#36.90 6/28/73

Memorandum 73-61

Subject: Study 36.90 - Condemnation (Pretrial and Discovery--Exchange of Information)

Summary

This memorandum presents for Commission decision basic policy issues relating to pretrial discovery in eminent domain proceedings. It indicates the problems that exist in discovering expert appraisal testimony and describes the various solutions that have been proposed, including the Federal Rule relating to discovery of expert opinion and the California exchange of appraisal data statute. The memorandum indicates that the California scheme is an effective one and should be preserved but that there are several defects in it that should be remedied. After discussing these defects and the remedies, the memorandum concludes with a staff proposal for a basic restructuring of the exchange provisions designed to preserve the mutuality of the exchange.

Introduction

The basic problem of discovery in eminent domain is that the single major issue of compensation (composed of fair market value, damages, and benefits) is peculiarly one of expert opinion. There have been real problems, in California as well as most of the other jurisdictions, in discovering opinions of experts retained in preparation for litigation. In California, it is fairly well established that the opinion of an appraisal expert in an eminent domain proceeding falls within the "work product" exception to the generally liberal discovery rules. See, e.g., Mack v. Superior Court, 259 Cal. App.2d 7, 66 Cal. Rptr. 280 (1968), and Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).

The "work product" exception has been codified in Code of Civil Procedure Section 2016(b) since 1963:

> 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 any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

The policy behind this exception is stated in Section 2016(g):

> It is the policy of this State (i) to preserve the rights of attorneys 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.

Whatever beneficial effects the work product exception may have for litigation generally, it has had a crippling effect on preparation and trial of cases requiring extensive reliance on expert testimony, particularly eminent domain. As the Commission noted 10 years ago, "Unless the valuation data to be related on direct examination of an expert witness can be discovered and its reliability tested through investigation prior to trial, the only means available to test the reliability of such data is lengthy--and often fruitless--cross-examination during trial." Recommendation and Study Relating to Condemnation Law and Procedure: Number 4--Discovery in Eminent Domain Proceedings, 4 Cal. L. Revision Comm'n Reports 701 (1963).

For this reason, there has been continuing pressure to liberalize the rules relating to discovery of appraisal data in eminent domain proceedings. California in 1967 enacted on the Commission's recommendation a provision for pretrial exchange of valuation data. The Federal Rules of Civil Procedure were amended in 1970 to permit broadened discovery of expert opinion prepared for litigation. The Uniform Eminent Domain Committee is developing liberalized rules. These and other representative approaches are outlined below.

Provisions Enabling Discovery of Expert Opinions

There has been a variey of solutions to the problem of discovery of expert opinion, ranging from extremely broad provisions to rather limited ones.

Discovery of all relevant data whether or not to be used at trial. Maryland Rules of Procedure, Rule U12 goes so far as to provide that a party to a proceeding for condemnation may discover (1) all written reports of experts pertaining to the value of the property regardless whether the reports were prepared for litigation or whether the experts are to be called as witnesses; (2) the name and adress of all experts who have examined the property regardless whether they are to be called as witnesses who are then subject to deposition; and (3) the name and address of all experts who are to be called as witnesses. The full text of the Maryland provision is set out in Exhibit I.

The Report of the Virginia Advisory Legislative Council on Laws Relating to Eminent Domain (1972) recommended a provision the same as Maryland's. However, the 1972 Virginia Legislative Assembly enacted a considerably toned-down version requiring disclosure only of the name and address of experts to be called as witnesses and, of them, only specific information such as comparable sales to be relied upon may be obtained. For the relevant portion of the report and the enacted statute, see Exhibit II.

An initial draft of the Uniform Eminent Domain Committee's discovery provision also provided for very broad discovery of all relevant information whether or not to be used at trial; however, the staff understands that the committee is in the process of honing down this initial draft so that discovery of the opinion and data of experts will be limited to those who will be called as witnesses.

Discovery of the opinion of experts to be called as witnesses. As noted above, the Virginia and the Uniform Committee discovery proposals have been transmuted to limited provisions for discovery of basic expert testimony to be produced at trial. This is the fundamental approach of the Federal Rules of Civil Procedure as amended in 1970. Rule 26(b)(4) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope to prevent abuse. Ordinarily, the order for further discovery will compensate the expert for his time and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. The text of Rule 26(b)(4) is set out as Exhibit III.

The reasons for adoption of this rule in 1970 are explained in the Notes of the Advisory Committee on Rules:

> Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues, as to which expert testimony is likely to be determinative. Prominent among these are food and drug, patent, and condemnation cases. [Citations omitted.]
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> In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take on the data on which he will base his judgment on the stand. [Citation omitted.] A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy--and often fruitless--cross-examination during trial," and recommends pretrial exchange of such material. [Citation omitted.] Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Exchange of information in eminent domain proceedings. The approach taken by California to abate the rigors of the work product rule, on the recommendation of the Commission, was the 1967 enactment of a statutory exchange of valuation scheme. See Code Civ. Proc. §§ 1272.01-1272.09 (Exhibit IV). The basic thrust of this scheme is that, no later than 50 days prior to the date set for trial, any party may make a demand on any other party to exchange valuation data for experts to be called as witnesses. A party who receives such a demand may, up to 40 days prior to trial, make a cross-demand on third parties for the same information. Then, 20 days prior to the date set for trial, each party who has served a demand, and each party on whom a demand has been served, exchanges the data. In order to assure that no party is required to give more or less than any other party, the specific elements that must be included in the statement of valuation data are set out by statute. A failure to disclose precludes admission of the testimony by way of direct examination.

The Uniform Eminent Domain Committee is developing a comparable scheme to supplement its basic provisions relating to discovery of expert testimony. See Exhibit V.

Comparison of the provisions. The role of discovery of expert opinion is considerably different from that of discovery of the usual fact witnesses. The expert normally has no relevant information about the case but has been employed by counsel in the hope he can develop favorable relevant opinions by examining specific items of evidence such as real property in the eminent domain 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.

To complicate his position, the expert often wears two hats: He is employed by counsel to form an opinion which he may later present as a witness in court; he also may be 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 the 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 hinderance 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. For this reason, the work product privilege is properly applied to this type of information, and such broad discovery statutes as that of Maryland and that initially proposed by the Virginia report and the Uniform Committee draft are inappropriate.

But 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 case. 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 pretrial discovery. It is for this reason that provisions such as the Federal Rule, and the Virginia and the Uniform Committee proposals as modified, limit discovery to opinions of experts to be called as witnesses.

