Meeting

10/30/62

Memorandum No. 72(1962)

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

BACKGROUND

The purpose of this memorandum is to present for Commission consideration the several comments and suggestions that have been received in connection with the Commission's tentative recommendation relating to Pretrial Conferences and Discovery in Eminent Domain Proceedings.

The tentative recommendation was first distributed for comment to approximately 100 interested persons on October 31, 1961. Most private attorneys, as well as most public agencies, commenting on the tentative recommendation objected to the proposed legislation. The reasons for objection ranged from differences in principle and the probable lack of necessity for any legislation to a fear of increased costs and invasion of the work-product concept.

The tentative recommendation was distributed again on August 14, 1962 after several decisions by the appellate courts clarifying the appropriate areas of discovery. The comments received since the second distribution indicate a balance of opinion for and against the proposed statute, with the criticism directed mainly at detail rather than principle. Accordingly, the staff suggests that the basic approach to this problem is a sound one and that questions of detail ought to be resolved in favor of submitting legislation on this subject to the 1963 Legislature.

Attached as Exhibit I (blue pages) is a report of the State Bar Committee on Condemnation Law and Procedure. Included in this report is the Committee's redraft of the Commission's proposed statute.

Attached as Exhibit II (yellow pages and pink pages) is a collection of letters received from private attorneys and representatives of various public agencies. (These letters are arranged in inverse chronological order except where more than one letter was received from the same source. The letters received since the second distribution of the tentative recommendation are reproduced on pink pages; all others are reproduced on yellow pages.) A table of contents to this exhibit is contained on page II-1 of the exhibit.

Attached as Exhibits III and IV (also pink pages) are two additional letters commenting on the tentative recommendation. These letters were received since the preparation of Exhibit II.

Also attached (white pages) is a letter received from the Department of Public Works.

Finally, there is attached a copy of the Commission's tentative recommendation which was distributed on the dates indicated above.

We had hoped to have a revised research study on this subject available at the time the Commission considered this tentative recommendation. Our consultant has not delivered the revised study. Accordingly, we suggest that you read the following cases which bear on discovery and spell out the Greyhound decision to some extent:

Oceanside Union School Dist. v. Superior Court, 58 Adv. Cal. 182 (July 1962);

San Diego Professional Assn. v. Superior Court, 58 Adv. Cal. 197 (July 1962) (indicating an expert witness' report is not privileged per se and disapproving Rust v. Roberts);

Dept. of Public Works v. Donovan, 57 Adv. Cal. 374, 19 Cal. Rptr. 473, 369 P.2d 1 (1962);
Mowry v. Superior Court, 202 Adv. Cal. App. 263 (April 1962).

We suggest also that you study the tentative recommendation and read the letters that are included in the various exhibits before you consider the following analysis of the comments and suggestions concerning the tentative recommendation.

IS THE STATUTE A SOUND SOLUTION TO THE PROBLEM OF DISCOVERY IN EMINENT DOMAIN CASES?

It should be noted at the outset that the tentative recommendation contains nothing regarding pretrial conferences in eminent domain proceedings. The staff recommends that we do not provide anything concerning pretrial conferences in the proposed statute. The matter of pretrial conferences is now being considered by the State Bar and by the Judicial Council. This seems to be a matter that should be dealt with by court rule rather than by statute. Moreover, we would not have time to work out the details of legislation concerning pretrial conferences even if we determined that to be the desirable course of action. Accordingly, comments which have been received that indicate general disapproval of the pretrial system do not properly reflect criticism of the proposed statute.

The tentative recommendation provides, in effect, for an exchange of appraisal reports a short time prior to trial. One of the most frequent criticisms of the tentative recommendation relates to the time element. Some persons stated that the exchange would be effective only if it occurred prior to the pretrial conference, while others felt that preparation for trial so far in advance of actual trial would be unduly

burdensome and costly. The cost factor is prominently mentioned by almost every private attorney commenting on the statute. In turn, the suggestion that the exchange of information should occur only a few days prior to trial effectively eliminates the value which such exchange would have so far as negotiation and settlement at pretrial is concerned. Moreover, as the Department of Public Works correctly notes, it seems that the question of timing properly depends upon the amount of information to be exchanged. Thus, while more time for preparation and analysis would be required if a detailed exchange is to occur, this would result in the double preparation which is condemned by almost every commentator. On the other hand, to so limit the amount of information to be exchanged far in advance of actual trial as to avoid double preparation would defeat the prime purpose of the statute. The question of timing, then, which engenders the subsidiary questions of cost, early or double preparation, and the extent of the detailed information to be exchanged, is the most important thread of criticism running through the comments received to date.

The questions of timing and the extent of information to be exchanged may be resolved in connection with a detailed consideration of the proposed statute. These should be considered only after an initial determination is made on the first question presented by the comments received on this tentative recommendation; and that is whether the general approach of the proposed statute is sound. Many of the comments indicate general approval of the discovery proceedings presently available to practitioners. Others, including the State Bar, suggest that there is a need for a simple, inexpensive means of exchanging factual information. As indicated, the staff feels that

the proposed statute represents a sound approach to the problem and ought to be the framework for needed remedial legislation.

SPECIFIC COMMENTS AND SUGGESTIONS

Assuming that the Commission desires to reaffirm its previously approved course of action as reflected in the tentative recommendation, the following specific comments and suggestions should be considered in connection with the Commission's proposed statute.

Section 1246.9 (presently Code of Civil Procedure Section 1246.1). The Department of Public Works (see pages 2 - 3 of the attached letter) objects to renumbering this section, pointing out that it is now properly located in the provisions relating to eminent domain. Additionally, the Department suggests that the Commission's proposed statute more appropriately belongs in that part of the Code of Civil Procedure dealing with discovery, with a possible cross-reference in the eminent domain title. The Department notes that the suggested placement would be compatible with the specialized discovery procedure pertaining to medical reports in personal injury actions [Code of Civil Procedure Section 2032].

As the Commission will recall, the decision to place the discovery statute in the eminent domain portion of the Code of Civil Procedure was based upon our plan to eventually reorganize the eminent domain title, with chapters relating to evidence, moving expenses, discovery, and the like. Although the proposed statute may be considered as a specialized discovery procedure, the substantive law to which it relates, i.e., eminent domain, is codified. This distinguishes the proposed legislation from other specialized discovery procedures like that relating to medical reports. Accordingly, the staff recommends that the proposed statute be placed in

the eminent domain title, and suggests that the tentative recommendation places the proposed statute in the most logical position in the eminent domain title.

Section 1246.1. As previously noted, a major objection to the entire statutory scheme proposed by the Commission--an objection expressed by well over half of the persons commenting on the tentative recommendation--is the timing provided for in this section. The State Bar and most practicing attorneys expressed particular concern over the cost factor involved in early preparation and the desirability of avoiding "double preparation."

In light of the substantial objections to the time limits provided in the tentative recommendation, the staff believes that the time for the exchange of information ought to be shortened to, perhaps, five days before trial. This, of course, would mean that there would be no exchange of information available for the pretrial conference unless voluntarily made by the parties. It is likely, however, that pretrial conferences will be made discretionary with the parties, for this is the conclusion of the State Bar and is now (as noted) a matter being studied by the State Bar and the Judicial Council. The staff sees no easy solution which would satisfy all of the objections made to the time element, but believes that a shorter time limit would be a better alternative than would a reduction in the amount of information to be exchanged, which, as noted, would effectively defeat the purpose of the statute.

Another problem with this section is raised by the Department of Public Works as follows:

> In many eminent domain actions there are several parties defendant who either have little or no interest in the case and who undertake none of the burden of preparing for trial, e.g.,

lessees and trust deed holders. Any party could, in collaboration with the principal defendant, serve a demand upon the plaintiff for an exchange. The information which this defendant would exchange would be of no use to the plaintiff and yet the plaintiff's information would give the principal defendant a "free ride" because the principal defendant does not simultaneously exchange any data with the plaintiff. Consequently, we would recommend that Section 1246.1(a) read as follows:

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

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

A similar change is recommended by the Department with respect to subdivisions (b) and (c) for the same reasons noted above.

Section 1246.2. There are several specific comments with respect to this section.

The first suggestion is that the requirement of listing every person upon whom an expert bases his opinion "in whole or in part" is going too far. "This would merely ask for a roll call of every public official and real estate man in the area." (See Exhibit II, page II-15.) The State Bar and the Department of Public Works also objects to this requirement, indicating that it defeats the purpose of a simple and inexpensive means of exchanging information. The Attorney General suggests a possible moderation by the addition of the word "substantial" preceding "part" in the quoted phrase. The Commission will recall that the prime purpose of including this requirement was to provide litigants with a means of identifying and verifying other experts upon whom the principal expert relied, such as a geologist, etc.

The State Bar Committee recommends that the Commission's statutory scheme not be limited to an exchange of valuation data. Rather, there should be an identification of experts intended to be produced as witnesses and the subject matter intended to be covered by each; such as a soil expert whose intended testimony does not deal directly with value. The specific suggestion is to require identification of every expert and the subject matter of the intended testimony, and to delete the limiting word "valuation" preceding "data" wherever it appears in the statute.

Several persons objected to the phraseology in subdivision (b)(2) with respect to indicated changes in zoning. Specifically, the requirement of "any information" was believed to be too broad. Most suggestions indicated that a statement of contention of the parties with respect to probable zoning changes would suffice.

The Commission should note the substantial split of opinion of the members of the State Bar Committee regarding the advisability of including offers in subdivision (b)(3) and the similar statement regarding the whole of subdivision (c). The Committee did, however, approve both of these subdivisions. There were no other adverse comments with respect to subdivision (b)(3).

The State Bar Committee recommends the deletion of subdivision (b)(4) as being unnecessary in the usual case and discoverable by other means where necessary in the unusual case. The Department of Public Works is in accord with the Committee's position.

Similarly, the State Bar Committee recommends adjustment of subdivision (b)(5) to require only information regarding actual gross income and actual expenses used in arriving at net income, since other

matters are not needed in the usual case and would be available through other means of discovery where necessary in the unusual case. The Department of Public Works is in accord with the Committee's position.

The Department of Public Works suggests that the reference in this section should specifically refer to "subdivision (b)(3)."

The Attorney General objects to the language "and circumstances" contained in Section 1246.2(c)(5), prefering instead that the more specific requirements of subdivision (c)(1) through (c)(4) would suffice without the necessity of giving additional information. In the Attorney General's experience "no court has ordered an exchange of the "circumstances" surrounding each sale and no party has requested such information."

A substantial number of persons objected to the requirement of listing the information required by subdivision (d). Some felt that this was entirely unnecessary and may prove to be unduly burdensome, particularly since the tangible information upon which an opinion is based would be available to any party exercising reasonable industry and diligence. Other commentators would distinguish between those tangible things upon which an opinion is based and those things which would be used by way of illustration. The State Bar Committee approved the deletion of this subdivision and the whole of Section 1246.3. The District Attorney of Ventura County favors a distinction between basis and illustration, but would include tangible things to be used by way of illustration in Section 1246.4, which relates to oral notice of data not previously listed in the data exchanged.

In light of the rather serious objections raised in connection with this subdivision, it would appear that the distinction between basis and illustration is a sound one. If this suggestion is approved, it would be a

matter of detail whether the oral notice be given by way of Section 1246.4 or included in a separate substantive section.

Section 1246.3. No specific comments were received with respect to this section other than the comment previously noted by the State Bar Committee and endorsed by the Department of Public Works that this section is unnecessary if subdivision (d) is deleted from Section 1246.2. Additionally, the Department suggests that this section is unnecessary in any event because the matter is adequately covered by existing Section 1231.

Section 1246.4. The only revisions in this section suggested by the State Bar Committee relate to making conforming changes in accord with the Committee's recommendation regarding Section 1246.2. In addition to endorsing the State Bar Committee's recommendation, the Department of Public Works would add that the notice be in writing except during the actual trial on the issue of market value. The specific language recommended by the department is as follows:

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

As noted by several members of the Commission, it is common practice to orally advise an opponent of new material which ought to be disclosed; and it is the purpose of this section to permit such practice to continue under the general supervision of the court. Accordingly, the staff recommends against a requirement that the data be in writing.

Another point is raised by the District Attorney of Contra Costa County (See Exhibit II, page II - 6b, items 3 and 4) as follows:

> 3. Experts other than appraisers. The basic theory is that the condemnor must put before the court the necessary showing, whether by certified copy of resolution alone, or with oral testimony, the case for "necessity". The burden is then cast upon the defendant to present his case in chief, followed by the condemnor's presentation. In actual practice, unless there is an entire taking, the preliminary presentation by the condemnor includes engineering testimony and exhibits concerning the plaintiff's proposed manner of construction the improvement. C.C.P. 1248(2). At this point some reference to claimed severance damage or "special benefit" is almost inevitable. The highest and best use of the remainder often depends upon existing zoning, or reasonably foreseeable changes in existing zoning. These factors, in all probability, were considered by the appraisers in reaching their opinions as to value. The various engineers and planners are presumably experts, and witnesses testifying to "the amount of damage or benefit, if any, to the larger parcel". The sanction proposed in C.C.P. 1246.4 may create hardship unless the plaintiff's "case in chief" is considered to include both the preliminary testimony concerning the proposed improvement as well as the valuation testimony produced after defendant has rested his case in chief.
>
> 4. Court appointed experts. Assume that the court has appointed an appraiser under either C.C.P. Sec. 1871 or C.C.P. Sec. 1266.2, and either plaintiff or defendants wish discovery of that expert's valuation data. Presumably the appointment will not be made until exhaustion of pre-trial procedures discloses that settlement is impossible. (cf. Contra Costa County Flood Control District v. Armstrong, 193 Cal. App. (2d) 206 (1961)). The forth paragraph of C.C.P. Sec. 1871 makes the witness subject to cross-examination; the proposed legislation makes no provision for service of notice except upon an adverse party, leaving the parties without any method of learning of the independent expert's valuation data in advance of his testimony at the trial.

