seller; nature and brief description of improvements, if any; price paid and terms of sale; with whom and when the sale was verified. Which sales are considered indicative of the value of the property. Gross multiplier used, if any.

6. If reproduction cost studies are made, the following information must be submitted: description of improvements; size and area of building; type of construction; age of building; condition of buildings indicating obsoletion and depreciation; remaining economic life of improvements; cost factor or other computation used to establish cost to replace improvements; depreciation allowance used and the basis therefor.

7. If a capitalization or other income study is made, the following minimum information should be included, where relevant: gross income utilized in computations and whether actual income being produced or assumed income is used and the basis therefor; enumeration of expense items expected, the respective amounts thereof and whether said amounts are based upon actual or assumed expenses; method of processing or treating income; capitalization rate or rates or multiplier used; if the recapture of improvements is provided for, (land residual method), a statement of the remaining economic life of improvements used and rate of capitalization applied to residual land; if annuity methods used, a statement of the anticipated economic period in which payments are expected and the discount rate used, and the residual value of the land adopted in the study. The valuation indicated by said method or methods.

8. Lease information, if applicable, including terms of existing leases and names and addresses of lessors, lessees, and other persons who verified the information.

Dated: OCT 3 1966

RICHARD BARRY

Richard Barry, Judge Pro Tem

Memo 67-27

EXHIBIT IV

DRAFT OF REPORT FOR ASSEMBLY COMMITTEE ON JUDICIARY

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL NO. 253

In order to indicate more fully its intent with respect to Senate Bill No. 253, the Assembly Committee on Judiciary makes the following report.

Except for the revised comments shown below, the comments contained under the various sections of Senate Bill No. 253 as set out in the Recommendation of the California Law Revision Commission Relating to Discovery in Eminent Domain Proceedings, contained on pages 19-29 of the Annual Report of the California Law Revision Commission (December 1966), and as revised by the Report of the Senate Committee on Judiciary on Senate Bill No. 253 as printed in the Senate Journal for March 30, 1967, reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill No. 253.

The following revised comments to various sections of Senate Bill No. 253 also reflect the intent of the Assembly Committee on Judiciary in approving Senate Bill No. 253.

Section 1272.01

Comment. Section 1272.01 provides a procedure to facilitate a simultaneous exchange of valuation data in eminent domain cases.

The procedure provided by this chapter is not mandatory; it applies only if one of the parties to the proceeding serves and files a demand to exchange valuation data not later than 10 days before the date set for the pretrial conference. Nevertheless, existence of the procedure provided by this chapter does not limit the power of the trial court to require an exchange of valuation data in all eminent domain cases to be tried in that court, whether or not one of the parties to the proceeding has served a demand

to exchange valuation data under this chapter. The power of the trial court to require such an exchange is well established. See Swartzman v. Superior Court, 231 Cal. App.2d 195, 200-204, 41 Cal. Rptr. 721, 726-728 (1964).

If a party serves a demand to exchange valuation data on another party to the proceeding, both the party serving the demand and the party upon whom the demand has been served are required to exchange statements of valuation data not later than 20 days prior to the day set for trial. The party who serves a demand must, as a matter of course, serve his statement of data upon each other party served with the demand. See subdivision (d). The parties required to make this exchange may agree to the precise time when this exchange will take place in order to insure that it will be a simultaneous exchange. Absent such agreement, the exchange nevertheless will be substantially simultaneous because both parties normally will make the exchange 20 days prior to the date set for trial.

Subdivision (b) of Section 1272.01 permits a party upon whom a demand has been served to serve a cross-demand on any other party to the proceeding to exchange valuation data. Such a cross-demand may be used, for example, by a party who wishes to protect himself from being required to reveal his valuation data to a party who has only a nominal interest in the proceeding while receiving no significant information in return. Under these circumstances, the party upon whom the demand was served may wish to serve a cross-demand on the opposing party who has a substantial interest in the proceeding. Absent such cross-demand, he would obtain no valuation data from this party since the exchange takes place only between the party who served the demand and the party upon whom the demand was served.

This chapter does not abrogate existing rules and policies, or preclude the adoption of further rules or policies, governing pretrial, calendaring, or discovery in eminent domain cases. In Los Angeles County, for example, the pretrial procedure in eminent domain cases is governed by a policy memorandum. See Policy Memorandum, Pretrial, Discovery and Calendaring in Eminent Domain Cases, Superior Court, County of Los Angeles (January 1, 1964); McCoy, Pretrial in Eminent Domain Actions, 38 L.A. Bar Bull. 439 (1963), reprinted in 1 Modern Practice Commentator 514 (1964). Nevertheless, this chapter does provide a simplified procedure for exchange of valuation data that may be invoked by a party whatever the rules or other requirements of the particular superior court may be. The chapter does not permit suspension of its procedures (i.e., demands and cross-demands at specified times for exchange of data--Section 1272.01; the prescribed content of the valuation statements--Section 1272.02; their service and filing at a prescribed time--Section 1272.01(d); and the sanction of exclusion of undisclosed evidence from presentation at the trial--Section 1272.04) by local rule or practice. To this extent, existing local requirements may need to be adapted to the procedure provided by this chapter and to the fact that this procedure may or may not be invoked by a party to any particular eminent domain proceeding.

This chapter does not prevent the use of other discovery procedures. See Section 1272.06 and the comment to that section. Nevertheless, in determining whether the use of another method of discovery should be permitted in a particular instance, the court should take into account the existence of the procedure provided by this chapter. All orders relative to discovery in eminent domain proceeding should be fashioned to achieve

fairness and mutuality in the disclosure of valuation data and opinions. In appropriate cases the court's leaving the parties to resort to the procedure of this chapter may be the only feasible way to achieve reciprocity of disclosure. See Swartzman v. Superior Court, supra.

Neither the existence of the procedure provided by this chapter, nor the fact that it has or has not been invoked by a party to the proceeding, is intended to extend the time for completion of discovery in the proceeding. The need for information other than the opinions and supporting data specified by Section 1272.02 must be anticipated and obtained by timely resort to other discovery procedures.

Section 1272.04

Comment. Section 1272.04 provides the only sanction for compliance by the parties with the procedures established by this chapter. The burdens and consequences specified by Code of Civil Procedure Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply, or a failure to comply fully, with the requirements of this chapter. Existence of the sanction of Section 1272.04 does not, of course, prevent those burdens and consequences from attaching to dereliction in making any other form of discovery invoked in the proceeding.

The sanction provided by Section 1272.04 is necessary 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 and the Comment to that section.

Section 1272.04 limits only the calling of a witness, or the presentation of testimony concerning valuation data on direct examination, during the case in chief of the party calling the witness or presenting the testimony. Nothing in Section 1272.04 precludes a party from calling a witness on rebuttal or having a witness testify concerning valuation data on rebuttal that is otherwise proper. See *San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 Pac. 585 (1928). Nor does the section preclude a party from bringing 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 diligence to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this chapter by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been used during the case in chief and such valuation data presented during direct examination.