While the federal rules for discovery of expert opinion commend themselves, the staff believes that California has a basically superior scheme of achieving the same goals. The basic problem with discovery of the opinion of expert witnesses is to work out methods of mutual disclosure of the opinions of potential witnesses which will achieve desired results with minimum waste of motion and with fairness to all concerned. Under the California scheme, 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, which, if lacking, would inhibit any genuine disclosure in advance of trial in the case of opinion witnesses, for parties could merely claim they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial.

The California exchange scheme, providing a precise listing of what must be exchanged and bearing the sanction that material not exchanged may not be introduced on direct examination, is in accord with the general rules of discovery that 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.

The staff believes that the California exchange scheme is basically sound and proposes in the following section several changes to make it more

effective. In this connection, the State Bar Committee on Governmental Liability and Condemnation, at its June 9, 1973, statewide meeting, restated its approval of the purposes of the exchange provision and other discovery procedures so long as the concept of mutuality is followed.

The foregoing discussion was adapted largely from the opinion in Swartzman v. Superior Court, 231 Cal. App.2d at 202-204.

Changes in the California Exchange Scheme

Assuming that the most sound approach to discovery of expert opinions in eminent domain is to retain the California exchange of valuation data provisions, and to remedy any defects they may have, what needs to be done? Attached to this memorandum is another copy of the responses to the questionnaire the Commission previously distributed. Some of the main concerns expressed in response to the questionnaire are that the exchange occurs too close to trial to be of any use, that the items listed in the exchange need to be expanded, that court enforcement of sanctions is inadequate, and that the cost is unduly great in small cases.

Timing of exchange. The existing provision requires demand within 50 days before trial, cross-demand within 40 days before trial, and exchange of data 20 days before trial. The common complaint with this scheme has been two-fold--that the 20 days is not adequate to make full use of the disclosed data, and that often the data disclosed at that date is incomplete. The exchange provision that the Uniform Committee is developing has a 90-day demand period and the exchange takes place 30 days before trial. The State Bar Committee at its June 9, 1973, meeting adopted the following position:

> Demand for information is to be made at least seventy (70) days before trial. The cross-demand for information is to be made no less than sixty (60) days before trial. The exchange of information is to occur no less than forty (40) days before trial. Further discovery through deposition, interrogatories, motion to produce, request for admissions should be permitted after the exchange of information without order of Court. All discovery is to be completed ten (10) days before trial.

Rule 222 of the California Rules of Court which generally prohibits discovery within 30 days prior to trial should not be a limitation upon discovery procedures mentioned above.

The reasons for the above proposed changes in Section 1272.01 is that effective discovery is often frustrated by the unavailability of the opposition's appraisal report, insufficient time to examine the data and effective discovery can not be pursued until the scope of relevance is defined by the expert witness's statement of his opinion and the reasons upon which it is based.

The staff believes the State Bar Committee recommendation is basically sound and would serve to cure the dual problem of insufficient time following the exchange and inadequacy of data at the time of the exchange by providing an early exchange with follow-up discovery to within 10 days of trial.

Items exchanged. One of the virtues of the California exchange scheme is its guarantee of mutuality in providing a listing of material that must be listed in the exchange data. This assures that no one party will be required to give any more or any less than he receives. Comments on the questionnaire, however, indicate a general dissatisfaction with the information required to be listed; suggestions for improvement include addition of reasons supporting opinion and method of computation, more detail on severance damages, and inclusion of gross income multiplier studies.

Court enforcement of exchange. The comments indicate that there is some dissatisfaction with the court's failure to exclude evidence that was not exchanged on demand. The reason for this failure to exclude apparently is that the courts are simply reluctant to impose so harsh a penalty as exclusion of relevant evidence. One possible solution suggested in the comments and developed in the Uniform Committee draft is to provide the court with less harsh alternative sanctions such as granting continuances to meet the surprise and allowing fees and costs for additional work required because of it.

Cost of exchange. The Federal Rules make provision for reimbursement of experts for time spent in responding to further discovery following initial disclosure of basic appraisal data; the comments on the questionnaire express dissatisfaction of the cost of discovery in small cases. The State Bar Committee at its June 1973 meeting proposed that:

> [W]hen the condemnor initiates any procedure of discovery relating to the employment, opinion, investigation or data of an expert witness hired by the condemnee, and where compliance with or response in such discovery procedure reasonably requires additional time or services to be expended or rendered by said expert witness, the condemnor should be responsible for reasonable fees of said expert witness as such should be determined by the trial court at the time and in the manner for taxing costs. Such rule of responsibility would not extend to time and services of an appraiser spent in the preparation of the report or statement of his opinions for the purposes of exchange under C.C.P. §1272.01 or similar pre-trial mutual exchange procedure.
>
> The foregoing motion was the product of lengthy debate and numerous amendatory motions. The Committee specifically discussed and rejected the contention that such a rule should also be applied to impose the fees of the condemnor's experts upon the condemnee where discovery procedures are invoked by the condemnee.

Mutuality. As noted above, mutuality of exchange is the key to the California scheme; the State Bar Committee predicated continued approval of the scheme on continued mutuality. In this connection, it should be noted that, at the June 1973 meeting, the Commission voted to delete the requirement of the existing scheme that any party who serves a demand for data must, when the time comes, exchange his own data with the party on whom he has made his demand. The reason for this decision was that, in the present statute, the requirement that he automatically exchange his own data may be overlooked by the incompetent attorney who expects to receive a statement but does not realize that the "exchange" procedure is a mutual one.

Whether this decision serves to destroy the mutuality of California's scheme is arguable. A person on whom a demand is made will still be able

to get information from the demander if he serves a cross-demand on him within the cut-off period (a possible trap for the attorney unfamiliar with the procedure); yet the cross-demand may not be possible if the demand itself is a cross-demand made at the end of the cut-off period.

There are several possible solutions to this problem. One is simply to exhume the automatic exchange requirement, placing it in a prominent position in the statute so that no one will be trapped. A second is to permit any person on whom a demand is served to serve a counter-demand regardless of passage of the cut-off date. A third is to make the exchange requirement universal--everyone must serve data on everyone else; this is the Uniform Committee approach.

The staff prefers a universal exchange scheme. Under this scheme, all parties would be required to exchange data 40 days prior to trial unless the parties have agreed not to or unless the trial is in a county that has adopted other adequate procedures. After the exchange, adopting some of the suggestions noted above, the parties would be able to employ traditional discovery devices to within 10 days of trial without necessity for a court order. The added expense for experts of either side in responding to this discovery would be recoverable except where discovery was required because full and complete disclosure of data was not made in the exchange.