Section 1246.5. There are no specific comments or suggestions with respect to this section other than the State Bar Committee's proposed changes to conform this section with the Committee's view of Section 1246.2, which includes changing "witness" to "expert witness."

Section 1246.6. There were no comments with respect to this section. In connection with this section and Section 1246.5, however, the comment of the Los Angeles County Counsel (Exhibit II, page II-12a et seq.) should be noted. The County Counsel comments that the proposed statute would exclude evidence of a sale which occurred within 20 days of the date of trial. However, it seems clear that Section 1246.6 (a) would permit the introduction of evidence of a sale which occurred between the time of the exchange and the date of trial.

Section 1246.7. There were few comments with respect to this section. The Attorney General suggests that the Commission's proposed statute ought to be the exclusive discovery procedure for use in eminent domain proceedings, unless there is good cause shown for the use of additional discovery methods. There is substantial support for this section from other sources. The staff believes that no change should be made in this section.

Section 1246.8. There were no specific comments with respect to this section. It should be noted, however, that the State Bar Committee unanimously approved adoption of this section and, in light of the fears expressed by some of the commentators with respect to the possibility of using such information gained through the exchange recommended by the Commission as evidence, the staff recommends that no change be made in this section.

Section 1247b. Two specific comments were directed to this section. First, the Department of Public Works objects to the 15-day requirement, stating that the present 30-day period tied to the date of trial presents no

problems. In short, the department finds no reason for departing from the present law with respect to the preparation of maps.

On the other hand, the State Bar Committee suggests that there may be frequent dispute with respect to whether there is a larger parcel, and if so, what is the part remaining. As the Committee states,

> So far as discovery is concerned, the important factor in this a area is information concerning the opponent's contentions. The condemnee is in some respects in a better position to know what the "larger" parcel is. Whether he is or not, he should not be permitted to have full knowledge of the condemnor's view of the subject and then, in the course of trial, present a disparate position for which the condemnor is not prepared. The Committee is unanimous: if the condemnee is given this right of discovery and chooses to exercise it, the condemnor should have a like right. The drafting of this action is not good. Again, the Committee chooses to leave the exactitudes of that task with the Commission.

As the Commission will recall, Section 1247b is the present law. The only change recommended by the Commission is (1) a conforming change to refer to "an eminent domain proceeding" instead of "a condemnation proceeding", and (2) to change the time for the preparation of a map from 30 days before trial to 15 days following the request.

Respectfully submitted,

Jon D. Smock
Assistant Counsel

EXHIBIT I

Report of State Bar Committee on Condemnation Law and Procedure

REPORT
OF STATE BAR COMMITTEE ON
PRETRIAL AND DISCOVERY
EMINENT DOMAIN PROCEEDINGS

On October 26, 1961, the California Law Revision Commission made a tentative recommendation relating to Pretrial Conferences and Discovery in Eminent Domain Proceedings. The Northern Section and the Southern Section of the Committee on Condemnation Law and Procedure had previously considered these subjects. At a meeting of both sections of the committee in Los Angeles on March 30, 1961, the Commission's recommendations of October 26, 1941, were studied.

The Committee's recommendations embrace: (1) the attached re-draft of the Commission's Proposed Legislation and (2) the section of this report entitled "Comments and Recommendations". The "re-draft" should not be considered a specific proposal of legislation. The Committee's concern is general objectives. The organization and drafting of legislation designed to accomplish those objectives are best performed by the Commission. The "re-draft" is merely a convenient form of reporting the Committee's recommendations.

Comments and Recommendations

1. Pretrial Conferences. Pretrial conferences in eminent domain actions have caused duplication of work and an

increase in costs in an area already over-burdened with costs. Commensurate benefits have not been realized. The need, if any, for a pretrial conference will be minimized if the Committee's recommendations respecting discovery are adopted.

Recommendations

Pretrial conferences should be held in eminent domain proceedings only if requested by a party or at the direction of the presiding Judge or Judge before whom the action will be tried.

2. Discovery Proceedings. Cost factors balanced against anticipated benefits discourage the use of discovery proceedings in eminent domain actions. Discovery can be a weapon as well as a ferret. It is the unusual case only where the amount involved or the means or tempers of the litigants will justify prudent counsel in initiating discovery. In the great bulk of eminent domain actions discovery proceedings themselves provide an effective shield against discovery. Accordingly, in the spirit of, and as a supplement to, existing discovery means, eminent domain actions require a simple, inexpensive method of exchanging information. Primarily, the information should be factual. Secondarily, information concerning a litigant's "contention" or "position" on a given issue will suffice; it will serve to alert an opponent and enable him to prepare the subject. Thus, "highest and best use" is a matter of opinion; but it should be

discoverable not for the value of the opinion itself but because it may expose a subsidiary issue which, if not solved by agreement, will be free of surprise and adequately prepared.

On the other hand, there is little merit in the exchange of expert opinions concerning the ultimate issues of value and damages. If the purpose is to induce settlement, the opposite might well result. Invariably, condemnation cases are prepared and ultimate opinions of value and damages are arrived at within twenty or thirty days of trial. Per diem costs compel one to avoid "double preparation". If an expert must take a fixed position well in advance of trial there may be a tendency, based on inadequate "dollar-saving" preparation, to inflate an opinion for a condemnee and to deflate an opinion for a condemnor. Moreover, the dollars and cents of a case and, indirectly, the opposing views of value and damages are exposed invariably by negotiation in advance of trial. Again, opinions of value and damages are readily and honestly changeable. They are dependent not only on time, circumstance and the extent of knowledge and study but on the utterly human tendency to magnify a fact at one moment and minimize it at another. It seems unfair to bind a litigant before trial to the subjective judgments of an expert who at the time of trial might honestly say "I now think the opinion I gave you was wrong; I can no longer testify to it." That is not an unusual experience among those in the eminent domain field.

General Recommendations

1. In eminent domain actions a simple, inexpensive method of exchanging information should be provided as a supplement to existing discovery proceedings.

2. The procedures proposed by the California Law Revision Commission, October 26, 1941, are approved in principle. However, the legislation proposes features which might well abort rather than further the desired general objective as stated in General Recommendations "1". The Committee's specific reactions are indicated in "Comments on Re-draft".

COMMENTS ON RE-DRAFT

1246.1(a) The Commission proposed that the "demand to exchange valuation data" be served and filed "not later than 40 days prior to the day set for trial". Time limitations must be carefully weighed:

(1) If we are to accomplish the general objective of providing a simple, inexpensive method of exchanging information, "double preparation" must be avoided. Experts are employed at substantial per diems. If at all possible the mechanics should be such that the expert's preparation for trial and his assistance in preparing the exchange data will coincide.

(2) It is not unusual for a case to be referred to counsel for trial as late as 30 days before trial. Procedures should not necessarily be tailored to that situation, but the

inflexible should be avoided.

The Committee's insertion of the phrase "or within 5 days after notice of trial date, whichever is later" is not intended as a hard and fast recommendation. Its purpose is to alert the Commission to a further consideration of mechanics.

1246.2(a) The Commission's proposal requires identification information about valuation experts and persons "upon whose statements or opinions" the opinion of the expert is based in whole or in part.

(1) The requirement of identification information should not be confined to valuation experts. Soil, water, construction, petroleum and other experts are employed in eminent domain actions. Pretrial knowledge of the identity of each expert to be called and the "subject matter" of his testimony will alert each litigant to issues he must meet. In requiring a statement of the "subject matter" of expert testimony, the Committee does not propose to exact a detailed or summary statement of testimony. A statement that the expert will testify in respect to "value", "damages", "soil conditions", and the like is intended.

(2) The Committee finds no value in requiring indentification information about persons upon whose statements or opinions an opinion is based. Conceivably such a statement could be lengthy; and considering the frailty of humans pressured by trial preparation it might well be incomplete and inexact. It can stimulate the overly-conscientious to needless detail in

seeking out each such person; some might find it rich in "make-work" possibilities. For the usual case it seems inconsistent with our general objective of providing a simple, inexpensive method of exchanging information.

1246.2(b) The Commission proposed an exchange of opinions of "value" and "damages". The Committee rejects this requirement. The rationale is set forth in Section 2 entitled "Discovery Proceedings".

1246.2(b)(2) The Commission proposed an exchange of any "information" which would indicate a probable change of zoning. Here again, detail is required and a desired end of simplicity is impinged. A statement of a party's contention in respect to a probable zoning change should suffice.

1246.2(b)(3) This is the Commission's proposal. It was adopted by a bare majority. All of the dissidents objected to the word "offers". One also objected to "contracts". A suggestion that the phrase "market data" be substituted for the words "offers, contracts, sales of property, leases and other transactions" was rejected. The minority feared that desired legislation might be defeated at the legislative or executive level because, despite Section 1246.8, the admissibility of offers might be inferred from the fact that the proposed section specifically covers "offers". The majority reasoned (1) opinions of value are often based in part on "offers", even though "offers" are not admissible and (2) if an opinion of value is based in part on "offers" an opponent should be so informed before trial.

1246.2(b)(4) The Commission proposed the exchange of "the cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used". A substantial majority of the Committee favored the elimination of this requirement. Ordinarily these elements would be minor factors. In peculiar circumstances where, for example, there would be no criterion for value except reproduction costs other discovery means can be used.

1246.2(b)(5) The Commission proposed that the statement should include "gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used". For the usual case such information is not necessary. In the unusual case, other discovery proceedings can be used. The Committee recommends that the statement be confined to information essential in all cases: actual gross income and actual expenses used in arriving at net income.

1246.2(c)(1)(2)(3)(4)(5) This is the Commission's proposal. It is of course tied to controversial section 1246.2(b)(3). Two members felt that in any event the word "offers" should be stricken from this section. The substantial majority felt that if 1246.2(b)(3) is adopted, these sections should not be changed.

1246.2(d) and 1246.3 These sections proposed by the Commission were rejected by all Committee members. Their practicality is questionable. If literally applied, they

could become a source of harassment. The discovery objectives of these sections can be accomplished by other discovery devices in the unusual case. In most cases the sections are wholly inconsistent with the Committee's desired general objectives.

1246.4, 1246.5, 1246.6 These sections are in accord with the Commission's proposals except that 1246.4(a)(1) and 1246.5(a) have been amended to reflect the Committee's amendments of 1246.2.

1246.7 This is the Commission's proposal. All but two of the Committee recommend it.

1246.8 This is the Commission's proposal. The Committee recommends it unanimously.

1247b The Commission's proposal requires the condemnor upon demand of the condemnee to provide a map of the "larger" parcel when only part is taken. Whether there is a "larger" parcel and if so what is the "part remaining" is a source of considerable dispute. So far as discovery is concerned the important factor in this area is information concerning the opponent's contentions. The condemnee is in some respects in a better position to know what the "larger" parcel is. Whether he is or not, he should not be permitted to have full knowledge of the condemnor's view of the subject and then, in the course of trial, present a disparate position for which the condemnor is not prepared. The Committee is unanimous: if the condemnee is given this right of discovery

and chooses to exercise it, the condemnor should have a like right. The drafting of the section is not good. Again, the Committee chooses to leave the exactitudes of that task with the Commission.

April 16, 1962.

Respectfully submitted,

COMMITTEE ON CONDEMNATION
LAW AND PROCEDURE

By_____
Chairman

RE-DRAFT

(Committee on Condemnation Law and Procedure)

An act to amend and renumber Section 1246.1 of, to amend Section 1247b of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4, 1246.5 1246.6, 1246.7 and 1246.8 to, the Code of Civil Procedure, relating to eminent domain proceedings.

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended and renumbered to read:

[~~1246.1~~] 1246.9. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.1 is added to the Code of Civil Procedure, to read:

1246.1. (a) Any party to an eminent domain proceeding may, not later than 40 days prior [~~to the day set for~~] trial, or within 5 days after notice of trial date, whichever is later, serve upon any adverse party to the eminent domain proceeding and file a demand to exchange [~~valuation~~] data.

(b) The demand shall:

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

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of [~~valuation~~] data in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and, subject to Section 1246.6 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of [~~valuation~~] data."

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

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

1246.2. The statement of [~~valuation~~] data shall contain:

(a) The name and business or residence address of each person intended to be called as [~~a~~] an expert witness [~~by the party to testify to his opinion of the value of the property described in the demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statement or opinion the opinion is based in whole or in part.~~] and the subject matter of his expert testimony.

[~~(b) The opinion of each witness listed as required in subdivision (a) of this section as to the value of the property described in the demand and as to the amount of the damage or benefit, if any, which will accrue to the larger parcel from which such property is taken and~~] [T]he following data to the extent that the opinion of a valuation expert is based in whole or in part thereon:

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

(2) The applicable zoning and the party's contention concerning [~~any information indicating~~] a probable change thereof.

(3) A list of the offers, contracts, sales of property, leases and other transactions supporting the opinion.

(4) The gross income from the property, and actual expenses used in arriving at net income [~~cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used~~].

[~~(5) The gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used.~~]

(c) With respect to each offer, contract, sale, lease or other transaction listed under subdivision (b) of this section:

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page where recorded.

