#36.90 10/23/74

Memorandum 74-51

Subject: Study 36.90 - Eminent Domain (Discovery)

Attached to this memorandum are copies of the Uniform Eminent Domain Code provisions relating to discovery (Exhibit I--pink) and Professor Van Alstyne's analysis and comparison (Exhibit II--yellow) with the comparable California eminent domain discovery provisions.

We plan at the November 1974 meeting to review the provisions of the Uniform Code and we will make any necessary changes in the Commission's recommended eminent domain legislation after it has been introduced in the Legislature.

In connection with the problem raised by Professor Van Alstyne at pages 2-3 of his analysis and comparison, relating to the ambiguity of the phrase "without requirement of court order" as used in Eminent Domain Law Section 1258.020, the staff notes that the intent of this phrase was to avoid any possible conflicts with California's fairly restrictive "work product" rule in deposition of experts. To resolve the ambiguity and make the Commission's intent clear, the staff has revised the introductory portion of subdivision (a) to read:

> 1258.020. (a) Notwithstanding ~~any other law~~ Section 2016 or any court rule relating to discovery, proceedings pursuant to subdivision (b) may be had without requirement of court order and may proceed until not later than 20 days prior to the day set for trial of the issue of compensation.

The Comment to the section would commence:

> Comment. Section 1258.020 is new. It permits discovery of experts who will testify at trial notwithstanding any implications to the contrary in the "work product" exception of Section 2016, without requirement of a court order. The section, however, ~~but~~ provides for court relief of any person to protect him from annoyance, embarrasment, or oppression.

In connection with this subject, the staff notes that the Commission has decided to study the field of discovery generally.

Respectfully submitted,

Nathaniel Sterling

EXHIBIT I

ARTICLE VII

[Proceedings Before Trial]

Section 701. [Application of Article.]

Discovery and pretrial conferences in condemnation actions are governed by the [Rules] [Code] of Civil Procedure, except as otherwise provided in this Article.

Comment

Article VII liberalizes conventional discovery practice as applied in eminent domain actions, and includes optional provisions strengthening the court's authority to conduct effective pretrial conferences in condemnation actions.

Since the intent of this Article is to expand the range of discovery normally available in condemnation actions, this section should be modified appropriately in adopting states that observe a more liberal discovery approach than that which is here set forth.

Section 702. [Discovery Scope.]

(a) Without leave of court, and without showing any need for the information sought, or of hardship or prejudice if discovery is withheld, a party to a condemnation action may:

(1) [By request for production] require any other party to produce for inspection and copying, or to furnish a copy of, any written appraisals, reports, maps, diagrams, charts, tables, or other documents in his possession or under his control that contain engineering, economic, valuation, comparable sales, or other data pertaining to the issue of compensation.

(2) By written interrogatory require any other party to disclose the identity and location of each person whom the other party expects to

call as a witness at the trial on any question relating to the issue of compensation, to state the substance of the facts and opinions to which the witness is expected to testify, and to summarize the grounds for each opinion.

(3) By written interogatory or deposition require any other party to disclose the identity and location of every person, including an employee or agent, whom he has caused to examine the property sought to be taken, or whom he has consulted or employed to provide information or to express an opinion relating thereto, in order to assist in determining the amount of compensation, whether or not the person so identified is expected to be called as a witness at the trial.

(4) By deposition examine any person whose identity is discoverable under paragraphs (2) and (3), and whom the other party expects to call as a witness at the trial, with respect to his findings and opinions on any question relating to the issue of compensation.

(b) A party may discover the findings and opinions, on any question relating to the issue of compensation, of a person whose identity is discoverable under paragraphs (2) and (3) of subsection (a), but whom the other party does not expect to call as a witness at the trial, only with leave of court first obtained on noticed motion for good cause shown, and subject to reasonable conditions required by the court.