The staff believes that such an exchange scheme would not only preserve mutuality but would also prove to be more equitable and effective than the existing California exchange scheme.

Respectfully submitted,

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Staff Counsel

EXHIBIT I

Maryland Rules of Procedure

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 Interrogatories 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.

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EXHIBIT II

LAWS RELATING TO EMINENT DOMAIN

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1972

EXTRACT

5. The major issue in eminent domain cases is determination of what amount shall be awarded a landowner for land taken and damages, if any, to his remaining property because of the take. The law requires the condemnor to make a "bona fide" offer of purchase before commencement of condemnation proceedings, and too often this is perfunctory and meaningless.

At trial the condemnor, through witnesses, may take the position the value of the land taken is less or more than the landowner was offered before trial and, notwithstanding prior negotiations, the condemnor may or may not deny any damage to landowner's remaining lands. Not until the trial does the landowner know the facts and reasoning upon which the condemnor's valuations or conclusions are based. Until the moment the condemnor rests his case, the landowner does not know where he stands. At this point, the landowner then has the burden of producing evidence to rebut that which he was not aware of until the time of trial. It is equally true that the condemnor does not know what evidence of the landowner it must rebut until the landowner rests his case.

The prohibition of discovery makes condemnation cases blind man's bluff. The adversaries reveal at trial only such facts and opinions obtained prior to trial as may be expedient to their respective causes and without discovery the facts and opinions withheld are forever hidden.

We believe the issue of "just compensation" may better be determined if each party had the opportunity to discover the facts and opinions of his adversary's witnesses before trial and thus be prepared to meet the issues at time of trial through presentation of properly prepared evidence rather than evidence produced on an instant mix basis.

The weight of authority in the United States indicates that discovery is not prohibited in condemnation cases; and we are advised full discovery has resulted in a higher incidence of pretrial settlements in jurisdictions where such is allowed, thereby making the requirement of a bona fide offer more than perfunctory and meaningless.

PROVISION RECOMMENDED BY VIRGINIA ADVISORY LEGISLATIVE COUNCIL

§ 25-46.4:2. In addition to the evidence which a party may discover under statute, or Rules of Court as promulgated by the Supreme Court of Virginia, any 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 written interrogatory or by deposition, 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 interrogated or examined by deposition, as provided in this section, shall be entitled to reasonable compensation therefor. Such compensation shall be paid by the party interrogating or deposing such expert.

PROVISION ENACTED BY 1972 SESSION OF VIRGINIA LEGISLATIVE ASSEMBLY

§ 25-46.4:2. Interrogatories.—Any party to a proceeding for condemnation may:

(1) By written interrogatory or by deposition require any other party to disclose the identity and location of every person whom such other party intends to call in his behalf at trial.

(2) By written interrogatory or by deposition, examine any person whose identity and location are obtainable under the provisions of this section, as such person's findings of: (a) comparable sales; (b) lease agreements; (c) square foot valuations; (d) total value of property taken; (e) total damage value, if any, over enhancement, if any; and (f) the specific method by which the total property or total damage valuations were derived.

A person interrogated or examined by deposition, as provided in this section, shall be entitled to reasonable compensation therefor. Such compensation shall be paid by the party interrogating or deposing such person. (1972, c. 533.)

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EXHIBIT III

FEDERAL RULES OF CIVIL PROCEDURE

V. DEPOSITIONS AND DISCOVERY

Rule 26.

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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EXHIBIT IV

[Code Civ. Proc. §§ 1272.01-1272.09]

CHAPTER 2. EXCHANGE OF INFORMATION IN EMINENT DOMAIN PROCEEDINGS [NEW]

Sec.

Chapter 2 added by Stats.1967, c. 1104, p. 2742, § 2.

§ 1272.01 Exchange of lists of expert witnesses and statements of valuation data

(a) Service and filing of demand.

(a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

(b) Cross-demand.

(b) A party on whom a demand is served may, not later than 40 days prior to the day set for the trial, serve upon any adverse party and file a cross-demand to exchange lists of expert witnesses and statements of valuation data relating to the parcel of property described in the demand.

(c) Contents of demand or cross-demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property to which the demand or cross-demand relates, 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 deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the date set for trial. Except as otherwise provided in that chapter, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

(d) Service and deposit of list and statements.

(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 deposit with the clerk of the

court a list of expert witnesses and statements of valuation data. A party who served a demand or cross-demand shall serve his list and statements 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 list and statements upon the party who served the demand or cross-demand.

(e) Duties of clerks of court.

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this chapter. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this chapter. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial. (Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.02 Statement of valuation data; persons from whom exchanged; contents

(a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

(1) The value of the property or property interest being valued.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the special benefit, if any, to the remainder of the larger parcel from which such property is taken.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used, and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(c) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (b):

(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 or other identification of the record of the transaction.

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

(d) If any opinion referred to in subdivision (a) is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(e) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (f), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(f) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this chapter.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.03 List of expert witnesses; contents

The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.04 Notice to persons upon whom list and statements served of additional witnesses or data; form

(a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

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

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1272.02 and 1272.03 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.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.05 Limitations upon calling witnesses and testimony by witnesses

Except as provided in Section 1272.06, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1272.01:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the information required by Section 1272.03 for such witness is included in the list served by the party who calls the witness.

(b) No party required to serve statements 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 remainder of the larger parcel from which such property is taken unless a statement of valuation data for the witness was served by the party who calls the witness.

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

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.06 Grounds for court authority to call witness or permit testimony by witness

(a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 to 1272.03, inclusive, that he has complied with Section 1272.04, and that, by the date of the service of his list and statements, he:

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

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

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.07 Applicability of chapter

This chapter does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.08 Use of discovery procedures

The procedure provided in this chapter does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. 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, affects the time for completion of discovery in the proceeding.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

§ 1272.09 Admissibility of evidence

Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

(Added Stats.1967, c. 1104, p. 2742, § 2.)

Section 702. [Exchange of Appraisal Reports]

(a) In addition or as an alternative to discovery under section 701, any party to the action, not later than [90] days prior to the date set for the trial of issues of compensation, may file and serve on all other parties a written demand for an exchange of appraisal reports that have not previously been furnished either voluntarily or pursuant to discovery proceedings.

(b) Not later than [30] days after service of the demand, the party making the demand and each other party served with the demand shall deliver to each other a copy of all appraisal reports in his possession or under his control and not previously furnished.