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

~~[(d)--A list of the maps, plans, documents, photographs, motion pictures, books, accounts, models, objects and other tangible things upon which the opinion of any person intended to be called as a witness by the party is based in whole or in part, or which is intended to be introduced as evidence in connection with, or to be used to explain, clarify or supplement, the testimony of any person intended to be called as a witness by the party.--The statement also shall indicate the place where each is located--and, if known, the times when it is available for inspection by the adverse party.]~~

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

~~[1246.3.--If a party required to serve a statement of valuation data has in his possession, custody or control any property or tangible-~~

~~thing-required-to-be-listed-in-his-statement-of-valuation-data,-he-shall make-it-available-at-reasonable-times-for-inspection-and-copying-or photographing--by-or-on-behalf-of-the-party-on-whom-the-statement-is served.~~]

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

1246.4. (a) A party who has served and filed a statement of [~~valuation~~] data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of [~~valuation~~] data, he:

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

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

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

(b) The notice required by subdivision (a) of this Section shall include the information specified in Section 1246.2, but it is not required to be in writing.

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

1246.5. Except as provided in Section 1246.4, if a demand to

exchange [~~valuation~~] data and one or more statements of [~~valuation~~] dat are served and filed pursuant to Section 1246.1:

(a) No party required to serve and file a statement of [~~valuation~~] data may call [a] an expert witness[~~to testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken~~] unless the name and address of such witness [~~are~~] is listed on the statement of the party who calls the witness.

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

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

1246.6. The court may, upon such terms as may be just, permit a party to call a witness or introduce on direct examination in his case in chief evidence required to be but not listed in such party's statement of [~~valuation~~] data if the court finds that such party has made a good faith effort to comply with Sections 1246.1 to 1246.3, inclusive, that he has complied with Section 1246.4, and that, by the date of the service of his statement of [~~valuation~~] data, he:

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

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

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

1246.7. The procedure provided in Sections 1246.1 to 1246.6, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 9. Section 1246.8 is added to the Code of Civil Procedure, to read:

1246.8. Nothing in Sections 1246.1 to 1246.7, inclusive, makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 10. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in [~~a-condemnation~~] an eminent domain proceeding only a portion of a LARGER parcel of property is sought to be taken THE CONDEMNOR, [~~and-upon~~], [the plaintiff,] within 15 days after a request of a CONDEMNEE [defendant] to the [plaintiff] CONDEMNOR [~~made-at-least-30-days-prior-to-the-time-of-trial,-the-plaintiff~~] shall prepare a map showing the boundaries of the [entire] LARGER parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the [defendant] CONDEMNEE or his attorney [~~at-least-fifteen~~

~~(15)-days-prior-to-the-time-of-trial~~]. IF THE CONDEMNEE EXERCISES THE FOREGOING RIGHT, THE CONDEMNOR SHALL HAVE THE SAME RIGHT OF DISCOVERY AS TO THE CONDEMNEE'S CONTENTION BY MAKING A SIMILAR WRITTEN REQUEST.

Note: Material is underlined and in strikeout on the basis of the existing code section. Changes made in Commission's draft are shown by capital letters for new material added by State Bar Committee and brackets (but no strikeout) for material deleted by the State Bar Committee.

Memo 72 (1962)

EXHIBIT II

Letters commenting on Tentative Recommendation of Commission

Memo 72(1962)

EXHIBIT II

TABLE OF CONTENTS

Memo. No. 72(1962)

COUNTY OF SAN MATEO

Keith C. Sorenson, District Attorney

Redwood City, Calif.

October 10, 1962

California Law Revision Commission
School of Law
Stanford University, California

Re: Pre-Trial Conferences and Discovery in Eminent Domain Proceedings

Gentlemen:

This office has reviewed your Commission's tentative recommendations and proposed legislation with reference to the exchange of valuation data to be used in eminent domain actions prior to trial.

We feel that legislation defining the rights of all parties in eminent domain actions to obtain such valuation data from adverse parties and the manner in which such valuation data can be obtained is preferable to the determination of such matters by the courts on a case-to-case basis.

We therefore wish to indicate our approval of the adoption of the proposed legislation in the manner proposed by your Commission.

Very truly yours,

KEITH C. SORENSON,
District Attorney

By /s/ JAMES M. PARMELEE
James M. Parmelee, Deputy

JMP/rt

Memo 72(1962)

COUNTY OF SAN DIEGO

office of

COUNTY COUNSEL
302 Civic Center
San Diego 1, California

October 9, 1962

California Law Revision Division
School of Law
Stanford University
Palo Alto, California

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

Re: Tentative Recommendation and Proposed Legislation Relating to Pre-Trial and Discovery in Eminent Domain Proceedings

Discovery rules should be applied in the same manner in a condemnation action as in other actions and proceedings. We previously expressed our agreement with the Commission in this respect. Naturally, with this aim in mind, we feel that there should be no special legislation with respect to discovery in condemnation or eminent domain proceedings. There is no useful purpose in cluttering up and confusing discovery proceedings by enacting special legislation for various fields of law; the same rules regarding the discovery of experts should apply with equal force in personal injury, contract, and condemnation actions.

It is similarly our feeling that in view of the recent indications that both pre-trial and discovery are going to be reconsidered by the Legislature with respect to all civil actions, that any comments at this time would be premature with regard to condemnation specifically.

It is evident that although there are statistical justifications for pre-trial proceedings by the Judicial Council studies, that there is a general feeling that said conferences are ineffective and very time consuming in most civil actions. It would appear to the undersigned that effective Pre-trial of all civil cases including condemnation cases would be accomplished by having the Pre-trial immediately preceding the actual trial in the department where the case will be tried. This is particularly true in view of the reluctance of most Pre-trial judges to "invade the province of the trial judge" in ruling on questions of law, so that as a practical result any matters that could be successfully determined at Pre-trial are deferred to

the discretion and judgment of the trial department; for example, such matters as what constitutes the entire parcel.

It is our understanding from a review of discovery statutes, both in Federal jurisdictions and California, that necessary amendments to the discovery rules should be made to provide for the protection of the work product of an attorney regardless of its technical compliance of the privilege rule. We submit, however, that the proposed amendments to discovery in condemnation actions as set forth in Section 1246.1 et seq. of the Code of Civil Procedure contained in the tentative recommendation and proposed legislation dated October 26, 1961, is an attempt to completely abrogate the work-product rule in condemnation actions alone. That this is not a desirable result can be seen from analysis of the intended purpose of discovery. It is, of course, to disclose facts in the hands of one party so that the other party can adequately prepare. Then the basic question is, what facts necessary to the preparation of a law suit are in the hands of one party and not available to his adversary. Such an inquiry in condemnation actions would disclose that all the factual information in the hands of the expert employed by one party would be equally available to the other party or his expert. For example, sales information or market data is available in the office of the county recorder. The county recorder usually keeps duplicate records so that they would be available in the event the originals were destroyed and title companies ordinarily have the same information available. The other party, by reasonable industry and diligence, may obtain from readily available sources all of the factual data required without resort to discovery proceedings.

The other factual information that such an expert may have assembled such as the existence, description, custody or location of any maps, plans or pictures of the property would be equally available to the other side provided reasonable diligence and industry were employed. One possible exception would be in the case of photographs taken by a governmental agency in a case where immediate possession could be obtained and the improvement was instituted before the property owner or his agents could take photographs showing the condition of the property on the date of valuation.

It would also appear that all of the other items enumerated under legislation as proposed, such as the highest and best use of the property, the value of the land and the cost of reproduction or replacement of the improvement thereon less depreciation, the capitalization of the income from the property, his qualifications to express an opinion of the value of the property, are matters of opinion and not properly discoverable.

The Federal decisions have consistently held that the opinions and reasons of an expert hired by one party are not discoverable based on a rule of unfairness, i.e., Federal cases under Federal discovery statutes take the position that it is "unfair" for one party to be aggressive and perspicacious enough to hire an expert and then have the other party participate in the results without any effort. This reasoning would be particularly applicable in condemnation actions where the only issue that is seriously contested is the value of the property and the extent of damages, if any. Such value and

damages are established by expert testimony. Therefore, qualified experts being the chief witnesses in any condemnation action could obtain factual information which is equally available to both sides. By reason of their professional knowledge, experience, and investigation, said experts could then evaluate the information and render an expert opinion of value to the party who has paid for the services.

In Federal practice a recognized exception to the rule of unfairness is applied when the subject matter is no longer available to one party. Therefore, if an expert has been hired for the purpose of examining a given item, which item has since become unavailable or materially altered, it would be proper to discover the facts disclosed by such examination; however, the discovering party would still have the burden of hiring his own expert to evaluate the factual information discovered and to make the necessary conclusions. See 4 Moore Federal Practice, Pages 1157-1158, Section 26.24 where the following comment is made:

> "The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research."

In Hickey v. United States (E. D. Pa. 1952) 17 Fed. Rules Serv. 33.351, Case 1, Judge Caney in a case where the landowner propounded interrogatories to the government seeking the government's appraisal reports, held that:

> "Here no fact is the subject of ascertainment but on the contrary the information here sought is the expert opinion of witnesses trained in the sales of real estate hired by the defendant to fix a value and presumably to testify for them at the trial of the case. While it is true that in many civil cases . . . it is requisite for the adversary to help a litigant on the other side of a case in the development of his side of the case, it always has to do with the facts as observed by witnesses to an occurrence or to a transaction and is not applicable to matters of expert testimony."

The proposed legislation, rather than having the effect of encouraging settlements in condemnation actions, undoubtedly would result in sharp practices and "expert shopping". It is submitted that the above statement is correct for the reason that if discovery of the entire appraisal report were allowed, the property owner, whom experience has shown, always feels that he has not received "just compensation", would be encouraged to find an appraiser who would provide a higher figure because opinions are made by humans and are subject to human frailities and experts are available who would come up with higher figures. The effect of such discovery in practice would be to educate the landowner and his attorney to such a degree that he could find witnesses

with higher figures. Furthermore, the proposed legislation would permit the moving party's appraiser to make an appraisal report wherein almost all of the work was done by the other party's expert.

In conclusion it is felt that the discovery rules should be amended for all civil proceedings so that the protection of the Holm and Carroll decisions under the privilege rule could be more narrowly defined and that the work-product rule be recognized in California with its exception that work-product is discoverable upon an adequate showing of good cause.

As stated by the Supreme Court of the United States in Hickman v. Taylor, 329 U.S. 495 at 510-511, when speaking of the work-product of the lawyer:

> "Were such materials open to opposing counsel on mere demand much of what is now put down in writing would remain unwritten. An attorney's thoughts heretofore inviolate would not be his own. Inefficiency, unfairness and sharp practice would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing and the interest of the clients and the cause of justice would be poorly served."

We respectfully request that if the Commission does not agree with the views herein set forth it expressly make note thereof in its report.

Very truly yours,

BERTRAM McLEES, JR., County Counsel

By S/
DAVID B. WALKER, Deputy

DBW:k

Memo. No. 72(1962)

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
State Building, Los Angeles 12

October 8, 1962

California Law Revision Commission
Office of Commission and Staff
School of Law
Stanford University, California

RE: Tentative Recommendation re Condemnation

Gentlemen:

This is in reply to your letter of August 14, 1962, asking us for our views on your proposed statute relating to discovery in condemnation cases.

As disclosed by your letter, the Supreme Court in the recent cases of People ex rel. Dept. of Public Works v. Donovan, 57 A.C. 374 (1962); Oceanside Union School Dist. v. Superior Court, 58 A.C. 182 (1962); San Diego Professional Assn. v. Superior Court, 58 A.C. 197 (1962), has clearly indicated that not only is the expert real estate appraiser's factual information and opinion discoverable, and that the same is true of his report, although delivered to the condemnor's attorney for use in preparing for the condemnation trial. The rationale of these decisions caused considerable concern to a substantial number of the bar culminating in a recommendation by the Committee on Administration of Justice of the State Bar to the Board of Governors of the State Bar that Section 2016(b) of the Code of Civil Procedure be amended as follows:

> "C.C.P. 2016(b) -- Delete the last sentence and substitute:
>
> "Notwithstanding the scope of discovery hereinabove set forth, it is the policy of this state (i) to preserve the rights of parties and their attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to so

> limit discovery that one party or his attorney may not take undue advantage of this adversary's industry or efforts. Accordingly, the following 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:
>
> (1) The work product of an attorney and
>
> (2) Except as provided in Section 2032, any opinion or report of an expert prepared for or in anticipation of litigation and any writing or thing created by or for a party or his agent in preparation for or in anticipation of litigation. Provided always that any writing that reflects an attorney's mental impression, conclusions, opinions or legal theories shall not be discoverable under any circumstances."

(37 State Bar Journal, pages 586-587.)

Should the Board of Governors adopt the recommendation of this Committee, then this proposed amendment will probably be submitted to the 1963 session of the Legislature. If this proposed amendment is enacted into law, then with respect to condemnation cases, an appraiser's opinion would be confidential, absent special circumstances. The only discoverable items would appear to be his "comparable sales" and perhaps certain factual aspects of his investigation. It seems to us that confining discovery to matters of fact rather than opinion fulfills the purposes of discovery without imposing an unreasonable burden on the parties.

In the event the proposed amendment or some similar amendment modifying the holding of the foregoing cases is not added to the Discovery Act, then we are in favor of your proposed legislation with the following suggested changes:

1. Section 1246.2(a) provides in part that:

> ". . . the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part."