Comment

Section 702 provides a liberal rule of discovery with respect to valuation issues that goes beyond the purview of conventional discovery in other civil actions. For example:

(1) Section 702(a)(1) permits discovery as a matter of right and without prior court approval of documentary data relating to valuation issues which may be in the possession of the other party,

whether or not prepared by a prospective trial witness. See, e.g., State v. Leach, 516 P.2d 1383 (Alaska 1973) (accord). Absent specific authorization, data of this kind would often be discoverable in other civil actions only upon a showing of special need or inability to obtain equivalent materials by other means. Compare FRCP, Rule 26(b)(3), relating to discovery of "trial preparation materials." The specification of the kinds of data included under subsection (a)(1) makes it clear that the mental impressions, opinions, conclusions or legal theories of an attorney (often called "attorney's work product") are not made discoverable by this section. The bracketed phrase "by request for production" should be adapted to conform to the usual discovery technique used in the adopting state to obtain documentary inspection (e.g., motion for inspection; subpoena duces tecum; etc.).

(2) Section 702(a)(2) authorizes a party by interrogatories to require disclosure of the identity and a summary of the testimony of the valuation witnesses expected to be called by any other party. If the party from whom the information is sought has not determined the choice of valuation witnesses he intends to call to testify at the trial, he must so respond, and later supplement his answer under Section 704 or the equivalent supplementation provision of state discovery practice. A failure to do so, unless relief is secured by a protective order under Section 703, exposes the noncomplying party to sanctions. See Section 706.

(3) Section 702(a)(3) authorizes discovery, as of right, of the

called to testify at the trial. Identification of all such persons will facilitate investigation and trial preparation both by informal means (e.g., interview) and by formal discovery (i.e., deposition) to the extent permitted by law. See subsection (b). Moreover, knowledge of the identity of consultants used by another party will assist counsel in seeking to employ other experts to help prepare his client's cause, and may provide clues as to the opponent's theory of value.

(4) Section 702(a)(4) authorizes the taking of the deposition of an expert or other valuation consultant whom another party expects to call as a witness at the trial, without the necessity for obtaining leave of court by motion in advance. Compare FRCP, Rule 26(b)(4)(A) and (B). Nothing in paragraph (4) precludes objections to questions asked during the deposition, if otherwise permissible under state discovery practice. But see Section 703.

Subsection (b) authorizes discovery of compensation-related facts and opinions held by consultants who are not expected to be

called as witnesses at the trial, but only with prior leave of court. No special test of exceptional circumstances or impracticability is imposed; the requisite "good cause" for the order is left to the court's sound discretion in light of the circumstances of the case. FRCP, Rule 26(b)(4)(B).

Section 702 is predicated upon the view that condemnation actions represent a unique form of litigation principally concerned with the determination of the single issue of the amount of just compensation to be paid. Because of their exceptional character, such actions can be expedited and tried with greater efficiency and less expense if the fullest possible pretrial disclosure of valuation data and testimony is authorized. As with other discoverable matter, of course, discoverability does not necessarily imply admissibility in evidence at the trial, and the rules here set forth are subject to the court's power under Section 703 to grant protective orders.

Section 703. [Protective Orders.]

(a) Discovery under Section 702 is subject to the power of the court to make orders which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense, but discovery authorized by Section 702 may not be denied or limited solely for the reason that the documents, information, facts, opinions, or other matters sought either were or were not prepared, obtained, or proc red in anticipation of litigation or in preparation for trial in the particular action.

(b) The party taking the deposition of an independent expert witness shall pay the expert a reasonable fee for time spent in preparing for and in giving his deposition.

Comment

Section 703 limits the court's authority to restrict the liberal discovery contemplated by Section 702. While the general power to make protective orders is expressly confirmed in Subsection (a) (compare FRCP, Rule 26(c), as to the general scope of protective orders), two significant limitations not ordinarily applicable in other civil actions are established:

(1) The court may not curtail discovery solely because the material sought was prepared, obtained, or procured in anticipation of litigation or trial in the action. Compare FRCP, Rule 26(b)(3), limiting discovery of anticipatory "trial preparation materials."