(c) An "appraisal report" within the meaning of this section is any written statement or analysis prepared by or under the direction of a person who is expected to be called as a witness at the trial to testify on any issue relating to the value or amount of compensation for the property sought to be taken, and shall to the extent reasonably available, include:

(1) the name and address of the witness;

(2) a summary of the facts known to and opinions held by the witness on any matters to which he expects to testify at the trial; and

(3) a complete and detailed statement of the supporting data upon which the report is based.

Comment

Section 702 is an adaptation of sections 1272.01 and 1272.02 of the California Code of Civil Procedure. Similar procedures for exchange of appraisal reports have been adopted in other jurisdictions, including New York, as a supplement to existing discovery practice. See 7 P. Nichols, Eminent Domain § 7.04[2] (rev. 3rd ed. 1971). As to the consequences of the exchange procedure, see sections 703 and 704.

Under this section, the required exchange of appraisal reports is triggered by service of a written demand by one of the parties. It is not an automatic procedure that must be followed in every case; accordingly, by voluntary cooperation between the parties, the formal procedure of this section may be avoided. On the other hand, in appropriate circumstances, the parties may employ the discovery procedures provided in section 701 without resort to the present section.

Section 703. [Supplementation of Appraisal Reports]

(a) A party shall, with reasonable promptness prior to trial, deliver a supplemental written report to every party to whom he was required to deliver one or more appraisal reports pursuant to section 702 if, after delivery of the reports,

(1) he determines to call as a valuation witness at the trial a person for whom an appraisal report was not previously delivered; or

(2) he discovers additional information or facts required to be included in the appraisal report for a witness but which was not included in the report as delivered.

(b) A supplemental report required by subsection (a) shall include all information required by section 702 and necessary to make the report reasonably complete and accurate.

Comment

Section 703 creates a duty on the part of a party, after exchanging appraisal reports pursuant to section 702, to supplement the reports in

order to keep them up-to-date and accurate in light of changes in the party's tactical plans and any newly discovered evidence relating to the expert's testimony. The requirements of sections 702 and 703 are, in effect, cumulative.

Reporter's Note: Section 703 has been revised on the basis of the committee's discussions at the September 1972 meeting.

Section 704. [Effect of Appraisal Reports on Expert Witness Testimony]

(a) Except as provided in subsection (b), a party required to deliver an appraisal report under section 702 may not, over objection by a party who was entitled to delivery of the report, call a witness to testify at the trial on any question relating to the value or to the amount of compensation for the property sought to be taken unless the required appraisal report for the witness, in substantial compliance with sections 702 and 703, was duly delivered.

(b) The court for good cause and in the absence of substantial prejudice to any party, may continue the trial for a reasonable period of time on such conditions as may be just, or may permit a party to call a witness or elicit an opinion or other testimony from a witness contrary to sub-

13 section (a).

Comment

Section 704(a) makes an unexcused failure to comply with the procedure for exchange of appraisal reports a basis for objection to valuation testimony that was required to be covered by a report. This section is applicable, however, only when an exchange of appraisal reports is required by demand properly served under section 702(a).

Section 704(b) gives the court power to excuse noncompliance upon a proper showing. In allowing the noncomplying party to introduce valuation testimony not covered in a duly delivered and adequate appraisal report, however, the court may impose any reasonable conditions that may be just, such as a short continuance of the trial or the payment of additional cost or expense of preparation to meet the unexpected evidence.

December 1972

RESULTS OF CALIFORNIA LAW REVISION COMMISSION'S FEBRUARY 1972 QUESTIONNAIRE RE DISCOVERY

Note

In February the Law Revision Commission sent a questionnaire on various aspects of condemnation practice to attorneys, judges and appraisers on its mailing list.

The answers to the questions regarding discovery (Questions 17-26) by attorneys have been tabulated and are indicated below. For the purpose of categorizing the answers, the attorneys who authored them were divided into three clasifications: those representing condemnors, those representing condemnees, and those who represent both sides. Regarding the latter classification, if, for example, an attorney stated that more than 50% of his condemnation practice involved representing condemnors while less than 5% is for condemnees, his answer would be placed in the category of a condemnor attorney rather than both, because the mass of his practice is for one side. The authors of the answers are not indicated except in one instance, the Legal Division of California Department of Public Works, first, because its response is a joint reply for 111 trial attorneys, and second, because of the volume of cases in which it is involved.

General Analysis

The replies to the questions on discovery contain no startling revelations. Most attorneys recognize that it is useful (Question 22), but they also note that often appraisal data and opinions are not finalized until very near the trial date. For this reason and because much of the data necessary for the appraisal is equally available to both parties in the market, discovery devices should be keyed to the approaches to value and severance damage employed by the appraiser, as well as information that is exclusively in the hands of the other party.

Those who have experience with the Los Angeles County procedure (Question 17) generally gave it a favorable rating. But some criticized the procedure in two areas: it is a nuisance in smaller cases, and it puts a burden on the property owner. Further, some attorneys supplement the procedure by interrogatories and depositions.

The discovery devices of interrogatories and statutory exchange (Questions 18 and 20) are the most often used, while depositions (Question 19) are employed to a lesser extent.

The point of greatest concern was raised by Question 21, regarding excluding testimony sought to be elicited by the opposing party at trial but which was not made known through discovery. Many noted courts are reluctant to exclude such testimony; and the State Division of Highways attorneys felt that those courts with a stricter approach apply it just to condemnors. Although it was not stated by any of the parties

responding to the questionnaire, this judicial reluctance to exclude reinforces the practice of delaying finalization of the appraisal until time of trial.

There is a great deal of suspicion that the other side is hiding information or not willing to exchange data on an equal basis. The fear of inequality of exchange was particularly noted as a deficiency in the statutory exchange procedure of CCP §§1272.01-1272.09 (Question 26); it was advised that the exchange should be policed by the court.

The responses did not recommend any overhaul of the discovery procedures in eminent domain. Perhaps, this was a product of the manner in which the questions were framed; only Question 26 regarding statutory exchange asked specifically about deficiencies, although Question 22 inquiring about the general usefulness of discovery in eminent domain called for comment by those responding.

There may be other reasons, however. Since condemnation is a specialty field in the law, it is not unusual to find a certain rapport between condemnor attorneys (especially those with the larger public agencies) and their counterparts who have the lion's share of the condemnee cases in a particular area. These attorneys see each other often; and in many instances the private practitioner was once employed by the agency, such as the Division of Highways. This rapport can lead to informal discovery sessions. Those who are not members of the "club" must struggle with discovery tools.