As you know, in the course of even a relatively simple appraisal assignment the appraiser contacts many persons such as governmental officials, real estate brokers and salesmen, contractors, engineers and land speculators. Depending on the

case some of these interviews are merely routine while others are of paramount importance. However, under the quoted portion of this section all parties interviewed apparently must be listed, because each such interview probably plays some minuscule "part" in the formation of the valuation opinion. We believe only the names of those persons who furnish information of substantial importance need be listed. Therefore, before the word "part" we suggest the insertion of the word "substantial".

2. Section 1246.2(b)(2) provides that:

> "The applicable zoning and any information indicating a probable change thereof." (Emphasis added.)

We believe that the terminology "any information indicating a probable change thereof" is vague and compliance therewith would be unnecessarily burdensome. In the course of any investigation of the reasonable probability of a zoning change a tremendous amount of information is assembled from many sources, such as myriad city officials, files of other zoning cases, informed persons who have been involved in similar problems and interested persons in the area of the subject property. We do not believe that each side should be put to the time-consuming and difficult task of reducing to writing all the data collected in the course of its investigation on this matter, any more than each side is required to set forth in detail "any information" relating to the selection of the highest and best use of the property. (See: Section 1246.2(b)(1).) Rather, as in the case of highest and best use, all that should be required is the ultimate determination, i.e., the opinion of the valuation expert as to whether there is a reasonable probability of a zoning change and, if so, to what zone.

3. For similar reasons we believe the words "and circumstances" in Section 1246.2(c)(5) should be eliminated. This section states that:

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

No more should be needed for each sale than the items required by sub-Sections (c)(1) to (c)(4) (parties, location, date, recording), the consideration and the terms. In this regard it should be noted that in past condemnation cases some courts have ordered an exchange of comparable sales data, consisting generally of the parties to the transaction, description, date, recording terms and consideration. To the best of our recollection, insofar as our cases are concerned no court has ordered an exchange of the "circumstances" surrounding each sale and no party has requested such information.

4. Section 1246.7, in effect, provides that this proposed discovery procedure does not prevent the utilization of any of the existing discovery methods. We submit that the information required to be disclosed by this proposed statute in the vast majority of cases will fairly and fully inform each side of the position of the other on all essential facts of the case. Consequently, we can see no reasonable basis for additional discovery. Thus, absent special circumstances, we believe that this proposed statute should be the exclusive method of discovery in condemnation cases. To cover those few instances where additional discovery is justified with respect to witnesses, such as the owner, nonparty lay witnesses or other expert witnesses, this section may be amended to provide that upon a showing of good cause additional discovery may be had provided that in no case shall any further information from the expert valuation witness be discoverable.

Thank you for having afforded us an opportunity to express our views on this proposed statute.

Very truly yours,

STANLEY MOSK, Attorney General

/s/ Howard S. Goldin

HOWARD S. GOLDIN
Assistant Attorney General

HSG:mu

Department of Law

James P. O'Drain
City Attorney

CITY OF RICHMOND
California

September 20, 1962

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

Gentlemen:

This office has reviewed the Commission's recommendation and proposed legislation relating to pre-trial conferences and discovery in eminent domain proceedings. We believe that the recommended changes are steps in the right direction; not only will it force both parties to prepare their cases earlier but will also facilitate possible settlement.

We also recommend that there be urged an amendment to the pre-trial rules to permit the holding of pre-trial conferences in eminent domain cases after the exchange of information suggested by your recommendations.

Yours very truly,

S/

James P. O'Drain
City Attorney

JPO'D:MH-2

cc: City Manager

Office of District Attorney

CONTRA COSTA COUNTY
Hall of Records, Room 512
Martinez, California

September 20, 1962

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

Attention: John H. DeMoully
Executive Secretary

Re: Pre-Trial Conferences and Discovery in Eminent Domain Proceedings

Gentlemen:

This office has the following comments to make in response to your letter of transmittal of August 14, 1962.

1. Discovery without exchange of data. Proposed C.C.P. Sections 1246.1 and 1246.2 commendably provide for a demand for exchange of significant data. The proposed C.C.P. Section 1246.7 preserves other discovery procedures. Oceanside Union School Dist. v. Superior Court, (July 1962) 58 Adv. Cal. 182, at pages 194-5, points up the problem faced by the plaintiff condemnor when the defendant landowner has no appraiser's reports, and wishes, through discovery procedures, to see the appraisals secured by the condemnor. This he may do, even though he is not prepared to exchange valuation data. Presumably the trial court has a discretionary function to perform if the discovery procedures are initiated by the defendant, but the Oceanside case does not make it clear what guides the trial court is to follow in exercising its discretion.

The rule that the defendant has the burden of proof on the issue of just compensation seems to have been overlooked entirely.

2. Trial date. The workings of the pre-trial system in Contra Costa County are presently that the Master Calendar Clerk suggests and the pre-trial judge sets eminent domain cases for trial along with other types of cases. The statutory preference in C.C.P. 1264, and the possibility of a motion to advance the case on the trial calendar are presently adequate, even when the condemnor cannot take immediate possession under Cal. Const. Art. I, Sec. 14.

The proposed change would require the court to set aside an unknown number of trial dates for eminent domain matters which might or might not be ready to go to trial. The suggested change seems to give little weight to the appraiser's own calendar of work. Competent appraisers usually have as much or more work in process than can be handled carefully.

3. Experts other than appraisers. The basic theory is that the condemnor must put before the court the necessary showing, whether by certified copy of resolution alone, or with oral testimony, the case for "necessity". The burden is then cast upon the defendant to present his case in chief, followed by the condemnor's presentation. In actual practice, unless there is an entire taking, the preliminary presentation by the condemnor includes engineering testimony and exhibits concerning the plaintiff's proposed manner of constructing the improvement C.C.P. 1248(2). At this point some reference to claimed severance damage or "special benefit" is almost inevitable. The highest and best use of the remainder often depends upon existing zoning, or reasonably foreseeable changes in existing zoning. These factors, in all probability, were considered by the appraisers in reaching their opinions as to value. The various engineers and planners are presumably experts, and witnesses testifying to "the amount of damage or benefit, if any, to the larger parcel". The sanction proposed in C.C.P. 1246.4 may create hardship unless the plaintiff's "case in chief" is considered to include both the preliminary testimony concerning the proposed improvement as well as the valuation testimony produced after defendant has rested his case in chief.

4. Court appointed experts. Assume that the court has appointed an appraiser under either C.C.P. Sec. 1871 or C.C.P. Sec. 1266.2, and either plaintiff or defendants wish discovery of that expert's valuation data. Presumably the appointment will not be made until exhaustion of pre-trial procedures discloses that settlement is impossible. (cf. Contra Costa County Flood Control District v. Armstrong, 193 Cal. App. (2d) 206 (1961)). The fourth paragraph of C.C.P. Sec. 1871 makes the witness subject to cross-examination; the proposed legislation makes no provision for service of notice except upon an adverse party, leaving the parties without any method of learning of the independent expert's valuation data in advance of his testimony at the trial.

Yours very truly,

S/

John A. Nejedly
District Attorney

JAN:CLH:mm

Office of District Attorney
CONTRA COSTA COUNTY
Hall of Records, Room 512
P.O. Box 670
Martinez, California

January 15, 1962

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

We have reviewed the proposal on "Pretrial Conferences and Discovery in Eminent Domain Proceedings".

If such procedure is implemented it should result in more settlements, after some experience under the system. However, we are not convinced that trials will be shortened as the issues will be apparent and it is believed more detailed cross-examination will result and additional rebuttal evidence will be offered.

It is imperative that the discovery procedure be instituted prior to pre-trial if it is to have any value. Generally the condemning agency has completed the appraisal process considerably in advance of pre-trial, but in many cases condemnees wait until the last possible moment. This procedure will require more prompt determination of factual data and should encourage earlier settlement discussions.

Please provide this office with a copy of your final recommendations.

Very truly yours,

John A. Nejedly
District Attorney

By:

John B. Clausen
Assistant

JBC:dq

Memo. No. 72(1962)

BOOTH, MITCHEL, STRANGE & WILLIAN
Attorneys at Law
458 South Spring Street
Los Angeles 13, California

August 29, 1962

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

Dear Mr. DeMoully:

Mr. Milford Springer, General Counsel of Southern Counties Gas Company, has transmitted to me the Law Revision Commission's proposals for new discovery rules in condemnation actions and has asked me to give my opinion.

I am not one who subscribes to the premise that the new discovery rules are valuable in the expedition or improvement of civil litigation. Certainly such things as depositions and medical examinations are necessary in damage actions, but the same necessities don't apply to eminent domain proceedings, particularly if you require an exchange of appraisals. It must be remembered that the new discovery rules are time consuming and therefore costly. It takes a wealthy client to litigate under the new rules. A poor man is lost, because once he has filed or has been filed against, he is subjected to never ending demands on his time and that of his lawyer. As one appellate judge said, "It is a nuisance".

However, if we have to accept the premise, I will add a thought or two to the purpose of the study, namely, the early discovery of your adversary's appraisals and proof. For years I have followed the tactics of disclosing my appraiser's opinion at some stage of the negotiations, and I have usually been able to find out what valuation my opponent expects to present. In fact, practically all branches of government make you an offer close to their valuation. So there are no surprises at trial, and pre-trials, interrogatories, inspections, etc. are not going to improve very much on the give and take of negotiations. However, I find no objection to exchanging appraisers' "opinions".

A distinction has to be made, however. A professional opini. of course, is based largely on comparable sales. It seems to me

that it is taking unfair advantage to examine your adversary's comparable sales. This information requires much digging and the tapping of sources, and again costs money. To require you to give all of your appraiser's information to the other side just might result in giving him a free ride at your expense. In brief, I would like to see the rule limited to exchange of conclusions, not to include all the comparable sales and other data on which they are based.

Now for one or two particulars, your proposed C.C.P.1246 (c) would require service of all valuation data on your adversary 20 days before trial. Ordinarily all discovery must be completed before pre-trial. Otherwise the pre-trial is almost useless. For another point, I think your proposed C.C.P.1246.2 needlessly lists too many specifics and would become an onerous burden. If such information is available at all, any professional appraiser would include it in his report. Once you have required an exchange of appraisals, you have just about concluded discovery. Then you would either negotiate a settlement or go to trial.

I have one further and I think realistic objection to your proposed new rules in condemnation. Obviously, most cases are settled. The negotiations frequently continue to the day of trial, certainly the last week. This office certainly settles what it can. Clients prefer it that way. Your proposed rules would require complete preparation and disclosure of all witnesses and information well before trial, if not pre-trial, as your memorandum suggests, against the penalty of not being able to use the witnesses or data. It is impractical to prepare your case, your client, and your appraisers that far in advance of actual trial. Moreover, while you are still in negotiations your client does not want to go to that expense.

In conclusion, I must add that I appreciate the efforts and objectives of the Law Revision Commission. We litigation lawyers are as eager as anyone, including the judges, to expedite disposition of differences. At the same time, we must protect our clients from the overwhelming burden imposed by litigation. It seems to me that the proposed rules would compound that burden.

Yours truly,

/s/ Bates Booth (smw)

BB:smw. BATES BOOTH

Office of the
COUNTY COUNSEL OF MARIN COUNTY
1005 A Street
San Rafael, California

August 28, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: John H. DeMoully

Re: Discovery Procedures - Eminent Domain Actions.

Gentlemen:

Thank you for the draft of the tentative recommendations prepared by the California Law Revision Commission in connection with the above noted matter.

In light of the recent decisions noted in your letter of August 14, 1962, it would appear that the recommendations are in order and should be the subject of limited comment and/or criticism.

Yours very truly,

S/E. WARREN McGUIRE
E. WARREN McGUIRE
County Counsel

EWM:tls

Chambers of

THE SUPERIOR COURT

Los Angeles 12, California
Philbrick McCoy, Judge

April 4, 1962

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

Dear Mr. DeMoully:

Thank you very much for your note of the 17th and the copies of the tentative recommendation of the Commission relating to pretrial conferences and discovery in eminent domain proceedings.

I have read the tentative recommendation and the proposed code sections with interest and feel that you are definitely on the right track. I assume that you have now read the decision of the Supreme Court in People ex rel. Department of Public Works v. Donovan, 57 A.C. 374. This adds substantial support to the views expressed by the Commission in its tentative recommendation.

I will greatly appreciate your keeping me posted as to the progress of this matter.

Sincerely yours,

S/ Philbrick McCoy

PMcC vm
cc: Honorable McIntyre Faries

FLOYD C. DODSON

Attorney at Law

Suite 310 Granada Building

Santa Barbara, California

January 18, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: John H. DeMoully, Executive Secretary

Gentlemen:

I was pleased to receive your letter of October 31, 1961, with the enclosure setting forth the tentative recommendations of the Commission relating to pre-trial conference and discovery in eminent domain proceedings.

I had hoped to find the time to write a detailed memorandum concerning my view of the proposed legislation but the press of other affairs have made that impossible. However, please be advised that it is my personal opinion that this proposed legislation is undesirable and unworkable as it relates to condemnation proceedings. Discovery in condemnation is a two-edged sword and I firmly believe that efforts by respective counsel to obtain the opinions of the expert witnesses employed by the adverse parties would so greatly complicate condemnation proceedings and so greatly increase the already exhorbitant costs to the property owner of trying these cases that it would, in the long run, work against the interest of the condemnee. Furthermore, I simply do not feel that a valid and final opinion can be arrived at by an appraiser until the actual time of trial, expecially in cases where the valuation date is the trial date. Due to the congested condition of the calendars in the various counties, this is now the rule rather than the exception. I believe the best way of trying condemnation cases is to devote one's time to preparation of an affirmative case rather than to spend endless hours and days trying to discover what will be the opponent's case.