(2) The fact that the material was not prepared or obtained for use in the present case is not, standing alone, grounds for denying discovery. In the absence of this qualification, a protective order could be granted on the theory that the material sought (e.g., an appraisal prepared for some purpose unrelated to the present action) was not relevant to the subject matter. Compare FRCP, Rule 26(b)(4) (implied limitation of discovery of expert facts and opinions to those "acquired or developed in anticipation of litigation or for trial").

If agreement cannot be reached between the parties as to the payment of the expert witness fees required by subsection (b), the court may determine the amount due and order its payment.

[Section 704. [Duty to Supplement or Amend Response.]

A party who has responded to a request for discovery is under a duty seasonably to supplement or amend his response by supplying any subsequently obtained information upon the basis of which he knows that an earlier response by him was incorrect when made or, though correct when made, is no longer true or accurate, if a failure to supply the information would tend to be prejudicially misleading to the other party.]

Comment

Section 704 is intended to make it clear, in the context of the special discovery provisions governing condemnation actions, that a party responding to discovery has a continuing duty to supplement his responses. A "party," within the purpose of this section, includes a corporate or other person whose officer or agent made a response or gave a deposition in discovery proceedings.

In states that already have adequate supplementation provisions in their general discovery rules or code, this section may not be strictly necessary and it is therefore bracketed as optional. Its enactment, however, may assist in avoiding any doubts on the matter, and will clarify the scope of the sanctions described in Section 707.

[Section 705. [Effect of Article on Admissibility of Evidence.]

This Article does not make admissible any evidence that is not otherwise admissible nor permit a witness to base an opinion on any matter that is not a legally proper basis for the opinion.]

Comment

Section 705 is bracketed for optional use in states where it is deemed appropriate expressly to foreclose the drawing of any inference from the provisions of Article VII regarding the admissibility of evidence or the permitted bases for an expert opinion. These matters are governed by other statutes, rules, and court decisions, and not by this section. See Article XI.

[Section 706. [Effect of Discovery Proceedings Upon Trial Evidence.]

(a) Except as provided in Subsection (b),

(1) a party required to produce documentary data under this Article may not, over objection by a party who was entitled to production thereof, call a witness to testify at the trial on any question relating to valuation or compensation unless copies of all appraisals, reports, maps, diagrams, charts, tables, or other documents prepared by or under the direction of the witness, or upon which his testimony is based in whole or in part, were supplied in substantial compliance with this Article; and

(2) a party who was requested to disclose the identity of a person by discovery proceedings under this Article may not call and examine that person at the trial, over objection by the party seeking the disclosure, with respect to any issue relating to valuation or compensation, unless the witness was identified and all additional properly requested information relating to the witness or his

testimony was supplied in substantial compliance with this Article.

(b) Upon such conditions as are just, the court may permit a party to call, or elicit an opinion or other testimony from, a witness whose testimony is barred under Subsection (a), if the court determines that the failure to respond to discovery was due to excusable mistake, inadvertence, or surprise, and did not materially impair the ability of the objecting party fairly to present the merits of his case.]

Comment

Section 706 is an optional provision designed to confirm the court's power to impose appropriate sanctions in the form of orders excluding evidence where pertinent pretrial discovery thereof was withheld. By reference to discovery under "this Article," this section makes it clear that the same consequence may be attached to a failure to properly supplement a prior discovery response. See Section 704.

Subsection (b) gives the court power to excuse noncompliance upon a proper showing of good cause and lack of prejudice. The court, however, may impose reasonable conditions, such as a continuance of the trial or the payment of additional cost or expense of preparation to meet the unexpected evidence.

[Section 707. [Pretrial Order.]

The court [may hold a pretrial conference and], in addition to other matters, may include in its pretrial order terms and conditions reasonably necessary to enforce any agreement between the parties respecting the scope or design of the project, the location or relocation of improvements, or the performance of work by the plaintiff, and in connection therewith may define the scope of the issues and order of presentation of evidence at the trial.]