Related to the above is the condemnor's practice of

converting negotiations between counsel into a discovery session. By adopting the posture of "show me why our figure is wrong" or "if we overlooked anything, we'll certainly re-evaluate our offer," the condemnee is pushed into revealing some of its strengths. If there is genuine response by the agency or it has the reputation of honestly re-evaluating its position, the prospect of settlement will begin to outweigh strategy of trial preparation.

The responses indicate that the condemnee is more inclined to discovery. Because the burden of going forward with its case at trial is upon the condemnee and "negotiations" can reveal the outline of the condemnee's case, the condemnor is frequently content to wait and see. If it initiates discovery, there is sure to be retaliation. But if it does not and the condemnee's attorney knows there is no prospect of settlement, the latter may choose to piece together the condemnor's case from the offer and hold revelation of the property owner's case until trial.

It appears that condemnation "club" attorneys have evolved a practical approach to discovery. There is a realization that it is not as beneficial as in other cases, where, for instance, eyewitness accounts of observable facts at the center of a dispute must be secured and analyzed. If there is need for revision of discovery in eminent domain, those who deal with it only on a sometime basis and have the small cases probably have a better perspective.

NORMAN E. MATTEONI
Consultant to Law Revision Commission

DISCOVERY AND EXCHANGE OF VALUATION DATA

Los Angeles County Procedure

17. Have you ever used the Los Angeles County exchange of appraisal information procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	3*	12	9
NO	9	11	4

If YES, did you also use any other discovery or exchange of valuation procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	1	6	4
NO	2*	4	6

If YES, what procedures did you use?

Condemnor Attys:

1. Depositions and request for admissions of fact.

Condemnee Attys:

1. Depositions.
2. Occasionally depositions and also interrogatories. (2)
3. Statutory exchange.

Attys for Both:

1. Interrogatories and depositions.
2. On occasion, depositions and interrogatories. (2)
3. Voluntary open appraisal book discussions with opposing counsel.

* The reply of the Legal Division of California Department of Public Works, which is included here and noted in answers to subsequent questions, is a joint reply on behalf of 111 trial attorneys.

What do you think of the Los Angeles County procedure?

Condemnor Attys:

1. I have read the procedure and find that it would be relatively beneficial in most situations.

2. Very good. It is simple and effective.

3. It is probably helpful in large cases, but a nuisance in small ones.

4. The difficulty with the Los Angeles rule coupled with statutory exchange is that the total expense to attorneys and their clients, and to the public by way of extra judicial time expended, is much greater than if the parties were left to the selective application of traditional discovery methods to appropriate cases. This is true because statutory discovery under the Los Angeles system is applied in every case going to pretrial. Further, the value of the use of statutory discovery, even coupled with judicial administration, is very much less than the value of the use of the more probative traditional tools of discovery when measured against the yardsticks of ascertainment of the truth leading to accurate verdicts on just compensation, or, in the alternative, realistic settlements.

   Traditional discovery by interrogatory and deposition takes very little judicial time when compared with statutory discovery administered through a pretrial judge. The latter system is based on the premise that every condemnation case calls for discovery and legal rulings before trial. Not every condemnation case calls for discovery. The majority of condemnation cases do call for discovery or legal rulings before trial. However, this majority is better served by traditional discovery and bifurcated trial than the Los Angeles pretrial system.*

Condemnee Attys:

1. Needs tightening up: pretrial order is loosely worded in some important aspects.

2. It is helpful and necessary, but imposes severe time requirements.

Condemnee Attys: (Cont'd)

3. It is good, if reasoning and means of computing value are fairly disclosed.

4. Good. (4)

5. It works but needs a conference after the exchange in order to promote settlements.

6. It works quite well.

7. Excellent.

8. Leads to widespread cheating by condemnors. No effective control on failure to fairly exchange. But, it is efficient.

9. It does not accomplish very much.

Attys for Both:

1. It is a waste of time; the reports obtained can be obtained with other discovery devices in a much easier fashion. The Los Angeles procedure is a great burden on out-of-county attorneys, since it requires extra and unnecessary court appearances.

2. Satisfactory, depending upon cooperation of opposing counsel.

3. Very good.

4. It forces early and thorough preparation of one's case. It puts greater economic burden on property owners. Generally it helps to settle cases.

5. It is a good procedure but it places a burden on the property owner in small cases. Some provision should be made for reimbursing the property owner for some or part of his appraisal report if the same is required as a court procedure. This could be handled in the same way as other recoverable court costs. The comment is limited to the preparation of the report alone and not to the cost of the appraiser.

6. Excellent. (3)

7. Prefer Code of Civil Procedure exchange.

General Questions Relating to Discovery

(These questions should be answered on the basis of your experience in counties other than Los Angeles.)

18. In what percentage of your condemnation cases do you use interrogatories?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	no replies	no replies	3
less than 5%	2	7	4
5-50%	7*	7	6
more than 50%	no replies	2	no replies
100%	1	6	1

19. In what percentage of your condemnation cases do you use depositions?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	no replies	2	3
less than 5%	3	9	3
5-50%	5*	6	7
more than 50%	1	1	1
100%	1	4	no replies

20. In what percentage of your condemnation cases do you use the statutory exchange procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	2	3	2
less than 5%	2*	3	7
5-50%	4	9	3
more than 50%	1	3	2
100%	1	2	no replies

21. When you have used discovery, have you experienced any difficulty in excluding testimony sought to be elicited by the opposing party at the trial which was available at the time but not made known through discovery?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	2*	7	7
NO	3	11	4

Comments:

Condemnor Attys:

1. Although not previously faced with the problem, I suspect that it would be difficult to persuade most judges to exclude such evidence if offered by condemnee.

2. Judges are extremely reluctant to exclude relevant evidence.

3. Courts are quite lenient to property owners when they do not fully respond, but not to condemnors, who are held to a much higher standard of performance.*

Condemnee Attys:

1. Courts seems to admit sales and other data which has not been exchanged or revealed in discovery. This is true under the statutory exchange procedure.

2. Judges let it in, revealed or not.

Attys for Both:

1. Judges know to exclude is to invite reversal. Judges are not usually reversed for what they let into evidence.

2. Situation has not come up often. I objected on only one occasion that information had not been disclosed; it was sustained and excluded.

3. Occasionally, you run up against a judge who will permit an adverse party to introduce information into evidence which should have been part of the exchange and which was deliberately withheld.