Far be it from me to predict the effect of Greyhound Corp. vs Superior Court on the trial of condemnation cases or to suggest

as to whether or not Rust vs Roberts is still the law. My guess is that opinion evidence in condemnation cases is probably discoverable. Many condemnation lawyers feel that such opinion evidence should be discoverable and that this would be very beneficial to the condemnee. However, the more experienced lawyers I have talked with seem to feel it would not particularly help either side but would only result in vastly increasing the time and expense of trying a case.

For the foregoing reasons, I respectfully suggest the Commission take a long look at this subject before making its final recommendation and seriously consider legislation that would preclude this result.

Respectfully submitted,

S/ Floyd C. Dodson

FCD:mcn

Offices of
THE COUNTY COUNSEL
OF LOS ANGELES COUNTY
Suite 648 Hall of Administration
500 West Temple Street
Los Angeles 12, California

January 15, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention Mr. John H. DeMoully
Executive Secretary

Re: Recommendation and proposed legislation relating to pre-trial conferences and discovery in eminent domain proceedings

Gentlemen:

The materials submitted by your Commission under date of October 31, 1961, in connection with the subject as above entitled have been read in detail and the following comments are made in connection with the content thereof.

The preliminary statements contained in your tentative recommendation on pages 1 and 2 seem to set forth factually the situation as it exists and particularly in connection with your statements on page 2 of your tentative recommendation we would concur that there are in fact reasons why market data information is not readily available until a few days before the time of the actual trial.

It is for this reason that we feel that the proposed legislation is not feasible in its present form.

It is to be noted that the legislation proposed by your Commission contemplates an exchange of valuation data "not later than 20 days prior to the date set for trial."

Your proposed legislation would then further provide that only such data as has been exchanged pursuant to this section may be utilized at the time of trial.

A perusal of Section 1249 of the Code of Civil Procedure appears to indicate at once the objections to your proposed legislation. Section 1249 fixes the date from which compensation shall be assessed and in instances wherein a case has not been brought to trial within one year after the date of the commencement of the action, the

compensation shall be deemed to have accrued at the date of the trial.

To apply your proposed legislation, however, to this section would mean that sales which have occurred within 20 days of the "date of valuation" which sales would be the very best evidence of the value of the properties involved could not be utilized in the course of the trial.

While the objection as set forth above is the one which is readily apparent and that which makes the proposed legislation completely improper it would appear to this office that the Commission's recommendations in their entirety are unnecessary in that the courts have been able to interpret the existing discovery statutes without the necessity of further legislation.

The discovery statutes in this State were presumably adopted in an attempt to pattern court procedures in California after those followed by the federal jurisdiction. Discovery in Federal Courts has long been permitted and there are innumerable court decisions available to interpret the statutes and to provide guide lines and limitations to permit the effective operation of the discovery principle.

In the field of eminent domain the sanctity of the appraiser's opinion has long been protected by the Federal Courts as falling within the attorney-client privilege, an exception under the discovery rules.

To permit discovery of valuation opinions and all valuation data is to impose upon the plaintiff the entire burden of appraising the property in question and thereby eliminating all negotiations from the eminent domain field. Inasmuch as a property owner could in every instance ascertain the opinion of value of the condemnor's appraisers by merely posing written interrogatories, he eliminates the necessity of retaining an appraiser until trial is but a few days in the future. He then merely provides his appointed appraiser with all of the information furnished by the appraisers for the plaintiff.

If one was to recognize the equity of the condemnor providing all services in connection with the appraisal of a parcel of property for the property owner, then it would appear that the most equitable way to handle such transactions is to have a system whereby the court would merely appoint his own appraiser in every instance and take the opinion of that appraiser as the value of the property without the necessity of condemnor and property owner furnishing any expert testimony to support or refute the opinion as expressed by the court appointed appraiser.

While, of course, it is recognized that such a drastic step as this is clearly not the intent of anybody in the condemnation field, be he a representative of the governmental agency or the property owner, it appears that to an extent this would be the only protection that the condemnor could seek in these instances.

While, of course, the legislation itself will have to be considered by the Board of Supervisors of this County, before a determination can be made as to whether or not its passage is to be supported or contested, we would advise you that it is our intention to recommend strongly to the Board that they go on record as opposing this legislation as being entirely prejudicial against the interest of condemning agencies.

Yours very truly,

HAROLD W. KENNEDY
County Counsel

By
Richard L. Riemer
Deputy County Counsel

RLR/ejp

City of

SANTA MONICA

California

Office of the City Attorney
City Hall - EXbrook 3-9975

January 10, 1962

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

Attention: John H. DeMoully,
Executive Secretary

Re: Pre-trial Conferences and Discovery in Eminent Domain Proceedings

Gentlemen:

I have carefully reviewed the proposed legislation in regard to pre-trial conferences and discovery in eminent domain proceedings. The suggested legislation, in the main, meets with my approval and appears to me to be a practical solution of a rather difficult problem.

Problems may arise where one or both sides are not satisfied with the response of the other side to the demand, and because of the shortness of time involved it may be difficult to resolve the dispute, but this is a matter which I feel will eventually solve itself and should not militate against submitting the proposed legislation as is.

Yours very truly,

ROBERT G. COCKINS
City Attorney

RGC:bev

TIMOTHY W. O'BRIEN
Attorney at Law
405 West Standley Street
UKIAH, CALIFORNIA

January 9, 1962

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

Re: Recommendations for Pretrial Conferences and Discovery in Eminent Domain Proceedings

Gentlemen:

As a former employee of the Office of the Attorney General in Sacramento, and as a person who observed the expansion of Division of Contracts and Rights of Way, Legal, and of the Right of Way section of Division of Highways, I have read with interest the tentative recommendations of the Law Revision Commission. Initially, I would say that I heartily agree with these recommendations, except that I feel that the exchange of appraisal information should be prior to pretrial.

I had a recent experience in which I took certain of the questions from your recommendations, and submitted them to the Division of Highways. A copy of the Interrogatories I presented is attached, together with the replies received from the Division of Highways.

If discovery is to be effective, mutual and full disclosure of expert opinions is indispensable. The defendant may not be as able to give full information as the plaintiff, because, under existing practices, the plaintiff makes certain appraisals prior to negotiations, or as part of the negotiations. These appraisals should be disclosed early in the proceedings because from these appraisals a person can evaluate accurately the possibility of resisting the condemnation, and evaluate the best offer, and determine if the defendant would be justified in expending the substantial sums necessary in order to obtain independent appraisals.

Please retain my name on your mailing list.

Very truly yours,

S/ TIM O'BRIEN

TIMOTHY W. O'BRIEN

TWO'B/eh
encls

Enclosure with letter from Timothy W. O'Brien

TIMOTHY W. O'BRIEN
405 West Standley St.
Post Office Box 325
Ukiah, California
HOmestead 2-4481

Attorney for Defendents:
Alfred Barbero and
Kathryn Barbero

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MENDOCINO

THE PEOPLE OF THE STATE OF CALIFORNIA etc	:	No. 23794
Plaintiff	:	
vs	:	
JAMES L. KINSEY et al	:	A INTERROGATORIES TO
	:	PLAINTIFF

TO THE PLAINTIFF, and to ROBERT E. REED, JOHN B. MATHENY and MELVIN R. DYKMAN, its Attorneys:

Defendants ALFRED BARBERO and KATHRYN BARBERO request that said plaintiff, under oath, answer pursuant to California Code of Civil Procedure, Section 2030, the following interrogatories:

1. State the name of each appraiser who has conducted an appraisal, or participated in the conduct of an appraisal, on behalf of plaintiff, of Parcels 5-A and 5-B.

2. State the name and business or residence address of each person intended to be called as a witness by the plaintiff, to testify to his opinion of the value of the property described as Parcel 5-A and

5-B, or as to the amount of damage or benefit, if any, to the larger remaining parcel from which said property is taken; also, the name and business or residence address of each person or corporation upon whose statements, transactions or representations or opinions, the opinion is based, in whole or in part.

3. As to each appraisal witness above named, after naming the witnesses and the dates upon which the appraisals were performed, state the following as to each appraisal, as to the opinion upon which the appraisal was based:

a) The highest and best use of the property;

b) The applicable zoning and any information indicating a probable change thereof;

c) A list of the offers, contracts, sales of property, leases and other transactions supporting the opinion;

d) The cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used;

e) The gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used.

4. What is the amount of money deposited in court for the order of immediate possession?

5. State upon whose opinion the amount of money deposited was determined.

6. When was this determination made?

7. Was this determination made in the light of any of the appraisal work above set forth? If so, state with particularity which work was considered or relied upon, if any.

Dated: November 16, 1961.

TIMOTHY W. O'BRIEN
Attorney for defendants
Alfred Barbero and
Kathryn Barbero

Enclosure with letter from Timothy W. O'Brien

ROBERT E. REED, JOHN B. MATHENY
ROBERT WILLIAMS, MELVIN R. DYKMAN
Public Works Building
1120 M. Street
Sacramento, California
Telephone: HIckory 5-4711, Ext. 2534

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MENDOCINO

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works, Plaintiff, v. JAMES L. KINSEY, et al., (as to Parcels Nos. 5-A and 5-B - Barbero), Defendants.	NO. 23794 ANSWER TO DEFENDANTS' INTERROGATORIES

TO DEFENDANTS ALFRED BARBERO and KATHRYN BARBERO, his wife, and to TIMOTHY W. O'BRIEN, their attorney:

Answer to Interrogatory 1: Plaintiff states that it is informed and believes and on such information and belief states that the appraisers who have conducted or participated in the conduct of an appraisal on its behalf were: W. Bernard Frese, P.O. Box 2321, Santa Rosa, California; Edward P. Murphy, 813 A Street, San Rafael, California and Donald E. Riever, Division of Highways, San Diego, California.

Answer to Interrogatory 2: Plaintiff objects to Interrogatory 2 on the basis that said question is not proper and it does not come within the purview of Section 2030 of the Code of Civil Procedure. In addition

thereto, plaintiff has not determined at this date, nor will it until the trial of the above-entitled action is in process, what persons will be witnesses in this action. In addition thereto, this interrogatory asks for an opinion which is intended to have probative value and is objectionable on this basis.

Answer to Interrogatory 3: Plaintiff objects to Interrogatory 3 on the basis that it has not determined at this date, nor will it until the trial of the above-entitled action is in process, what persons will be witnesses. In addition thereto no person is a witness in said action until said person actually participates in said trial under oath.

Answer to Interrogatory 3 a): In addition to the above statement, this interrogatory is objectionable in that it asks for an opinion which is intended to have probative value.

Answer to Interrogatory 3 b): Plaintiff wishes to state that it has no information on the probable zoning, nor any information as to probable changes thereof.

Answer to Interrogatory 3 c): This interrogatory relates to "appraisal witnesses". As above stated, plaintiff has not determined at this date, nor will it until the trial of the above-entitled action is in process, what persons will be witnesses in this action, and therefore, plaintiff is unable to answer such question.

Answer to Interrogatory 3 d): This interrogatory asks for an opinion which is intended to have probative value and is objectionable on this basis. In addition thereto, said information is unknown.

Answer to Interrogatory 3 e): Plaintiff objects to this interrogatory on the basis that the information as to the gross and net

income of defendants' property is contained within the defendants' own records and knowledge. In addition thereto, said interrogatory asks for an opinion which is intended to have probative value and therefore is objectionable.

Answer to Interrogatory 4: This information is available at the County Court House, County of Mendocino, Office of the County Clerk, Ukiah, California, File No. 23794, People of the State of California, acting by and through the Department of Public Works, Plaintiff, v. James L. Kinsey, et al., Defendants.

Answer to Interrogatory 5: The affidavit in support of the Order for Immediate Possession is on file in this action and said information is contained in said file which is located and available at the County Court House, County of Mendocino, Office of the County Clerk, Ukiah, California, File No. 23794, People of the State of California, acting by and through the Department of Public Works, Plaintiff, v. James L. Kinsey, et al., Defendants.

Answer to Interrogatory 6: This information is available at the County Court House, County of Mendocino, Office of the County Clerk, Ukiah, California, File No. 23794, People of the State of California, acting by and through the Department of Public Works, Plaintiff, v. James L. Kinsey, et al., Defendants.

Answer to Interrogatory 7: The determination and amount of money deposited to obtain the Order for Immediate Possession was that of Leland Crane. Mr. Crane took into consideration the work of Mr. Donald E. Riever.

DATED: November 29, 1961.

ROBERT E. REED, JOHN B. MATHENY
ROBERT WILLIAMS, MELVIN R. DYKMAN
By /s/ Melvin R. Dykman
MELVIN R. DYKMAN

C. Ray Robinson
Robinson-Montgomery Building
1812 L. Street
Merced, California

January 5, 1962

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

Attention: John H. DeMoully, Executive Secretary

Dear Mr. DeMoully:

Would you please pass the following comments on to the Commission, in connection with the proposed revision to the Code of Civil Procedure, relating to Discovery in Eminent Domain Proceedings.

I do not believe the addition in proposed Section 1246.2(a), in which a party is asked to name each person and his address upon whose statements or opinion the opinion of the expert is based, is advisable or helpful in any way. This would merely ask for a roll call of every public official and real estate man in the area. Although this is something the expert will undoubtedly testify to, the extent of such testimony is rarely the subject of cross-examination, except in unusual cases. It seems to me that this information might be quite lengthy and not be productive of any good.