Memorandum

From: Arvo Van Alstyne

To: California Law Revision Commission

Subject: Discovery Under the Uniform Eminent Domain Code

This memorandum analyzes the discovery provisions of Article VII of the Uniform Eminent Domain Code (herein referred to as the "Code"), and compares them with California discovery available in eminent domain cases.

SECTION 701 - UNIFORM CODE.

This section is intended to make it clear that the discovery provisions of Article VII supplement and do not replace the state's general discovery practice for civil actions. The latter provisions continue to be applicable in eminent domain cases, except to the extent that the Code, by providing an inconsistent rule, supersedes the general law.

Comment: The proposed California Eminent Domain Law expresses substantially the same position as §701 of the Code. See § 1230.040 and Comment, Tent. Rec. p. 84; § 1258.010.

SECTION 702 - UNIFORM CODE.

(a) Documentary production. Section 702(a)(1) authorizes a party to obtain discovery, for purposes of inspection and copying, of valuation-related trial preparation materials in the possession or under the control of any other party to the condemnation action. This provision liberalizes the usual scope of discovery of such documents in that:

(1) Documentary production may be demanded without first obtaining a court order. Discovery is a matter of right and not of judicial discretion. Compare FRCP Rule 26(b)(3) (discovery of trial preparation materials authorized only by court order).

Comment: Under CCP 2019(a)(5), a party to a condemnation proceeding may also require production of documents without a prior court order, by serving a notice to produce; but CCP 2019(a)(5) is only available to obtain production at a deposition. If production of documents for inspection and copying is desired, but not at a deposition, a noticed motion and showing of good cause are necessary under CCP 2031.

Section 1258.020 of the proposed California Eminent Domain Law also provides that discovery may be obtained, "without requirement of court order," after an exchange of valuation data pursuant to §§ 1258.210 - 1258.300. This provision is ambiguous and difficult to apply in any literal sense, especially since the only relevant mode of discovery for which a court order would ordinarily be required appears to be documentary inspection under CCP § 2031. It seems doubtful that the quoted passage could have been intended to authorize discovery under § 2031 without a court order, since judicial control of discovery, through insistence upon a showing of "good cause" as a condition precedent to granting of inspection are essential to the scheme of that section. Thus, CCP § 2031 would be anomalous and unworkable without a court order.

The similar language of Code § 702, however, is not open to the same criticism. While California has no general rule requiring a prior court order to obtain discovery of trial preparation materials, such as FRCP Rule 26(b)(3), the language of Code § 702 precluding need for a court order was framed on the assumption that an adopting state would ordinarily have a counterpart to FRCP Rule 26(b)(3) in its general discovery provisions.

The reference in § 1258.020 to lack of any requirement for a court order thus must be deemed to mean that judicial permission to initiate any kind of discovery proceedings, following an exchange of valuation data, is not necessary. Construed in this manner, however, § 1258.020 merely allows an automatic exception to the 30-days-before-trial cut off of discovery provided by Rule 222, allowing ten additional days for discovery. That is scarcely a significant liberalization of discovery, as the Comment to § 1258.020 appears to suggest.

(2) Discovery under Code § 702(a)(1) is not dependent upon a showing of "need for the information sought or of hardship or prejudice if discovery is withheld." Compare FRCP, Rule 26(b)(3).

Comment: Section 702(a)(1) is a substantially more liberal rule of discovery than CCP 2031.

The latter section requires a showing to the court's satisfaction that "good cause" exists for documentary production

exists; and this requirement is specifically defined by CCP 2036(a) to include not only a showing of discoverability (i.e., relevant to subject matter, etc.) but also a showing of "specific facts justifying discovery." See People ex rel. Dept. of Public Works v. Younger (1970) 5 Cal. App. 3d 575, 86 Cal. Rptr. 237 (Production of appraisal report of condemnor's appraiser denied for lack of adequate showing of good cause).