4. Depends entirely on the individual judge.

22. Is discovery generally useful in eminent domain cases?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	7*	13	9
NO	2	7	3

Comments:

Condemnor Attys:

1. Seldom.
2. Landowner never has any appraisal data.
3. Discovery is very useful in condemnation cases. It enables the parties to ascertain the theories of the case, which results in quicker and simpler presentation in trial. Anything that simplifies and expedites a condemnation trial should be encouraged.*
4. Helpful to some extent, but to a far less extent than in other types of cases because the appraisers "discover" most essentials.

Condemnee Attys:

1. Appraisers are often instructed to "have notes" but not conclusions. Also, condemning agencies subsequently hire additional appraisers and discard the one(s) previously deposed. Also, appraisers frequently are "not ready" for depositions.
2. More disclosure is needed.
3. Discovery is helpful in every case, both in preparing for trial and effecting settlement.
4. Failure of judges to restrict agency malpractices.
5. "Generally useful," yes. The work product rule (Swartzman and Mack cases), attorney-client privilege re staff report (Glen Arms) radically limits discovery of information which, aside from the "adversary proceeding," property owners should have by right.
6. On rare occasions it can be of help, but for the most part it is not.

Condemnee Attys: (Cont'd)

7. Generally speaking, to get information from a condemning agency is like trying to get blood from a turnip. About the only useful data is engineering information which is usually voluntarily supplied by the condemnor upon request. Even then it is always incomplete. Discovery is generally of very little value unless you have a particularly complicated case or issues involving fraudulent and deceptive conduct by the condemnor. It is costly in time and money and the costs are generally disproportionate to the results. Condemnees in small cases cannot afford it.

Attys for Both:

1. Appraisals must be comparable to be of use.

2. I represent an agency which must prove issue of necessity and, if raised as a defense, issue of proper location. Discovery on these issues is generally more useful than on just compensation issue.

3. Not used often, but should be available, and is useful under some circumstances.

4. It is not useful where it seeks to reach market data generally available to both sides. But, on capitalization of income studies, if property owner unwilling to voluntarily disclose data, discovery would be helpful.

5. The problem of discovery from the property owner's standpoint is that, except in a case involving a lot of money, it frequently places an intolerable financial burden on the defendant without any hope of recovering the cost which is thrust upon him.

6. Yes, in more complicated cases; no, in simple valuation cases.

7. When enforced.

Statutory Exchange of Valuation Data (CCP §§1272.01-1272.09)

If you have ever used statutory exchange of valuation data, please answer Questions 23-26.

23. Who do you find more willing to initiate statutory exchange?

	Condemnor Attys	Condemnee Attys	Attys for Both
Plaintiffs	3	3	3
Defendants	3*	4	3
About equal	no replies	8	4

24. Do you find the exchange used as supplementary to or in place of other discovery devices?

	Condemnor Attys	Condemnee Attys	Attys for Both
Supplementary	2	3	3
In place of	2*	7	4
About equal	2	4	2

25. Have you had to seek sanctions under CCP §1272.05 for failure of opponent to exchange valuation data?

	Condemnor Attys	Condemnee Attys	Attys for Both
Never	4	11	3
Infrequently	2*	4	6
Frequently	no replies	no replies	1

Were you satisfied with the court's action on your request that sanctions be imposed?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	1	2	1
NO	1*	1	6

26. What deficiencies are there in the statutory exchange of valuation data procedure?

Condemnor Attys:

1. Does not adequately cover cases where primary issue is severance damages. Should require statement of reasons supporting opinion of severance and preclude use of any not disclosed.

2. Often have been dissatisfied with quality of information furnished by condemnee.

3. It is far too cumbersome, especially for cases where the amount of money involved is small. Attorneys for condemnees cannot afford to comply with the provisions where spread is small. Forces premature trial preparation.

4. The courts have a tendency to be more lenient to property owners when they fail to respond, than to the condemnor.*

Condemnee Attys:

1. Should be broadened to equate with Los Angeles County exchange of appraisal information procedure.

2. My experience has been that the condemnors' experts evade the exchange procedure. Experts have stated that reports were oral, that final reports had not been completed, that all comparable sales had not been assembled, that their reports were not formalized and had not been submitted.

3. Provision should be made for motion to require "specification of reasons and/or method of computation" within five (5) days after receipt of other report. Failure to provide such specification within ten (10) days after request, where original report does not fairly disclose reasons or method of compilation would constitute grounds for such sanctions as examination out of presence of jury, continuance to prepare rebuttal and attorneys fees.

4. It is too rigid; discovery procedures should be same as in other cases.

5. There should be a conference with the court ten (10) days after the exchange to clarify areas of difference.

Condemnee Attys: (Cont'd)

6. No effective control on failure to fairly exchange.

7. I have never found a court that was willing to impose sanctions.

Attys for Both:

1. No deficiencies in procedure but in content of exchanged data.

2. It is an exchange too close to trial to prepare for trial or to decide not to go to trial. If the data exchanged is too minimal, it is too late to use other discovery methods. Therefore, most people use other methods earlier and then add the exchange for an attempt to see what else can be obtained.

3. There is need for some basis of determining equality of exchange.

4. The statutory exchange procedure generally favors the plaintiff at the expense of the defense.

5. Enforcement by court.

6. CCP §1272.02(b) should require data as to "gross income multiplied" studies.

7. It is too easy for a judge to find "excusable neglect" on the part of defendant's attorney as not to deprive him of his "just compensation" chances.

CHAPTER 7. DISCOVERY; EXCHANGE OF VALUATION DATA

Article 1. Discovery

§ 1258.010. Use of discovery procedures

1258.010. The provisions of this chapter supplement but do not replace, restrict, or prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings.

Comment. Section 1258.010 supersedes former Section 1272.08 and makes clear that the special provisions of this chapter relating to exchange of valuation data (Article 2) and further discovery following exchange (Section 1258.020) do not limit the availability of discovery generally in eminent domain. See Section 1230.040 and Comment thereto (rules of practice in eminent domain proceedings).

§ 1258.020. Discovery following exchange of valuation data

1258.020. (a) Notwithstanding any other law or court rule relating to depositions and discovery, deposition and discovery proceedings pursuant to subdivision (b) may be had without requirement of court order and may proceed until not later than 10 days prior to the day set for trial of the issue of compensation.

(b) A party to an exchange of lists of expert witnesses and statements of valuation data pursuant to Article 2 (commencing with Section 1258.210) or pursuant to court rule as provided in Section 1258.300 may after the time of the exchange take the deposition of the other party to the exchange and of any person listed by him as an expert witness and obtain from them discovery concerning the matters referred to in Section 1258.260.