I believe the provision relating to a list of exhibits proposed to be offered, also goes too far. This is in proposed Section 1246.2(d): Very often, maps and other exhibits are not prepared for trial, until a week or two before the trial. This proposed section, taken in conjunction with Section 1246.5 and 1246.6, would seem to require a party to prepare his exhibits at least twenty days before trial. The new rules would not take into account the circumstance that a settlement before trial may obviate the necessity for preparing certain exhibits. Furthermore, it fails to take into account the fact of life, that preparation for trial takes place the week before trial and not three weeks before trial, in the typical case. On the other hand, I cannot visualize that there is any major benefit deriving to one side or the other, by reason of having knowledge of what pictures the other side is going to use. In the usual case, the condemning agency supplies a map of the property taken.

Thank you for considering the above comments.

Very truly yours,

Sig. Eugene A. Mash

EUGENE A. MASH

bt

City of GLENDALE, California

613 East Broadway
Glendale 5, California
CItrus 4-4651
CHapman 5-6871

January 4, 1962

California Law Revision Commission
Stanford School of Law
Stanford, California

Gentlemen:

In the letter of transmittal dated October 31, 1961, which enclosed your tentative recommendations as to discovery in eminent domain proceedings, our comments were invited.

Our study of the proposed amendments convinces us that the recommended law, though fair on its face, contains one serious flaw. Perhaps it would be more correct to say that it omits an essential ingredient of fairness.

Ostensibly the procedure would work as well for the condemner as for the private property owner. In practice however some practitioners representing defendants have no appraisal whatsoever until the day of trial. In one fairly recent case the appraisal report was handed the attorney on the Monday the jury was picked; the comparables had been checked the preceding weekend. What would there have been for the condemner to discover? Yet in this same case the defendant had attempted discovery; we need not suggest the reason.

The condemner on the other hand must have an appraisal at an early date, usually before filing the eminent domain complaint. The defendant, for financial reasons if no other, will not have a report unless and until he must.

The excellent purpose of the principle of discovery will undoubtedly be extended to condemnation by the courts. Therefore, it is worthwhile to anticipate the course of decision and lay the ground rules by appropriate statutes. However, it is one thing to speak of "exchange" and the elimination of surprise, and it is quite another to require a public body to disclose its case, commit itself to a figure and a theory, and to allow unscrupulous "experts" to discover and enlarge flaws without giving a thing in exchange.

Heretofore the principle announced in Rust v. Roberts has forced the other party to require his expert to propound his own valuation opinion. If the law will now allow the property owner to require the public body to establish a value opinion, with data and analysis, to be used as a point of departure, the practical effect will be to shift the entire burden of proof. This can be done under the law as recommended, for the defendant can demand the condemner's valuation data at an early stage of the proceedings. He then obtains the condemner's report at no risk to himself for he has not even hired an appraiser. Under no interpretation of the proposed statutes is he required to have any data until the 20th day prior to trial; and he may possibly even produce his witness under the proposed Section 7 (CCP 1246.6) for it would only be in an aggravated case that the court would totally exclude the property owner's evidence.

The statutes proposed speak of exchange but do not require it. The word "exchange" used in Section 2 is empty, an exchange is inferred but the statutes do not say when it must be made. Section 2 does nothing more than establish a procedure for a demand, which is useless to the condemner for the reasons mentioned. The practical effect of the law would be to reward chicanery for the subsequent furnishing of a report, second-guessing or copying the condemner is no exchange.

Discovery in eminent domain will only serve its true purpose when it makes possible a real exchange eliminating surprise rather than fostering surprise. If exchange is the object of the proposed law, let it provide for an exchange. Make tender of one's own information a condition to the demand. This is only fair. It would serve the object of Greyhound Corporation v. Superior Court, which strongly denounced the "free ride". The reciprocal procedure would enhance settlement. The one-sided demand procedure will lead to widely divergent valuations and an increase in jury trials.

Very truly yours,

HENRY McCLERNAN, CITY ATTORNEY

By_____
Joseph W. Rainville,
Assistant City Attorney

JWR:jhb

City of GLENDALE, California

613 East Broadway
Glendale 5, California
CItrus 4-4651
Chapman 5-6871

January 15, 1962

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMoully
Executive Secretary

Dear Mr. DeMoully:

Thank you for your letter of January 9, 1962 expressing the Commission's views as to the sanctions imposed by Sections 1246.5 and 1246.6. I also appreciate the enclosure, the tentative recommendation and proposed legislation in which was underscored a portion of Section 1246.1(c). Rereading the sections I have come to the view you expressed so well by the sentence: "The sanction, of course, applies only if one of the parties has served and filed a demand to exchange valuation information."

On that basis I am happy to say that I have changed my views, and have fully reconsidered the position taken in my letter of January 4, 1962.

Very truly yours,

HENRY McCLERNAN, CITY ATTORNEY

BY _____
Joseph W. Rainville
Assistant City Attorney

JWR:gk

GALLIGAN, JACKSON & GREGORIO
Attorneys at Law
341 California Drive
Burlingame, California

January 3, 1962

California Law Revision Commission
Office of Commission and Staff
School of Law
Stanford University, California

Re: Tentative recommendations re Eminent Domain discovery

Gentlemen:

Based upon my experience, I wish to express disapproval of your tentative recommendations amending Code of Civil Procedure Section 1246(1) as expressed in your analysis dated October 26, 1961.

Mandatory discovery with harsh penalties for noncompliance will not induce the spirit of cooperation necessary for compromise, nor will it successfully streamline our legal procedure. On the contrary, it will tend to create a negative attitude toward discovery. Rarely is a case prepared adequately at pre-trial stage to intelligibly and fully present either side of the case, and mandatory discovery will penalize the prepared side in such a situation. And a full disclosure in advance of trial will rarely change the attitude of the opposing side or encourage bona fide settlement attempt so long as the typical condemnor's attorney (Division of Highway or School District) has little authority to negotiate beyond his highest appraisal, even if he is convinced of the probable merit of a contrary position.

Whatever merit there would be in shortening the length of trial (I see very little) would be offset by the disadvantage of curtailing a full and adequate hearing. Also, in some cases, an attorney practicing under mandatory discovery would be forced to limit the theory of his case, and the specific witnesses he was going to present at trial in advance of knowing some particular weakness or need.

As an alternative suggestion to mandatory discovery, I respectfully suggest that this commission consider voluntary discovery and in addition, procedural changes and a mandatory negotiation procedure. The procedural changes most sorely needed in Eminent Domain litigation relate to a more speedy trial, particularly regarding the nature and quantity of evidence admissible.

Substantive changes are also indicated, giving the condemnee a more adequate award, including the cost of title reports, appraisal expenses,

survey expenses and moving expenses.

Mandatory negotiation procedure will cause owners to receive a legitimate offer for their property before they are served with process. Too frequently they are compelled to appear by attorney in the law suit without having even received a written offer for their property.

In conclusion, we need changes in our rules of evidence, substantive rules of compensation and negotiation procedures rather than a mandatory discovery. And if further discovery is indicated it should be voluntary in nature.

Thank you.

Very truly yours,

JESS S. JACKSON

JSJ:sh
cc. Bert Currie
James Cos
Thomas B. Adams

DISTRICT ATTORNEY
Ventura County
Ventura, California

December 29, 1961

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

Dear Mr. DeMoully:

In your letter of October 31, 1961, you requested comments upon the tentative recommendation of the Commission concerning pre-trial conferences and discovery in eminent domain proceedings.

The problems inherent in pre-trial discovery in eminent domain cases have been recognized by the Commission and clearly stated on pages 1 through 7 of the tentative recommendation. However, I do want to emphasize that from the standpoint of the practitioner and his client the adoption of the Commission's proposed legislation will definitely add expense to cases which are set for trial. In most of those cases which are settled after the pre-trial conference this expense will be a burden without a corresponding benefit.

I am dubious that the exchange of valuation data, even in conjunction with the pre-trial conference, will tend to produce settlements as suggested by the Commission. From my own experience and discussions with other practitioners, it is my conclusion that cases either go to trial or are settled for considerations other than the matters which are brought out at pre-trial conferences. Thus, it appears to me that in the vast bulk of those cases which are set for trial, the pre-trial conference is merely another hurdle to be gotten over before an ultimate disposition of the case can be made. I am afraid the pre-trial exchange of valuation data will occupy much the same position.

Notwithstanding my pessimistic view of the pre-trial conference system, it is a part of our law and undoubtedly will remain so. Under the circumstances it certainly is anomalous to provide for adequate discovery and exchange of evidence in most other types of cases and not in eminent domain cases. If pre-trial conferences in eminent domain cases are to have any meaning whatsoever, obviously some provision must be made for the exchange of valuation data since valuation (or the amount of the award) is usually the only disputed issue in such cases. It is for this reason alone that I generally approve the tentative recommendations of the Commission. In giving such approval I remain far from convinced that the burdens imposed by the Commission's tentative recommendation will be balanced by possible benefits.

I have one specific comment concerning the substance of the proposed section 1246.2 which is to be added to Code of Civil Procedure. This section describes what the statements of valuation data shall contain and provides in subparagraph (d) that there shall be included a "list of the maps, plans, documents, photographs, motion pictures, books, accounts, models, objects and other tangible things" on which the expert witness may base his opinion, or which will be introduced "to explain, clarify or supplement" the testimony of the expert witness.

Thus, subsection (d) distinguishes between two kinds of physical evidence: that upon which the expert bases his opinion, and that which may be used merely to illustrate his testimony.

Certainly I do not object to the requirement that physical evidence upon which an expert opinion is based be disclosed, nor do I object to the provision that if it is not listed it may not be introduced in the case in chief except for the reasons stated in proposed section 1246.6 of the Code of Civil Procedure. However, with respect to physical evidence which is merely illustrative, this requirement is too stringent in my opinion. In many instances illustrative exhibits such as photographs, charts, diagrams and large-scale maps are not prepared until it is definitely known that the case is going to trial. Such exhibits are often expensive to prepare. It may well be that a party or his counsel in the exercise of sound judgment will determine not to prepare such exhibits until the last minute before trial. Nonetheless, if such illustrative exhibits are not listed on the statement of valuation data pursuant to proposed section 1246.2, they cannot be introduced in the case in chief because they do not come within any of the exceptions listed in proposed section 1246.6. Those exceptions are inability to have located or listed such evidence in the exercise of reasonable diligence, or a failure to discover the evidence through mistake, inadvertence, surprise or excusable neglect. Obviously, none of the exceptions applies to exhibits the preparation of which was deliberately withheld in a good faith exercise of judgment.

I feel that exhibits which are merely illustrative of the testimony of an expert witness should be included in the Commission's proposed section 1246.4 of the Code of Civil Procedure. This would permit notice to be given to the other party orally if the exhibit were prepared after service of the statement of valuation data. The opposing party would be able to inspect such exhibits prior to the date of trial, and they could be introduced in the case in chief even though not listed on the statement of valuation data.

Very truly yours,

S/ Bruce A. Thompson
BRUCE A. THOMPSON
District Attorney

BAT:va

DION R. HOLM
City Attorney
City Hall
San Francisco 2, California

December 26, 1961

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

Dear Mr. DeMoully:

Re Tentative Recommendation of the California Law Revision Commission Respecting Pretrial Conferences and Discovery in Eminent Domain Proceedings.

Your letter dated October 31 respecting the above entitled matter has been received.

It is proposed by the California Law Revision Commission that legislation should be enacted which would provide that parties to eminent domain proceedings not later than forty days prior to the day set for trial may serve upon any adverse party to the proceeding and file a demand to exchange valuation data. Thereafter, at least twenty days prior to trial, both the parties serving the demand and the party on whom the demand is served should be required to serve on each other statements containing specific valuation data including the opinion of each witness respecting the value of the property described in the demand or as to the amount of damage or benefit to the parcel from which such property is taken. Sanctions would be imposed to enforce the exchange of such data.

In the Greyhound Corporation v. Superior Court, 56 A.C. 353, 379 (1961), the California Supreme Court did not determine that appraisers reports in condemnation cases are discoverable. Such reports, presently at least, appear to be privileged. It is believed, therefore, that the privileged character of such opinions should not be eliminated by the enactment of legislation providing for a pretrial exchange of written statements containing such data. The legislation as presently proposed appears to be objectionable.

Very truly yours,

S/ Dion R. Holm
DION R. HOLM
City Attorney

Law Offices of
BRUNER, MINDER & CHANDLER
Best Building
1326 E. 14th Street
San Leandro, California

November 29, 1961

California Law Revision Commission
School of Law
Stanford, California

Gentlemen:

This office has received your tentative recommendation and proposed legislation relating to pre-trial conferences and discovery in eminent domain proceedings dated October 26, 1961.

It is our belief that broad discovery rules are important in the field of eminent domain as in other fields. However, it appears to us, that out of the present day condemnations, a majority of them involve a client who is an individual owner of a parcel that has small value compared to the value of all the parcels being condemned by the condemning authority at that particular time. A serious problem would still persist if the discovery procedures were amended.

This problem is that the individual owner is attempting to keep his expenses to a minimum until it is absolutely clear to him that the case cannot be settled. The condemning authority on the other hand does not have this problem. The authority already has contracted for appraisal services and the same are written off as a cost of the project as are attorney fees and costs. The condemnee must conserve his resources since he has to pay his appraiser and attorney from the market value of his property or his award. Hence, we feel that the revision as suggested would make condemnation more expensive to the normal defendant.