In addition to the "good cause" requirement of CCP 2031, California courts have treated engineering, appraisal, and valuation data of the kind referred to in Code § 702(1) as a form of conditionally privileged (i.e., not absolutely privileged) "work product." See, e.g., San Diego Professional Association v. Superior Court (1962) 58 Cal.2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (order granting inspection of expert reports sustained). See also, Swartzman v. Superior Court (1964) 231 Cal. App.2d 195, 41 Cal. Rptr. 721. Under CCp 2016(b), second paragraph, such materials--provided they do not reflect an attorney's mental impressions, conclusions, opinions, or legal theories--are discoverable only upon a showing that denial of discovery "will unfairly prejudice" the ability of the moving party to prepare for trial or "will result in an injustice."

Code § 702(a)(1) is intended to preclude the necessity for a party in an eminent domain case to make this double showing of good cause and probable prejudice or hardship as a condition to

compulsory disclosure of the described trial preparation materials.

(b) Interrogatories to identify valuation witnesses and obtain valuation data. Under Section 702(a)(2) of the Code, the identity of valuation witnesses expected to testify at the trial, together with the substance of the anticipated testimony and a summary of supporting grounds for any opinions contained therein, may be discovered by written interrogatory. As with documentary inspection (see above), a court order is not required, nor is any showing of good cause or probable prejudice from a denial of discovery. See FRCP Rule 26(b)(4), par. A(i) (similar).

Comment: The discovery authorized by Code § 702(a)(2) includes a more general and limited form of the information discoverable through an exchange of valuation data under CCP 1272.01 (and proposed Eminent Domain Law, §§ 1258.210 to 1258.260, set out in Tent. Recom. pp. 197-203).

The Uniform Code Commissioners considered adoption of an exchange procedure similar to California's, but rejected this approach as being unduly complicated. Liberalization of the scope of conventional discovery was regarded as a preferable approach in a proposed Uniform Law drafted for adoption by all 50 states.

(c) Identification of valuation consultants. Section 702(a)(3) of the Code authorizes discovery, without a court order or showing of need or prejudice, of the identity of all persons consulted by the opposite party in connection with the question of the amount of compensation. This section

expressly includes persons not intended to be called by the opposite party to testify at the trial. It does not authorize discovery of the facts or opinions held by the consultants so identified, however. (But see Code § 702(b), below.) As the Comment to § 702(a)(3) points out, identification alone may be useful to trial preparation, may provide clues to the adverse party's theory of value, and can assist in identifying experts who are available for employment.

Comment: Code § 702(a)(3) goes beyond the range of valuation data required to be exchanged under CCP 1272.03 (proposed Eminent Domain Law § 1258.240), since the latter is limited to each person "intended to be called as an expert witness."

However, discovery of the identity of expert consultants--as distinguished from their opinions and the reasons for them--appears to be readily available under California decisional law by conventional discovery devices. Oceanside Union School District v. Superior Court (1962) 58 Cal.2d 180, 373 P.2d 439, 23 Cal. Rptr. 375; Grossman and Van Alstyne, California Discovery Practice § 44 (1972).

(d) Depositions of prospective expert witnesses. Code § 702(a)(4) authorizes the taking of the deposition, as a matter of right, of valuation witnesses expected to be called to testify by the other party, with respect to their findings and opinions. Compare FRCP Rule 26(b)(4), par. A(ii) (depositions for this purpose only permitted on court order).

Comment: Following an exchange of valuation data, § 1258.020(b)

authorizes the taking of the deposition of any expert witness listed by the other party. This rule is somewhat narrower than that in the Code, since the latter is not limited to "experts." Section 1258.020(b), however, appears merely to codify existing California law affirming the propriety of deposing the experts to be called by the other side. See, e.g., Oceanside Union School Dist. v. Superior Court, supra; Dow Chemical Co. v. Superior Court (1969) 2 Cal. App. 3d 1, 82 Cal. Rptr. 288.