(c) Nothing in this section affects the power of the court, upon noticed motion by the person subjected to deposition or discovery proceedings pursuant to subdivision (b), to make any order that justice requires to protect such person from annoyance, embarrassment, or oppression.

Comment. Section 1258.020 is new. It permits, notwithstanding the general provisions relating to discovery, depositions of parties and of experts who will testify at trial and discovery generally of facts, theories, and opinions relating to the valuation of the property involved in the eminent domain proceeding.

Section 1258.020 permits depositions and discovery without requirement of a court order but provides for court relief of any person to protect him from annoyance, embarrassment, or oppression. Section 1258.020 permits deposition and discovery proceedings to within 10 days prior to trial despite the general provision of Rule 222 of the California Rules of Court limiting discovery within 30 days of trial. The provisions of Section 1258.020 apply

only after an exchange pursuant to Article 2 or a comparable exchange of valuation data and lists of experts has taken place.

The expenses of an expert deposed under this section may be compensable. See Govt. Code § 69092.5.

§ 1258.030. Admissibility of evidence

1258.030. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Comment. Section 1258.030 is the same as former Section 1272.09 but makes clear that not only the exchange provisions of Article 2 but also the discovery provisions of Article 1 do not affect or alter the rules on admissibility of evidence. The admission of evidence in eminent domain proceedings is governed by Evidence Code Sections 810 to 822 and other provisions of the Evidence Code.

Article 2. Exchange of Valuation Data

§ 1258.210. Demand for exchange

1258.210. (a) Not later than 30 days following the filing of his answer, a defendant may serve on any adverse party and any adverse party may serve on that defendant a demand to exchange lists of expert witnesses and statements of valuation data. Thereafter, the court may permit any party, upon noticed motion and a showing of good cause, to serve such a demand upon any adverse party.

(b) The demand shall be filed and shall:

(1) Describe the property to which it relates, which description may be by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Article 2 (commencing with Section 1258.210) of Chapter 7 of Title 7 of Part 3 of the Code of Civil Procedure not later than the date of exchange to be set in accordance with that article. Except as otherwise provided in that article, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

Comment. Section 1258.210 supersedes subdivisions (a)-(c) of former Section 1272.01. The simplified procedure provided by this article for exchanging valuation information is not mandatory in all cases; it applies only if invoked by a party to the proceeding. Moreover, the procedure provided by this

article is not applicable in counties which provide an adequate substitute. See Section 1258.300.

Subdivision (a) of Section 1258.210 changes the time for making a demand to exchange from 50 days prior to trial to 30 days following filing of a defendant's answer with provision for a later demand where good cause is shown. This change will enable an earlier exchange thereby permitting additional discovery, if necessary, based on information exchanged. See Section 1258.020 (further discovery following exchange). It will also remove the uncertainty of the 50-day time limit prior to trial in cases where the trial date is known only 30 days prior to trial.

Under Section 1258.210, a defendant may serve and file a demand to exchange not later than 30 days following the filing of his answer, and the plaintiff may serve and file a demand to exchange on a particular defendant not later than 30 days following the filing of that defendant's answer. A demand may, of course, be filed and served before an answer has been filed.

Where a party makes a demand to exchange data, that party must, of course, himself provide his own data to the party on whom the demand was served. See Section 1258.230(a).

Subdivision (b) of Section 1258.210 is the same in substance as former Section 1272.01(c).

Subdivision (b) of the former section--permitting cross-demands within 40 days prior to trial--is deleted because it gave rise to confusion that a person serving a demand need not exchange his own data unless a cross-demand is served on him. The deleted provision is unnecessary in light of the provision in subdivision (a) for relief from the time limits for serving a demand upon a showing of good cause.

§ 1258.220. Date of exchange

1258.220. For the purposes of this article, the "date of exchange" is the date agreed to for the exchange of their lists of expert witnesses and statements of valuation data by the party who served a demand and the party on whom the demand was served or, failing such agreement, the date set by the court on noticed motion of either party, which date shall be approximately 40 days prior to commencement of the trial on the issue of compensation.

Comment. Section 1258.220, defining the date of exchange, supersedes the exchange date--20 days prior to trial--prescribed by former Section 1272.01(d). The exchange date is to be the date selected by the parties to the exchange or, failing agreement, the date selected by the court, approximately 40 days prior to trial. This earlier exchange date will enable subsequent discovery. See Section 1258.020 (further discovery following exchange).

§ 1258.230. Exchange of lists and statements

1258.230. (a) Not later than the date of exchange:

(1) Each party who served a demand and each party upon whom a demand was served shall deposit with the clerk of the court a list of expert witnesses and statements of valuation data.

(2) A party who served a demand shall serve his list and statements upon each party on whom he served his demand.

(3) Each party on whom a demand was served shall serve his list and statements upon the party who served the demand.

(b) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this article. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this article. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial.

Comment. Section 1258.230 is the same in substance as former Section 1272.01(d)-(e).

Subdivision (b) requires that deposits with the clerk of lists and statements be entered in the register of actions. With respect to maintenance of the register, see Govt. Code § 69845. Such entries will permit the court

to determine whether a list and statements have been deposited in compliance with this article. However, the statements or appraisal reports used as statements (see Section 1258.260) will not necessarily be in the form prescribed by court rules for papers to be filed. Also, the copies deposited with the clerk serve the limited purpose of enabling the trial court to rule under Section 1258.280 upon admissibility of opinions not supported by data. Hence, the subdivision does not require or permit the filing of lists and statements but instead requires the clerk to maintain custody of them and make them available to the trial court at the commencement of the trial. In the usual case, the copies furnished to the court will have served their only purpose at the conclusion of evidence. The subdivision therefore permits them to be returned to the attorneys. For those instances in which the copies might be of significance in connection with an appeal or posttrial motion, the subdivision permits the court, on its own initiative or on request of a party, to order them retained. In this event, the copies retained may thereafter be disposed of in the manner of exhibits introduced in the trial.

§ 1258.240. Contents of list of expert witnesses

1258.240. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement of the subject matter to which his testimony relates.

Comment. Section 1258.240 is the same as former Section 1272.03. It requires inclusion of all persons to be called as experts, not merely those to be called as valuation experts. See Evid. Code §§ 813(b), 814. In addition to naming each proposed expert witness, the list must identify the subject matter of his testimony, e.g., "valuation testimony," "existence of oil on subject property," and the like. This further information is necessary to apprise the adverse party of the range and general nature of the expert testimony to be presented at the trial.