Incidentally, as a matter of practice we have encountered few if any cases where we were not given the valuation figure of the plaintiff well in advance of the date of pre-trial. In many instances the original offer by the condemning authority before the client even contacts an attorney is the plaintiff's valuation. We have found also that the condemning authority is usually quite frank and revealing of its expert's opinion via its District Attorney, City Attorney or Highway Agent throughout settlement negotiations (which always last up until the moment of trial and even persists throughout trial). Of course we reciprocate in the giving of such information.

Hence, broader discovery along lines suggested does not seem to us to be practical or desired legislation. We earnestly suggest that the Commission take another look at the effect of such legislation upon the defendant.

Very truly yours,
S/ Stephen M. Chandler
BRUNER, MINDER & CHANDLER
By Stephen M. Chandler

SMC:lm

Suite 204
811 North Broadway
Santa Ana, California

LINNELL AND WALDRON
LAW OFFICES

November 27, 1961

California Law Revision Commission
School of Law
Stanford, California

Att'n: Mr. John H. DeMoully
Executive Secretary

Re: Tentative recommendations and proposed legislation relating to pre trial conferences and discovery in eminent domain proceedings

Gentlemen:

This is in response to your invitation to receive comments concerning the above-referenced subject matter which this office has read and studied with a great deal of interest. The writer was formerly employed by the Los Angeles County Counsel's Office and specializes in the trial of eminent domain cases.

It has been my experience that there are few, if any, surprises in the way of valuation data introduced or attempted to be introduced into evidence by the opposing side in condemnation trials. Undoubtedly, the principal reason for this is that most of the information used by appraisers as expert valuation witnesses is a matter of public knowledge and is available to both sides. It is my opinion that the rules of discovery at the present time are quite ample and that there is no need to enlarge them to accommodate any further parties to eminent domain proceedings.

The reasons for the problem that the commission points out on pages two and three of its tentative recommendations as to why pertinent valuation data is frequently not accumulated until after the normal time for completion of discovery is quite true. Some of these reasons are not only practical but necessary. It appears to me that the tentative recommendations of the commission would reward the party who is lax in preparation and quite often penalize the party who is thorough and who has done preparation in advance. Moreover, it would work a tremendous burden on attorneys both in public law offices as well as in private law offices who handle a considerable volume of condemnation cases and who use the same appraisers quite frequently. In other words, in having to submit the valuation data set forth in the proposed recommendations of the commission would add considerable clerical work to the otherwise normal burden of preparing a case for trial and one having many condemnation trials would be continually plagued with demands for valuation data from opposing counsel if utilized, with the penalty of not being able to utilize such evidence on direct examination for failure to produce the data.

It would lead to additional side issues at the time of trial where later evidence is obtained. There is already too much of this in condemnation trials at the present time. On a prospective change in the date of value it is conceivable that the twenty day period could come at a time when the pertinency of the market data obtained prior to a change in the date of value would be questionable. I believe that some of the data mentioned under section 1246.2 as proposed of the Code of Civil Procedure is not admissible anyway in evidence upon direct examination.

In short, tentative recommendations of the commission place an unnecessary and impractical burden upon a party and I would oppose such legislation for the reasons advanced.

Respectfully,

LINNELL and WALDRON

S/ Robert F. Waldron

Robert F. Waldron

RFW/lm

Memo 72(1962)

EXHIBIT III

ROBERT P. McNAMEE

Attorney at Law
417 Hubbard Avenue
Santa Clara, California

October 22, 1962

State of California
California Law Revision Commission
Office of Commission and Staff
School of Law
Stanford University, California

Attention: Mr. John H. DeMoully
Executive Secretary

Re: Tentative Recommendations in Condemnation Procedure

Gentlemen:

As a basis for the recommendations of the Law Revision Commission, it has posed certain problems and then proposed corrective legislation. I believe that the proposed solution would not solve the problems posed by it. I further beli the problems posed are not acute and do not need remedial legislation.

Specifically, it poses the problem of reimbursement of experts and goes on to state "the other major problem is that pertinent valuation data" is not available until after pretrial; then--it gives three reasons for the causes allegedly creating this situation. The corrective legislation proposed; to wit, the exchange of information by written statements will not eliminate the causes given by it as to why pertinent data is not available until after pretrial

No procedural innovation will eliminate these three causes or the problem posed by the Commission. As long as an appraiser or attorney either on direct or cross-examination at trial may refer to events and data which have occurred in the period subsequent to the pretrial and prior to or during the trial, an attorney will not seriously prepare his case for pretrial because he will again have to do so immediately prior to trial. Further, he will have to have the appraiser fully informed and ready at pretrial and then send him out immediately prior to trial to search out for events and facts which have occurred since pretrial. This involves additional work for the attorneys and additional fees for the appraiser, which items attorneys for both parties seek to avoid. Therefor I suggest that the Commission re-examine its statement of the problem and its solution and perhaps seek answers to the questions: "How can a court compel the exchange of written statements if one or both parties have little or nothing to exchange?", and "Should the trial court permit reference either on direct or cross-examination by either an attorney or an appraiser to events and data occurring after pretrial?"

The major defect in the Commission's analysis and proposed remedy is its failure to face squarely the question of whether there should be a cut off date for information and data, which must be enforced by the trial judge.

I suspect the Commission recognizes the existence of the problems created by the happening of subsequent events and after-acquired data when it suggests that a demand be made forty days prior to trial and the exchange be given twenty days prior to trial and then suggests changes in the rules of the Judicial Council to permit the holding of pretrial within twenty days of trial. Assuming these rules are changed, there is no assurance that the trial will be held within this twenty day period. To be feasible, this recommendation must assume that the trial courts can give a definite date prior to or at pretrial and can so control their trial calendar that eminent domain cases which have been pretried can commence being tried within twenty days. This is not true in Santa Clara County and other counties I know of.

Suppose information is exchanged, the case is pretried, set for trial within twenty days, but because of conveneince of attorneys, witnesses and conditions of the trial calendar does not commence trial until six or eight weeks after pretrial. Can data and events occurring after pretrial be used by the expert? If so, there will be little inducement to spend money preparing for pretrial and exchange of information and then incurring an additional expense for work done immediately prior to trial.

If, however, a cut off date such as the issuance of summons or pretrial conference were established and it were the rule that no events, sales or facts occurring thereafter could be referred to in trial, then there would be no reason for an attorney to delay preparation of his case and hold off on incurring appraisal expense, other than natural inertia and this could be easily handled by a pretrial judge insisting on the preparation and exchange of data, and levying contempt fines on those attorneys who failed to prepare themselves.

I realize that a cut off date such as the pretrial conference date runs afoul of that provision of the code allowing valuation to be made as of the date of trial in certain situations when tried more than one year from the issuance of summons. This would have to be modified or different procedures and cut off dates used in such situations. Although I have some ideas on the solution of this conflict, time does not permit me to outline them and, also, for reasons set forth in the next paragraph, I feel it would be a waste of time to do so.

From a reading of the tentative recommendation of the Commission, I receive the impression that its attitude is cut and dried and, also, very one-sided. Consequently, I do not anticipate any serious consideration to be given my comments but, nevertheless, I feel compelled to make them, primarily because I think it unfortunate that a commission of such distinguished members of the Bar should indicate it is satisfied with work of such poor caliber.

The analysis and recommendations read as if they were put forth because the Commission thought something was expected of them, rather than because there had been serious and earnest attempt to analyze and solve a serious problem.

Very truly yours,

S/
Robert P. McNamee
Attorney at Law

RPM:bn
cc: Commission Members

Meeting

October 26, 1962

Mr. Robert P. McNamee
Attorney at Law
417 Hubbard Avenue
Santa Clara, California

Dear Mr. McNamee:

This letter is in response to your letter of October 22 concerning the tentative recommendation of the California Law Revision Commission relating to pretrial conferences and discovery in eminent domain proceedings. Please excuse the fact that we mimeographed this reply to your letter. I wanted the Commissioners to have a copy of my reply at the time they consider your letter.

You stated that you have some ideas on the solution to the problem presented by the present practice relating to pretrial conferences and discovery in eminent domain proceedings. However, you indicated that you felt that it would be a waste of time to outline these ideas because the Commission would not give serious consideration to your comments.

As stated in the letter of transmittal that accompanied the tentative recommendation, the Commission gives careful consideration to all comments it receives on its tentative recommendations. It might be helpful in this connection to outline the procedure the Commission follows in making its studies. The Commission does not undertake to study a particular

problem until the Commission has available a comprehensive research study on the existing law and the defects in the existing law. Ordinarily these research studies are prepared by experts in the particular field of law under study by the Commission. For the study of condemnation law and procedure, the Commission retained as its research consultant the law firm of Hill, Farrer & Burrill of Los Angeles. This firm, as you probably know, handles a substantial volume of condemnation cases and has represented both public entities and private persons. A substantial sum was paid this firm for a series of studies relating to condemnation law and procedure. The research study on pretrial conferences and discovery was prepared in July 1960 and has already been revised once in view of the Greyhound case. The firm is now again revising the study to take into account a number of more recent discovery cases.

When the research study is available, the Commission's staff prepares an analysis of the policy questions presented by the particular problem under study. The Commission discusses these policy questions at meetings at which the research consultant is available for consultation by members of the Commission. The research study provides the Commission members with necessary background information. This information is supplemented with materials prepared by various interested persons--both public agencies and

private attorneys interested in condemnation law and procedure. Often these interested persons attend the Commission meeting and are available to answer questions asked by members of the Commission. After a number of meetings, basic policy decisions are tentatively made. Then a draft statute is prepared and considered at a number of meetings in an effort to prepare a tentative recommendation that may be distributed for comments.

In view of your comments concerning the procedures used by the Commission, you may be interested in some of the materials prepared for and considered by the Commission in connection with the study of pretrial conferences and discovery. The following memoranda and other materials relate to this study:

Research study (revised Dec. 20, 1961, now in process of revision)
Memorandum No. 60(1960)
Memorandum No. 68(1960)
Memorandum No. 79(1960) (supply of this memorandum is exhausted)
Tentative Recommendation and Proposed Legislation (Sept. 30, 1960)
Memorandum No. 97(1960)
Supplement to Memorandum No. 97(1960)
Second Supplement to Memorandum No. 97(1960)
Third Supplement to Memorandum No. 97(1960)
Memorandum No. 9(1961)
Revised Memorandum No. 16(1961)
Memorandum No. 25(1961)
Memorandum No. 38(1961)
Memorandum No. 49(1961)

Under separate cover we are sending you a copy of the above listed material to the extent that we still

have copies available for distribution.

In light of your comment that you believe it would be a waste of time to outline your ideas because the Commission would not give serious consideration to your comments, you will note that the Commission distributed a tentative recommendation relating to this subject in September 1960. After considering the comments received, the Commission determined not to make a recommendation on this subject to the 1961 Legislature (as originally planned) and instead began work on a new recommendation based on a completely different theory. The tentative recommendation that prompted your letter was a result of the additional study given this problem after the Commission had considered the comments received on its first tentative recommendation. The second tentative recommendation relating to pretrial conferences and discovery in eminent domain proceedings (the one that you received) was first distributed on October 31, 1961, to more than 100 persons who have expressed an interest in this study. The Commission distributes its tentative recommendations so that it may have before it the comments and suggestions of all interested persons before it determines what its recommendation to the Legislature will be. Because a number of cases decided by the California Supreme

Court after October 1961 had clarified the law relating to discovery (indicating that appraisal reports, for example, may be subject to discovery), the second tentative recommendation was again distributed for comments on August 14, 1962.

All letters containing comments on the second tentative recommendation are being mimeographed and will be distributed to each member of the Commission prior to the time this tentative recommendation will again be considered. I cannot, of course, predict what changes, if any, the Commission will make in the second tentative recommendation relating to pretrial conferences and discovery in view of the comments received. I might say, however, that the comments from public agencies indicate that some public agencies believe that the tentative statute represents a sound approach to the problem and other public agencies believe that the statute is not a sound approach and suggest other solutions. Private attorneys who often represent property owners likewise are divided on whether the statute represents a sound approach to the problem. Some members of the judiciary have expressed approval (in principle) of the tentative recommendation of the Commission in light of the problems they face in the pretrial and trial of eminent domain cases.

The Commission has concluded that the considerable

expense involved in preparing copies of tentative recommendations and distributing them to numerous persons is justified because the Commission does not wish to make any final determinations until it has before it the comments of all interested persons who wish to submit comments to the Commission. Accordingly, I know that the Commission would appreciate receiving a written statement containing any ideas you may have concerning changes in the law relating to pretrial conferences and discovery in eminent domain proceedings. I can assure you that the Commission will give thoughtful consideration to your letter of October 22 as well as to any additional comments you may send us.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:njc
cc Commission members

Memo 72(1962)

EXHIVIT IV
Department of Presiding Judge

THE SUPERIOR COURT

Los Angeles 12, California

September 4, 1962

M E M O R A N D U M

TO: Judge Philbrick McCoy
Chairman of the Discovery and Pretrial Committee
of the Los Angeles Superior Court

FROM: Presiding Judge

SUBJECT: Recommendations and Proposed Legislation (tentative only)
of Commission re Discovery in Eminent Domain Proceedings

Herman Selvin, Esq., Chairman of the California Law Revision Commission, and I talked with respect to pretrial conferences and discovery in eminent domain proceedings. Thereafter, he very kindly asked Executive Secretary John H. DeMoully of that Commission to send me copies of the Commission's tentative recommendations and proposed legislation. These have been read by me, and I look with favor on what they are doing (as a matter of general principle). Therefore, I am sending a copy of their tentative recommendations as to legislation to Judge Rosenthal of our Los Angeles Superior Courts Legislative Committee, and the rest of the copies to Judge McCoy, Chairman of our Discovery and Pretrial Committee, so that he may distribute them, if he thinks this is advisable, among members of the Committee.