The Code provision is more liberal than the California rule, since a showing of need or prejudice is expressly precluded under § 702(a)(4). The cited California cases (Oceanside and Dow, supra), however, indicate that if a protective order is sought to prevent the taking of the expert's deposition, the court may properly require the deposing party to make a showing of necessity for the deposition and inability to obtain the same information through his own experts or by alternative means.

(e) Discovery of findings and opinions of non-witness consultants. Code § 702(b) permits discovery of the findings and opinions of consultants who are not expected to be called to testify by the opposite party, but only on court order for good cause, and subject to reasonable conditions (e.g., payment of the expert's preparation and deposition attendance fees under Code § 703(b); payment of a share of the professional fee paid to the expert by the other party). Compare FRCP Rule 26(b)(4), par. B.

Comment: Under California law, discovery of the findings and

opinions of non-witness consultants, whether by deposition or inspection, is very limited, and is regarded as within the scope of the qualified "work product" doctrine. See, e.g., Swartzman v. Superior Court, supra; San Diego Professional Assn. v. Superior Court, supra; Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal. App.2d 527, 51 Cal. Rptr. 511.

Thus, the rule in § 702(b) is similar to the rule in California; but due to use of somewhat less restrictive language (compare CCP § 2016(b) and § 2016(g), relating to the "work product" doctrine), the Code appears to be slightly more tolerant of discovery in such cases than is the California law.

SECTION 703 - UNIFORM CODE.

Section 703(a) of the Code confirms the power of the court to control or limit discovery under § 702 by protective orders.

Comment: In this respect, § 703(a) appears to be essentially the same as § 1258.020(c) of the California Eminent Domain Law.

Section 703(a), however, also includes an explicit limitation upon the power of the court to deny or restrict discovery solely because the information sought was, or was not, prepared in anticipation or preparation for trial in the instant action.

Comment: California law does not appear to contain a comparable provision. Section 703(a), in this respect, is intended to preclude a narrow interpretation based upon the restrictive wording of

FRCP Rule 26(b)(4) (limiting discovery of expert information to materials acquired or developed in anticipation of litigation or for trial).

Section 703(b) requires a party deposing an independent expert (i.e., not an employee of the other party) to pay him a reasonable deposition fee.

Comment: While not explicitly spelled out in California statutes, a condition of payment of an expert's fee has been held a reasonable exercise of judicial discretion, in connection with an order authorizing discovery. See San Diego Professional Assn. v. Superior Court, supra.

SECTION 704 - UNIFORM CODE.

Code § 704 imposes a continuing duty upon a party to supplement or amend his previous responses to discovery if subsequently obtained information indicates that they were incorrect or are no longer accurate, if a failure to supply the additional information would be prejudicially misleading to the other party. Compare FRCP Rule 26(e)(2).

Comment: California law does not impose any general duty of supplementation of responses to discovery. See Grossman and Van Alstyne, California Discovery Practice § 473 (1972).

However, CCP 1272.04 (redrafted as § 1258.270 of the proposed Eminent Domain Law) does require supplementation of expert witness lists and statements of valuation data after they have been served under the exchange procedure. This section does not apply to responses given to conventional discovery demands.

SECTION 705 - UNIFORM CODE.

Code § 705 makes it clear that the liberal discovery provisions of the Code do not affect or alter the rules governing admissibility of evidence.

Comment: Code § 705 is substantially the same in both words and substance as California Eminent Domain Law, § 1258.030.

SECTION 706 - UNIFORM CODE.

Code § 706(a) confirms the power of the court to exclude valuation testimony offered by a party at the trial if that party failed to comply with an authorized demand for discovery relating to that witness or his testimony.

Comment: Section 706(a) has a counterpart in § 1258.270 of the California Eminent Domain Law.

Code § 706(b) authorizes the court to excuse noncompliance with the discovery rules if (1) the failure to respond was due to "excusable mistake, inadvertence, or surprise" and (2) it did not impair the ability of the objecting party to fairly present the merits of his position.

Comment: A somewhat more sophisticated approach to the problem of judicial excuses for noncompliance with the valuation data exchange program is found in § 1258.290. See also, CCP 2034.