Unlike Section 1258.260 (contents of statement of valuation data), this section does not require that the particulars of the expert opinion be stated or that the supporting factual data be set forth. In such case, normal discovery techniques can be used to obtain the particulars of the opinion and supporting factual data. See Section 1258.020 (further discovery after exchange). See also Section 1258.010 (use of discovery procedures).

§ 1258.250. Persons for whom statements of valuation data must be exchanged

1258.250. A statement of valuation data shall be exchanged for each person intended to be called as a witness by a party to testify to his opinion as to any of the following matters:

(a) The value of the property being taken.

(b) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(c) The amount of the benefit, if any, to the remainder of the larger parcel from which such property is taken.

(d) The amount of any other compensation required to be paid by Chapter 9 (commencing with Section 1263.010) or Chapter 10 (commencing with Section 1265.010).

Comment. Section 1258.250 is the same in substance as subdivision (a) of former Section 1272.02 with conforming changes made to reflect the compensation provisions of Chapters 9 (commencing with Section 1263.010) and 10 (commencing with Section 1265.010).

Section 1258.250 requires that a statement of valuation data be provided for each person who is to testify to his opinion as to one or more of the matters listed in the section whether or not that person is to qualify as an expert. For example, a statement must be provided for the owner of the property if he is to testify concerning value, damages, benefits, or other items of compensation.

§ 1258.260. Contents of statement of valuation data

1258.260. (a) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in Section 1258.250 and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(b) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (a), the statement of valuation data shall give:

(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 or other identification of the record of the transaction.

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

(c) If any opinion referred to in Section 1258.250 is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(d) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (e), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(e) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

Comment. Section 1258.260 is the same in substance as former Section 1272.02(b)-(f).

Subdivision (a) requires the setting forth of the specified data to the extent that any opinion is based thereon. Cf. Evid. Code §§ 814-821. It does not require that the specified data be set forth if the witness' opinion is not based thereon even though such data may have been compiled or ascertained by the witness. Also, the supporting data required by subdivision (a) commonly will pertain to the witness' opinion as to value, and the same data will be considered by the witness to support his opinion as to damages and benefits. In this case, the statement or appraisal report may simply recite that the opinion as to damages or benefits is supported by the same data as the opinion as to value. Where the required information, however, is not identical with respect to all opinions of the witness, subdivision (a) requires that the item of supporting data be separately stated with respect to each opinion of the witness.

Subdivision (c) requires that each valuation statement give information regarding any person who will not be called as a witness but upon whose opinion the testimony of the valuation witness will be based in whole or substantial part. This information is needed by the adverse party not only for the general purpose of properly preparing for trial but also to enable him to utilize his right under Section 804 of the Evidence Code to call the other expert and examine him as an adverse witness concerning his opinion. The subdivision also requires a statement of the subject matter of the supporting opinion. As to this requirement, and the parallel requirement under Section 1258.240, see the Comment to Section 1258.240.

§ 1258.270. Supplementation of lists and statements

1258.270. (a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

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

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1258.240 and 1258.260 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 1258.270 is the same in substance as former Section 1272.04. Although Section 1258.270 requires supplementation of lists and statements exchanged, compliance with the section does not insure that the party will be permitted to call the witness or have a witness testify as to the opinion or data. See Sections 1258.280 and 1258.290.

§ 1258.280. Limitations upon calling witnesses and testimony by witnesses

1258.280. Except as provided in Section 1258.290, upon objection of a party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1258.230:

(a) No party required to serve a list of expert witnesses on the objecting party may call an expert witness to testify on direct examination during his case in chief unless the information required by Section 1258.240 for such witness is included in the list served.

(b) No party required to serve statements of valuation data on the objecting party may call a witness to testify on direct examination during his case in chief to his opinion on any matter listed in Section 1258.250 unless a statement of valuation data for such witness was served.

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

Comment. Section 1258.280 is the same in substance as former Section 1272.05. Section 1258.280 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. For applications of the same sanction to other required pretrial disclosures, see Sections 454 (copies of accounts) and 2032 (physicians' statements). Although the furnishing of a list of expert witnesses and statements of valuation data is analogous to responding to inter-

rogatories or a request for admissions, the consequences specified by Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply with the requirements of this article. Existence of the sanction provided by Section 1258.280 does not, of course, prevent those consequences from attaching to a failure to make discovery when regular discovery techniques are invoked in the proceeding.

Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the list or statements. See Section 1258.290 and the Comment to that section.

Section 1258.280 limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See City & County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585 (1928); State v. Loop, 127 Cal. App.2d 786, 274 P.2d 885 (1954). The section also does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should take care 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 article by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been called and such valuation data presented on the direct examination during the case in chief.

Application of the concept of "case in chief" to the presentation of evidence by the plaintiff requires particular attention. The defendant presents his case in chief first in the order of the trial. Therefore, the following presentation by the plaintiff may include evidence of two kinds; i.e., evidence comprising the case in chief of the plaintiff and evidence in rebuttal of evidence previously presented by the defendants. If the evidence offered in rebuttal is proper as such, this section does not prevent its presentation at that time.

§ 1258.290. Relief from limitations on calling witness or testimony by witness

1258.290. (a) The court may, upon such terms as may be just (including but not limited to continuing the trial for a reasonable period of time and awarding costs and expenses), permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1258.210 to 1258.260, inclusive, that he has complied with Section 1258.270, and that by the date of exchange he:

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

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

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

Comment. Section 1258.290 is the same in substance as former Section 1272.06 and allows the court to permit a party who has made a good faith effort to comply with this article to call a witness or use valuation data that was not included in his list of expert witnesses or statements of valuation data. The standards set out in Section 1258.290 are similar to those applied under Section 657 (granting a new trial upon newly discovered evidence) and Section 473 (relieving a party from default). The court should apply the same standards in making determinations under this section. The consideration

listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section.

§ 1258.300. Applicability of article

1258.300. The superior court in any county may provide by court rule a procedure for the exchange of valuation data which shall be used in lieu of the procedure provided by this article if the Judicial Council finds that such procedure serves the same purpose and is an adequate substitute for the procedure provided by this article.

Comment. Section 1258.300 supersedes former Section 1272.06. Section 1258.300 supplants the special legislation relating to Los Angeles County by the general principle that any county that has adopted adequate rules that are approved by the Judicial Council is exempt from the provisions of this article. Under this general standard, a system for disclosing valuation data under judicial supervision such as that in Los Angeles County would qualify for approval by the Judicial Council. See Policy Memorandum, Eminent Domain (Including Inverse Condemnation), Superior Court, County of Los Angeles (dated February 7, 1973); Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).