This afternoon, Judge Hufstedler, who is to take the place of Judge Crary, commencing next week (upon his leaving us to go up on the Federal bench), as the Presiding Judge of the Pretrial Master Calendar, and I discussed this matter in a general way and it was our thought that in view of the time that it will take to get legislation, there should be a rule of the Judicial Council or our Court, or at least a policy memorandum, requiring disclosure such as is indicated by the Oceanside case before pretrial, and that at pretrial the contentions and issues on such matters should be covered by order. Also, we felt that the matter of contentions as to benefits and severance should be covered.

In other words, I am inclined to be for the change in the law but think we can save days of trial work by going into this matter fairly rapidly. Judge Hufstedler suggested that the matter be taken up at the meeting of the Discovery and Pretrial Committee and then if the committee agrees it can be taken up with the representatives of the major condemning bodies. This likewise seemed to me to be a good suggestion.

Will Judge McCoy, therefore, please, after he has read this and the enclosure, call me? And any of the rest of you who have thoughts on this subject please call me on the telephone, and then we can decide where to go from here, or is it there?

Thanks.

McIntyre Faries
Presiding Judge

MCF:lll
attach.

cc: Judge J. F. Moroney
Judge Emil Gumpert
Judge Reginald I. Bauder
Judge Clarke E. Stephens
Judge James M. McRoberts
Judge William H. Levit
Judge Shirley M. Hufstedler
Judge William H. Rosenthal

Herman Selvin, Esq., Chairman
California Law Revision Commission

John H. DeMoully, Executive Secretary
California Law Revision Commission

ROBERT E. REED
CHIEF OF DIVISION

EDMUND G. BROWN
GOVERNOR OF CALIFORNIA

ROBERT B. BRADFORD
DIRECTOR

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

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

PLEASE REFER TO
FILE NO.

October 11, 1962

Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention Mr. John H. DeMoully, Executive Secretary

Gentlemen:

Re: Pretrial and Discovery in Eminent Domain Proceedings

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

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

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

PRETRIAL

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

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

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

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

The Committee recommended as follows:

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

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

DISCOVERY

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

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

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

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

Code of Civil Procedure Section 1246.9

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

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

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

Code of Civil Procedure Section 1246.1(a)

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

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

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

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

Code of Civil Procedure Section 1246.1(b)

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

"(2) Include a statement in substantially the following form: 'You are required to serve and file a statement of valuation data upon all other parties in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and, subject to Section 1246.6 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of valuation data.'"

Code of Civil Procedure Section 1246.1(c)

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

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

Code of Civil Procedure Section 1246.2(b)

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

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

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

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

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

Code of Civil Procedure Section 1246.2(c).

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

Code of Civil Procedure Section 1246.3.

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

Code of Civil Procedure Section 1246.4.

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

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

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

Code of Civil Procedure Section 1246.5.

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

Code of Civil Procedure Section 1247(b).

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

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

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

Very truly yours,

Robert E. Reed

ROBERT E. REED
Chief of Division

(36) October 26, 1961

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

Pretrial Conferences and Discovery in Eminent Domain Proceedings

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

Pretrial Conferences and Discovery in Eminent Domain Proceedings

One of the major improvements in the procedural law of this State in recent years has been the enactment of adequate discovery legislation. Effective discovery techniques serve two desirable purposes. First, they enable a party to learn and to determine the reliability of the evidence that will be presented against him at the trial. Second, they make the pretrial conference more effective because each party has greater knowledge of what he can expect to prove and what the adverse party can be expected to prove against him.

The use of discovery in eminent domain proceedings has not kept pace with its use generally in other civil proceedings. Prior to the August 1961 decision of the California Supreme Court in Greyhound Corp. v. Superior Court,[1] this was in part attributable to such decisions as Rust v. Roberts.[2] These decisions severely limited the extent to which the opinion of an expert could be discovered in an eminent domain case. They made discovery ineffective in eminent domain litigation because the principal issue involved in such cases--the value of the property taken or damaged--is a

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1. 56 A.C. 353.
2. 171 Cal. App.2d 772, 341 P.2d 36 (1959)

matter of expert opinion. The extent to which the Greyhound case has made the opinion of the expert in an eminent domain case discoverable is not clear, although in that case the Supreme Court cited Grand Lake Drive-In v. Superior Court[3] (holding that an expert's opinion may be discovered) with approval[4] and criticized Rust v. Roberts.[5]

Even if the courts construe the Greyhound case to permit broad discovery in eminent domain litigation, two major problems involving the use of discovery in these cases will still exist. The first is the problem of compensating the expert for his time in preparing for and giving his deposition. It seems unfair for one party to impose this expense upon the adverse party against his will. Even if the problem of the allocation of this expense were readily soluble, the amount of the expense involved in taking the deposition of an expert often would make this form of discovery impractical.

The other major problem is that the pertinent valuation data frequently is not accumulated until after the normal time for completion of discovery--the time of the pretrial conference. There are three reasons why this data is not available until a few days before the time of the actual trial. First, the parties usually are unwilling to incur the expense of having the expert complete his appraisal until shortly before the actual trial, for they seek to avoid this expense until it is clear that the case cannot be settled. Second, an appraisal report completed a considerable time before the trial must be brought up to date just

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3. Grand Lake Drive-In v. Superior Court, 179 Cal. App.2d 122, 3 Cal. Rptr. 621 (1960).
4. See 56 A.C. 353, 394-396.
5. See 56 A.C. 353, 378-380.

before the trial and this involves additional expense. Third, an appraiser who completes his appraisal a considerable time before the trial may find that he has forgotten many of the details by the time of the trial and may need to devote a substantial amount of time to reviewing his appraisal just before trial in order to refresh his memory.

The Commission believes that these problems relating to effective discovery in eminent domain cases may be overcome by legislation providing for a pretrial exchange of written statements containing pertinent valuation data. This technique is not novel; a variation of this procedure is now used in some federal district courts in eminent domain proceedings and similar procedures are provided by the statutes of some other states. Analogous procedures are provided by California statutes relating to other fields where the problems are comparable. For example, Code of Civil Procedure Section 454 provides that, upon demand, a copy of an account sued upon must be delivered to the adverse party; and, if such delivery is not made, the party suing upon the account may not give any evidence thereof at the trial. Similarly, Code of Civil Procedure Section 2032 provides for a compulsory exchange of physicians' reports under certain circumstances; and, if the report of an examining physician has not been exchanged, the court may exclude his testimony at the trial.

The Commission recognizes that pretrial exchange of valuation data will require a party to prepare a substantial portion of his case somewhat earlier than is now the practice -- i.e., by the time the information is required to be exchanged rather than by the time of the trial. But the recommended procedure has several offsetting

advantages. First, it will tend to assure the reliability of the data upon which the appraisal testimony given at the trial is based, for the parties will have had an opportunity to test such data through investigation prior to trial. Such pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference will serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data in advance, may be able to stipulate at the pretrial conference to highest and best use, to what sales are comparable, to the admissibility of certain other evidence and, perhaps, even to the amounts of certain items of damage. Of course, this desirable objective can be fully achieved only if the Judicial Council amends the pretrial rules to provide for the holding of pretrial conferences in eminent domain cases subsequent to the time for exchange of the valuation data.[7]

The procedure recommended above for the pretrial exchange of valuation data is supplemental to other discovery procedures. Never-

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7. The proposed statute provides for the exchange of valuation data not less than 20 days prior to trial. Under existing pretrial procedures, this time limit does not provide assurance that the data will be exchanged prior to the pretrial conference. As valuation opinions are subject to change as more data are acquired, it is desirable to have the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible. The Commission is hopeful that if the proposed statute is enacted the Judicial Council will amend the pretrial rules to permit the holding of the pretrial conference in eminent domain cases after the completion of the procedures required in the proposed statute, i.e., within 20 days of the time set for trial. If the Judicial Council believes a different time schedule for the pretrial conference in eminent domain cases is necessary, the Commission will reconsider its recommendation to determine whether the procedures here required can be completed before the pretrial conference.

theless, the Commission anticipates that the procedure herein recommended will provide all the information that is necessary in the ordinary case and that other methods of discovery will be used only in unusual cases.

For the foregoing reasons, the Commission makes the following recommendations:

1. At least 40 days prior to the trial, any party to an eminent domain proceeding should be permitted to serve on any adverse party a demand to exchange valuation data. Thereafter, at least 20 days prior to the trial, both the party serving the demand and the party on whom the demand is served should be required to serve on each other statements setting forth specified valuation data, such as the names of the witnesses who will testify as to the value of the property, the opinions of these witnesses and certain of the data upon which the opinions are based. In lieu of reporting the contents of documentary material, a party should be able to list the documents and indicate where and when they are available for inspection.

Compliance with these requirements will be relatively inexpensive. Appraisal reports ordinarily contain all the valuation data required to be listed in the statement and copies of the reports can be made a part of the statement. Of course, the required listing of data is not intended to enlarge the extent to which such data may be admissible as evidence in the actual trial of an eminent domain case.

2. If a demand and a statement of valuation data are served, a party should not be permitted to call a witness to testify on direct examination during his case in chief to any information required to be listed upon a statement of valuation data unless he has listed

the witness and the information in the statement he served on the adverse parties.

This sanction is needed to enforce the required exchange of the statements of valuation data. The same procedural technique is used to enforce the required exchange of physicians' statements under Code of Civil Procedure Section 2032 and to enforce the required service of a copy of the account under Code of Civil Procedure Section 454. The sanction, however, should be limited to a party's case in chief so that cross-examination and rebuttal are unaffected by the required exchange of valuation data, for it is often difficult to anticipate the evidence required for proper rebuttal or cross-examination.

3. The court should be authorized to permit a party to call a witness or to introduce evidence not listed in his statement of valuation data upon a showing that such party made a good faith effort to comply with the statute, that he diligently gave notice to the adverse parties of his intention to call such witness or to introduce such evidence, and that prior to serving the statement he (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect. These are similar to the standards now applied by the courts under Code of Civil Procedure Section 657 (for granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default) and it is appropriate for the court to apply the standards here.

4. Section 1247b of the Code of Civil Procedure, which now requires the condemner in partial taking cases to serve a map of the affected

parcel upon the condemnee if requested to do so, should be amended so that the condemnee may obtain the map prior to the time for the service of his statement of valuation data. This will enable the condemnee to prepare his statement of valuation data with an accurate idea of the amount of property to be taken by the condemner.

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

An act to amend and renumber Section 1246.1 of, to amend Section 1247b of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4, 1246.5, 1246.6, 1246.7 and 1246.8 to, the Code of Civil Procedure, relating to eminent domain proceedings.

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended and renumbered to read:

[~~1246.1~~] 1246.9. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.1 is added to the Code of Civil Procedure, to read:

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

(b) The demand shall:

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

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and, subject to Section 1246.6 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of valuation data."

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

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

1246.2. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as a witness by the party to testify to his opinion

of the value of the property described in the demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part.

(b) The opinion of each witness listed as required in subdivision (a) of this section as to the value of the property described in the demand and as to the amount of the damage or benefit, if any, which will accrue to the larger parcel from which such property is taken and the following data to the extent that the opinion is based thereon:

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

(2) The applicable zoning and any information indicating a probable change thereof.

(3) A list of the offers, contracts, sales of property, leases and other transactions supporting the opinion.

(4) The cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used.

(5) The gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used.

(c) With respect to each offer, contract, sale, lease or other transaction listed under subdivision (b) of this section:

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page where recorded.

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

(d) A list of the maps, plans, documents, photographs, motion pictures, books, accounts, models, objects and other tangible things upon which the opinion of any person intended to be called as a witness by the party is based in whole or in part, or which is intended to be introduced as evidence in connection with, or to be used to explain, clarify or supplement, the testimony of any person intended to be called as a witness by the party. The statement also shall indicate the place where each is located and, if known, the times when it is available for inspection by the adverse party.

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

1246.3. If a party required to serve a statement of valuation data has in his possession, custody or control any property or tangible thing required to be listed in his statement of valuation data, he shall make it available at reasonable times for inspection and copying or photographing by or on behalf of the party on whom the statement is served.

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

1246.4. (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

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

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

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

(b) The notice required by subdivision (a) of this Section shall include the information specified in Section 1246.2, but it is not required to be in writing.

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

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

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

(b) No witness called by any party required to serve and file

a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed on a statement of valuation data unless such data is listed on the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

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

1246.6. The court may, upon such terms as may be just, permit a party to call a witness or introduce on direct examination in his case in chief evidence required to be but not listed in such party's statement of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1246.1 to 1246.3, inclusive, that he has complied with Section 1246.4, and that, by the date of the service of his statement of valuation data, he:

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

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

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

1246.7. The procedure provided in Sections 1246.1 to 1246.6, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 9. Section 1246.8 is added to the Code of Civil Procedure, to read:

1246.8. Nothing in Sections 1246.1 to 1246.7, inclusive, makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 10. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in [~~a condemnation~~] an eminent domain proceeding only a portion of a parcel of property is sought to be taken [~~and upon~~], the plaintiff, within 15 days after a request of a defendant to the plaintiff, [~~made at least 30 days prior to the time of trial, the plaintiff~~] shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney [~~at least fifteen (15) days prior to the time of trial~~].